



IN THE INDUSTRIAL COURT AT NAIROBI

PETITION No. 47 OF 2012

BETWEEN

MAJOR EDWIN MACHARIA.....
CLAIMANT

VERSUS

HON. ATTORNEY
GENERAL.....RESPONDENT

RULING

This Petition was originally filed in the High Court at Nairobi, and registered as Petition No. 295 of 2007.

It was transferred to the Industrial Court by the High Court, on 4th December 2012.

The record indicates the Attorney-General had at the time of transfer filed Response to the Petition. Both Parties had filed their submissions.

The Petitioner scheduled the Petition for hearing on 12th March 2014. The Respondent was invited on fixing of the hearing date, but did not appear at the Court Registry. The date was taken *ex parte*.

The Respondent was served with the Hearing Notice, affidavit of service filed, but did not attend hearing on 12th March 2014. The Petitioner gave her evidence, rested the Petition, and was given 14 days within which to file her closing submissions.

The Respondent filed an application dated 20th May 2014, seeking to have the proceedings of 12th March 2014 and consequential orders of the Court set aside. The application is supported by the affidavit of Esther N. Muchiri, State Counsel, sworn on 30th May 2014.

She explains that the Attorney General's Clerk who received the Hearing Notice failed to bring the Notice to her attention; the Attorney General has been diligent in responding to the Petition; the Attorney General is ready to continue with this diligent response; and the nature of the Petition demands that the Respondent is granted the opportunity to cross-examine the Petitioner.

The Petitioner filed a Replying Affidavit, Sworn on 19th June 2014. She states there is no good reason shown by the Attorney General for failure to attend the hearing. The Petitioner notified the Respondent about the hearing, invited the Respondent to take a suitable date, and the Respondent ignored the invitation. She has given evidence in full, and closed her Petition.

The respective Party's positions were underscored in submissions made in Court by Ms. Muchiri for the Respondent, and Ms. Mburu holding brief for Ms. Madahana for the Petitioner, on the 30th June 2014.

The Court finds and Orders:-

1. Service of the Hearing Notice upon the Respondent is not disputed or faulted. The Respondent was invited to take the hearing date. There was no response to the invitation. There was no attendance on the part of the Respondent, when the hearing proceeded on 12th March 2014. The Petitioner gave evidence and rested her Petition.
2. The reason given by Ms. Muchriri for non-attendance is a very weak reason. She says the Attorney General's Clerk failed to pass over the Hearing Notice to her. Nothing is said about the failure to appear at the Court Registry when hearing was scheduled.
3. The Petitioner has done everything she is required to do, to have this longstanding Petition heard and finalized.
4. The Court has noted however, that the Respondent has filed a Response to the Petition and also filed submissions. The proceedings at the High Court, and the initial proceedings at the Industrial Court, support the Respondent's case that it has the desire and the will, to respond to the Petition in full. The Court is prepared to give the Respondent a chance to do this. The failure by the Attorney General to attend the hearing on 12th March 2014 seems to have been occasioned by an internal but excusable clerical error. It is very weak ground to justify setting aside of the *ex parte* proceedings, but the history of the Petition, and the obligation of the Court to administer justice on merit, persuades the Court to exercise its discretion in favour of the Respondent.
5. The Petitioner in the view of the Court may be recalled, but at an expense. The Respondent may be allowed to cross-examine her, give its own evidence, but at an expense. *In sum:-*

(a) The Orders of 12th March 2014 are varied.

(b) The Petitioner may be recalled for cross-examination and re-examination at a date to be agreed upon by the Parties at the Registry.

(c) Parties are at Liberty to adduce such evidence as they may wish before proceedings are closed.

(d) The Respondent to pay to the Petitioner costs of Kshs.10,000 payable before the next hearing date.

Dated and delivered at Nairobi this 21st day of July 2014

James Rika

Judge