



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 2484 OF 2012

BERNARD LEVOYWA.....CLAIMANT

VS

SALINA TRANSPORTERS.....RESPONDENT

RULING

1. This ruling flows from the Respondent's application dated 23rd June 2014 seeking orders for stay of execution and setting aside of the award of this Court dated 19th May 2014. The application which is supported by the affidavit of Stephen Gitonga is based on the following grounds:

- a. That a hearing notice was served upon the Respondent's Advocates on 2nd December 2013 but due to a mistake, the hearing date was not entered in the Advocate's diary;
- b. That the non attendance on 2nd April 2014 which was inadvertent was the result of an honest and excusable error on the part of the Advocate's staff;
- c. That the Respondent is an innocent party who has been severely prejudiced.

2. In the submissions filed on behalf of the Respondent on 2nd September 2014, it is submitted that the mistake occasioned by Counsel for the Respondent was genuine and not meant to prejudice the Claimant. Further, Counsel for the Claimant did not serve the judgment notice as required by law.

3. In a replying affidavit sworn by the Claimant on 8th July 2014, it is deponed that Counsel for the Respondent was properly served with a hearing notice in good time. Failure to attend Court on the hearing date therefore amounted to professional negligence on the part of the Respondent's Counsel which should not be visited on the Claimant. According to the Claimant, the Respondent's application to set aside a validly entered judgment is an attempt to delay justice.

4. Setting aside of *ex parte* judgments is a matter of discretion which is exercised on a balance of the right of a successful claimant to reap the fruits of an award with the right of a defendant to have their day in court. The Court was referred to the case of **Edwin Oduor Chacha Vs Dr. Philisters Onyango and Another [2013]** where **Onyango J** reiterated the principles for setting aside *ex parte* judgments.

5. In this regard, the discretion granted to the Court is to be exercised in a manner that avoids injustice arising from an accident, inadvertence or excusable mistake. It is not intended to aid a party who deliberately sets out to delay justice. In exercising its discretion, the Court is called upon to consider the facts and circumstances of each case and to inquire whether the party who holds the award can reasonably be compensated for the delay caused by an award of costs. Ultimately, to deny a party the right to be

heard should be the last resort.

6. I have examined the court record and do not find any evidence that the Respondent has deliberately sought to delay this matter. I have also considered the explanation given by Counsel for the Respondent for failure to attend Court on 2nd April 2014 and have reached the conclusion that it constitutes an excusable mistake for which the Respondent should not be made to suffer. I therefore elect to exercise my discretion in favour of the Respondent and consequently set aside the award dated 19th May 2014 subject to the

Respondent paying to the Claimant thrown away costs amounting to Kshs. 10,000 before the hearing date.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF NOVEMBER 2014

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JUDGE

Appearance:

Mrs. Rashid for the Claimant

Mr. Gitonga for the Respondent