



REPUBLIC OF KENYA

THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1352 OF 2013

JAMES MUREITHI WANGOMBE.....CLAIMANT/RESPONDENT

VERSUS

RACHAEL KUTHI MUA (Sued as Proprietor of

PIZZA PAN RESTAURANT)

.....RESPONDENT/APPLICANT

## RULING

1. The Respondent/Applicant herein seeks to set aside the proceedings of this Court taken on the 24<sup>th</sup> day of February 2014. The Grounds on which the Notice of Motion dated 4<sup>th</sup> March 2014 is predicated are that the matter came up for hearing before this Court on 24<sup>th</sup> February 2014 and was heard in the presence of the Claimant but in the absence of the Respondent and that the Respondent or her Advocate did not deliberately fail to attend Court for the hearing on 24<sup>th</sup> February 2014. The Respondent/Applicant's Application was supported by the Affidavit of Lucy Sereu Moinket Advocate. It was deposed that the Hearing Notice was received but the date was misdiarised in the Advocate's Court diary as 28<sup>th</sup> February 2014 in place of 24<sup>th</sup> February 2014.
2. The Claimant/Respondent was opposed to the Application and filed a Replying Affidavit sworn by the Claimant/Respondent James Mureithi Wangombe on 20<sup>th</sup> March 2014. The Claimant/Respondent deposed that the Respondent/Applicant sought to merely delay the conclusion of the case and the application had been brought in bad faith. He deposed further that the Respondent's advocate was served with the hearing notice in this matter and the firm refused to attend Court and there was no supporting affidavit of the alleged Court clerk.
3. In **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the Court of Appeal per Duffus President of the Court stated thus:-  
  
**"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given it by the rules.....the principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of it's coercive power where that has obtained only by a failure to follow any of the rules of procedure"** (emphasis mine)
4. It is amply clear that there are no fetters to the wide discretion by this Court to reopen the case. The Court heard the case on 24<sup>th</sup> February 2014 the date slated for the hearing. The Hearing Notice was served on 9<sup>th</sup> December 2013. There is no diary extract attached to show the error said to have been made. Indeed, as pointed out by the Claimant, even the Clerk who made the error has

not deposed to the errors he allegedly made while diarizing the case.

5. When a Court is invited to exercise its discretion and reopen proceedings, it is imperative that the circumstances of the case be evaluated. In the case before me the circumstances of the case are not exceptional. In **Omwoyo v African Highlands & Produce Co. Limited [2002] 1 KLR 700**, Ringera J. as he then was held:-

**“Even if the matter involved an exercise of discretion I would have declined to exercise the courts discretion in favour of the Applicant on the grounds that he found himself in a predicament as a result of his advocates alleged mistake”**

6. In the case before me, I have evaluated the reasons advanced and nothing hinges on the explanations given. There is no basis for the Court to find that there was any error by Counsel. There are only allegations made. The affidavit in Support though sworn has no date endorsed thereon and it is thus defective in terms of the Oaths and Statutory Declarations Act cap 15 Laws of Kenya. As there is insufficient basis to reopen the case I therefore decline to exercise my discretion in favour of the Respondent/Applicant. The Application is dismissed with costs to the Claimant/Respondent. Judgment of the Court will be delivered on 7<sup>th</sup> May 2014.

Orders accordingly.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of May 2014**

**Nzioki wa Makau**

**JUDGE**