



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 21 OF 2013

(Originally Nairobi Cause No. 1646 of 2012)

TRANSPORT WORKERS UNION KENYA.....CLAIMANT

v

AFRICAN SAFARI DIANI ADVENTURE.....RESPONDENT

RULING

1. On 28 June 2013 I delivered judgment in which I found in favour of the Claimant Union and ordered the Respondent to pay the grievant Ali Kirao a total sum of Kshs 158,013/-.
2. The judgment went to some length on service of process and court attendances.
3. The Respondent was dissatisfied with the judgment and on 18 July 2013 it filed a motion application under urgency seeking mainly leave to file a Response out of time. I certified the motion urgent and directed the Respondent to serve the motion for *inter partes* hearing on 23 August 2013.
4. On 23 August 2013 the motion came up for hearing but Mr. Omuya for the Respondent sought an adjournment on the basis that he had been served with a preliminary objection and he needed to file a replying affidavit.
5. I granted the Respondent 15 days within which to file a replying affidavit and documentation to establish that his client had travelled out of the country. I adjourned the hearing of the motion to 16 September 2013.
6. On 16 September 2013 the representative of the Claimant Union was present while the Respondent was not represented. Because of the non attendance I dismissed the motion.
7. On 23 September 2013 the Respondent filed another motion under certificate of urgency seeking reinstatement of the motion filed in court on 18 July 2013 and dismissed on 16 September 2013. I certified the motion urgent and set 7 October 2013 for *inter partes* hearing.
8. The motion proceeded to hearing on 7 October 2013 and Mr. Omuya submitted that the motion was unopposed because the Claimant Union had not filed nor served him with any response or objection.
9. On the merits of the motion, Mr. Omuya relied on the grounds set on the face of the motion and his affidavit sworn on 23 September 2013. The reason given for failure to attend court on 16 September 2013 to prosecute the motion was that the counsel had inadvertently entered in his diary that the application was coming up on 16 October 2013 instead of 16 September 2013.
10. Mr. Otieno, Assistant General Secretary of the Claimant Union in his reply submitted that the record of the proceedings were clear that the Respondent had requested for 2 weeks to file a reply on 23 August 2013 and that the deadline passed without the Response being filed and that the application is meant to delay the Claimant unfairly.
11. I have duly considered the submissions by the Respondent/Applicant and the Claimant Union/Respondent and the record of proceedings. I have already mentioned that the judgment

- went to some length to give the history of service of process before hearing. The Court caused the Deputy Registrar of the Court to write to the parties more than once. The Respondent does not deny receipt of those notices which were sent to its postal address P.O Box 5664-80401 Diani Beach Mombasa.
12. It cannot therefore be true that the Respondent came to learn about the Cause only when it was served with a copy of judgment on 31 July 2013. In any case, the Respondent does not deny that the person who allegedly received process on its behalf, one Gerishon Kidaha is its employee. The Respondent only states that the said Gerishon Kidaha did not have authority to receive official documents. It is clear that the Respondent had knowledge of the Cause and its progress.
 13. On the main reason given for failure to attend Court, the Court has considered the Respondent's assertions that it incorrectly entered the hearing details in the diary. The Court's cause lists are published in the courthouse notice board and Kenya Law Reports website a week in advance for the attention and information of the public, litigants and legal practitioners.
 14. The cause list is also sent as a soft copy to the Law Society of Kenya Mombasa branch for the information of its members. The Respondent could have easily noticed that a matter it is involved in was in the cause list for 16 September 2013.
 15. In my considered view the Respondent has not demonstrated that there are sufficient reasons to reinstate the motion application which was dismissed. The Court therefore declines to exercise its discretion in favour of the Respondent and the motion dated 23 September 2013 is dismissed with no order as to costs. The execution process can proceed.

Delivered, dated and signed in open Court in Mombasa on this 1st day of November 2013.

Radido Stephen

Judge

Appearances

Mr. Otieno Assistant General Secretary for Claimant Union/Respondent

Mr. Omuya instructed by Hezron Gekonde & Co. Advocates for Respondent/Applicant