



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1513 OF 2011

BETWEEN

FRANCIS MWAURA MBOCHE.....
.....CLAIMANT

VERSUS

NACICO CO-OPERATIVE SAVINGS & CREDIT SOCIETY.....
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Omwanza instructed by Richu and Associates Advocates for the Claimant

M/s Ocheing' instructed by Hamilton Harrison & Mathews Advocates for the Respondent

RULING

This dispute was scheduled for the hearing of a preliminary challenge raised by the Respondent under Section 90 of the Employment Act 2007, on 6th March 2012. The hearing date was taken in Court on 26th October 2011 by Mr. Omwanza for the Claimant, and Ms. Ocheing' for the Respondent.

On the hearing date there was no attendance, or communication to Court or with the Advocates for the Claimant, made by the Respondent's Advocates.

Mr. Omwanza applied to have the preliminary challenge dismissed for non-prosecution, a prayer which the Court granted.

The Respondent immediately lodged an application dated 12th March 2012, seeking variation and/or setting aside of the dismissal order.

The application was heard on 17th July 2012. The file appears to have been taken back to the Registry, instead of being forwarded to the trial Judge's Chambers, occasioning delay in the preparation of the Ruling. The misplacement and delay are regretted.

Ms. Ochieng explained in an affidavit sworn on 12th March 2012, that she recorded the wrong Hearing date, 8th March 2012, in her diary. Correspondence passed onto her client supports this explanation. She did not deliberately stay away from the proceedings. She made a genuine human error. She asked the

Court to examine the history of the dispute, to confirm the aptitude of the Respondent, in defending the Claim. She argues that the preliminary challenge raised, involved a fundamental issue of the validity of the claim, and jurisdiction of the Court.

Mr. Omwanza counters that Ms. Ochieng displayed professional negligence. Her client should pursue a claim against her, not against the Claimant. She was the same Advocate who took the hearing date on 26th October 2011. Relying on the affidavit of the Claimant sworn on 19th March 2012, the Claimant prays the Court to reject the application. Mr. Omwanza submits that he remembers it was Ms. Ochieng, who proposed the 6th March 2012 as the hearing date.

The Court Finds and Orders:-

1. The explanation by Ms. Ochieng on her absence at the hearing of 6th March 2012, is satisfactory. She recorded the 8th March 2012 as the hearing date, instead of the correct 6th March 2012, through excusable mistake. She communicated the wrong date to her client. It may well be that she suggested the 6th March 2012. That did not rule out that she would proceed to mistakenly note the 8th March 2012 as the hearing date. This is a human error.

2. The preliminary challenge raises a critical point law. The validity of the claim, and jurisdiction of the Court, under section 90 of the Employment Act 2007, have been questioned. This is an issue that can be raised even at the substantive hearing, or raised by the Court on its own motion. The failure by the Respondent's Advocates to prosecute the challenge on 6th March 2012, did not result in any finding of the Court on the fundamental issue posed by the objection. It would assist in the fair administration of justice, if the parties are granted another opportunity to argue the legal point, at a preliminary stage.

For these reasons:-

- (a) The application dated 12th March 2012 is allowed;**
- (b) Costs of Kshs.5,000 to the Claimant, to be paid before the Respondent can be granted further audience in this Court; and**
- (c) Parties to agree on a suitable date for the hearing of the preliminary challenge.**

Dated and delivered at Nairobi this 21st day of June 2013

James Rika

Judge