



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 2058 OF 2012**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT**

**VS**

**RELI CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTD.....RESPONDENT**

**RULING**

1. The Claimant's application brought by Notice of Motion dated 2<sup>nd</sup> April 2014 seeks review and setting aside of the order of this Court issued on 20<sup>th</sup> February 2014 dismissing the Claimant's case for non attendance.
2. The application, which is supported by the affidavit of Lydia Olaya Anyosi, the Grievant herein is based on the following grounds:
  - a. That the order of 20<sup>th</sup> February 2014 was based on non disclosure of material facts;
  - b. That the Respondent failed to disclose to the Court that the Claimant, being under the mistaken belief that the case had not been set down for hearing, was seeking a hearing date at the Registry;
  - c. That it is in the interest of justice that the order of the Court dated 20<sup>th</sup> February 2014 be set aside and the Claimant's case be reinstated;
  - d. That if the prayers sought are not granted, the Grievant will suffer irreparable loss.
3. In the Grievant's supporting affidavit sworn on 2<sup>nd</sup> April 2014, it is deponed that failure to attend Court on 20<sup>th</sup> February 2014 was caused by an omission on the part of the union representative. The Grievant further depones that by letter dated 3<sup>rd</sup> December 2013 received by the Respondent on 4<sup>th</sup> December 2013, the Claimant had invited the Respondent to take a hearing date at the Registry.
4. The Respondent filed Grounds of Opposition and a Replying Affidavit sworn by the Respondent's General Manager, Julius Muhatia Mukalo on 8<sup>th</sup> April 2014. Mukalo depones that on 20<sup>th</sup> February 2014 he together with his Advocate, were present in Court but neither the Grievant nor the Claimant's representative was present. The Respondent's Advocate therefore applied for the Claimant's case to be dismissed. According to Mukalo, the Respondent was under no obligation to offer any explanation to the Court as alleged by the Claimant.
5. The orders sought by the Claimant are discretionary and the Court is under a duty to exercise

its discretion judiciously. The Claimant's representative, John O. Owiyo told the Court that he had inadvertently failed to diarise the hearing date taken in Court in his presence. Owiyo further stated that on 20<sup>th</sup> February 2014, the Respondent's Advocates were aware that he was in fact seeking a hearing date at the Registry, a fact they failed to disclose to the Court.

6. Ms. Chelagat for the Respondent admitted that the Claimant's letter dated 3<sup>rd</sup> December 2013, inviting the Respondent to take a hearing date at the Registry had indeed been received by her law firm. She however could not confirm whether there was any reaction from the Respondent to the Claimant's letter which had evidently been sent in error since a hearing date had already been fixed.

7. On the whole, the Court finds that failure by the Claimant and the Grievant to attend Court on 20<sup>th</sup> February 2014 was occasioned by an honest mistake on the part of the Claimant's representative, John O. Owiyo. The Court is therefore persuaded to exercise its discretion in favour of the Claimant and proceeds to set aside its order of 20<sup>th</sup> February 2014 dismissing the Claimant's case for non attendance. Consequently, the Claimant's case is reinstated.

8. The costs of this application will be in the cause.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF JUNE 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. John O. Owiyo (union representative) for the Claimant

Ms. Chelagat for the Respondent