



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

**AT NAIROBI**

**CAUSE NO. 648 OF 2010**

**OSBORNE ASHIONO MUTUMIRA .....CLAIMANT/APPLICANT**

**VERSUS -**

**ETHIOPIAN AIRLINES (S.C) LIMITED.....RESPONDENT**

Mr. Ashimosi for the Claimant/Applicant.

Mr. Parekh for the Respondent.

**RULING**

This suit was filed by the Claimant/Applicant on 14<sup>th</sup> July, 2011.

The Claimant/Applicant has brought an application for review of judgment of Hon. Justice Nderi Nduma made on 20<sup>th</sup> May, 2013 in which the substantive claim brought by the Claimant against the Respondent was dismissed with costs, and the counter claim by the Respondent succeeded and the court awarded the Respondent Kenya Shillings 271,809 thousand with costs of the suit.

**History.**

This matter was first heard by Justice Stewart M. Madzayo and judgment delivered on 29<sup>th</sup> June, 2011.

The matter had proceeded *ex parte* as the advocate for the Claimant/Applicant Mr. Ashimosi did not appear. The award was in favour of the Respondent.

The matter started afresh and the same was set for hearing before Justice Makau on 5<sup>th</sup> November, 2012 but the same was not listed and did not proceed.

The matter was granted two hearing dates in court on the same date by myself, in view of the fact that witnesses for the Respondent resided outside the country and the Respondent had incurred immense expenses in concluding this matter to the extent that the actual expenses may have already exceeded the claimed amount.

Mr. Parekh undertook to serve the hearing notice for the 8<sup>th</sup> and 9<sup>th</sup> May, 2013 to the advocates for the Claimant/Applicant.

The advocate for the Claimant/Applicant and the Claimant himself did not appear in court and the matter proceeded *ex parte* upon the court being satisfied proper service had been done.

Indeed, the advocates for the Claimant/Applicant Mr. Ashimosi conceded that service was effected on his law firm but that he had misdiarised the matter and thus did not appear for the hearing.

This is a second time, the said advocate had failed to come to court yet this is a matter which he knew or ought to have known that the Respondent had incurred a lot of expenses in an effort to get the same heard and concluded.

It is pertinent to note that, even on the 5<sup>th</sup> November, 2012, when the matter was not listed for hearing, the date had been taken in court by consent of the parties but the counsel for the Claimant/Applicant did not bother to get the matter heard on the same day and or allocated another hearing date. It was counsel for the Respondent who made the effort to have the matter mentioned before me and sought the court to allocate hearing dates on priority basis due to the history of the matter which had resulted in the Respondent incurring immense expenses by bringing witnesses out of the country.

In other words, the interest shown by the Claimant/Applicant in prosecuting this matter is wanting but as soon as an *ex parte* award is granted, they move with speed to have the same set aside.

The court is not convinced of the bona fides of the Claimant/Applicant in bringing this application.

In this regard, the court is guided by the decision of the Court of Appeal at Nairobi in the matter of **Mbogo and Another vs. Shah; Civil application No. 5 of 1967**; Wherein an advocate upon refusing to accept service of the proceedings filed failed to enter appearance and to file a defence after substituted service was effected by advertisement.

The Respondent obtained judgment *ex parte* against the appellants, which the insurance company then applied to set aside. The application was refused by the High Court and an appeal was brought to the Court of Appeal. The Court of Appeal held;

**“(i) In the circumstances the Judge exercised correctly his discretion to refuse the application to set aside the judgment (Statement of Harris J. in *Kimani v Mc Connel* [1966] E.A, 547 was approved).”**

In this matter, given its particular history and the conduct of the advocate of the Claimant/Applicant I refuse to exercise my discretion in favour of the Claimant/Applicant and dismiss the application to set aside the judgment of the court delivered on 20<sup>th</sup> May, 2013 with costs to be paid to the Respondent.

***Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2013.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**