



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1375 OF 2011**

**ROBERT BOSIRE NYAGAKA ..... CLAIMANT**

**VERSUS**

**SAMEER AGRICULTURE AND LIVESTOCK (K)**

**LIMITED ..... RESPONDENT**

Mr. Khalwale for the Respondent / Applicant

Mr. Makhoha for the Claimant / Respondent

**RULING**

1. This Application was filed by Messrs. Khalwale & Co. Advocates. The Application seeks an order in the following terms;

1) that the firm of Messrs. Khalwale & Company Advocates be granted leave to act and represent the Respondent / Applicant in place of Messrs. Sang Langat Co. Advocates.

2) that there be a stay of execution of the decrees issued herein pending hearing and final determination of the application.

3) that the judgment and decree and all consequential orders herein be set aside and matter be set down for hearing forthwith.

2. The Application is founded on the grounds outlined on the face of the Notice of Motion *inter alia*;

(i) The Applicants were not made aware of the hearing date nor entry of Judgment.

3. The Application is further supported by an Affidavit of Mr. Kennedy Efedha, the Administrative and Personnel Manager of the Respondent / Applicant company.

4. It is not in dispute that the Respondent had instructed Messrs. Sang Langat and Company Advocates, which firm was on record and in conduct of this matter.

5. The Reply to the Memorandum of Claim was however filed by the Legal Officer of the Respondent

Mr. Augustine M. Gacharia on 25<sup>th</sup> August 2011 prior to instructing Messrs. Sang Langat & Company Advocates who filed a notice of appointment on 10<sup>th</sup> October, 2012.

6. The record shows clearly that the Respondent's Advocate was served with a Hearing Notice for 22<sup>nd</sup> January 2013, when the matter was set for hearing. Mr. Sang Langat for the Respondent did not appear on the day and the matter was postponed to the 27<sup>th</sup> March 2013 for hearing.

7. The Advocates for the Respondent were served with a hearing notice for the 27<sup>th</sup> March 2013 but again Mr. Sang Langat did not appear for hearing.

8. The matter was rescheduled for hearing on 20<sup>th</sup> June 2013. The Respondent's Advocate was served with a hearing notice but again Mr. Sang Langat did not appear for the hearing of the matter.

9. The Court is satisfied that proper service had been done on the three occasions and Affidavit of Service by duly authorized Process Servers were filed in Court and the matter proceeded *ex parte* at 12.30 p.m. on 20<sup>th</sup> June 2013 in terms of **Rule 22(b)** of the **Industrial Court (Procedure) Rules, 2010**.

10. Since the Respondent had filed a statement of response and documentary evidence, the Court did in fact consider the Respondent's defence to the claim.

11. Indeed on page 5 of the judgment, the Court stated;

*“that notwithstanding, the Court has considered the memorandum filed in reply to the claim by the Respondent and annexures I, III and IV.”*

12. The Court came to the conclusion that the Claimant was not on a short term contract as at 1<sup>st</sup> July 2011 as alleged by the Respondent when his employment was terminated since the said contract had lapsed on 30<sup>th</sup> June 2011.

13. The Court also found contrary to the allegations by the Respondent that the termination was due to alleged unsatisfactory performance but not due to exfluxion of time.

The Court therefore considered the merits of the Respondent's case notwithstanding their absence.

14. Having said that the Mr. Sang Langat has not placed any affidavit on record in support of the application to explain why on three occasions when the matter was set for hearing he had failed to appear on behalf of the Respondent.

15. Instead, the Respondent has ingenuously sought to have another Advocate come on record and therefore no satisfactory explanation has been put before Court as to why there was failure of attendance on these occasions.

16. An overriding principal of administration of justice is to ensure that matters are heard and disposed off expeditiously. Indefinite and unexplained absence by a party is sufficient justification for the Court to proceed in the absence of the party in default.

17. The Court is not satisfied, upon considering the application put forth and the replying Affidavit by the Claimant deponed to on 28<sup>th</sup> May 2014 and filed on the same date that there is justification to set aside the award of the Court delivered on 19<sup>th</sup> September 2013.

18. This Application to set aside the judgment of the court was brought more than seven (7) months down the line and therefore cannot be said to have been filed without undue delay. All this time Mr. Sang Langat remained on record and in conduct of this matter.

19. The Court views suspiciously, this late attempt to substitute the Advocate on record. This in the Court's view is meant to shield the defaulting party from the glaring negligence by the former Advocate, which occasioned unnecessary delay to the disposal of this matter.

Accordingly, the Claimant / Respondent is entitled to an expedient enjoyment of the fruits of the Judgment of the Court and the application is dismissed with costs.

**Dated and Delivered at Nairobi this 13<sup>th</sup> day of November, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**