



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NO. 1 OF 2014

BETWEEN

KAZUNGU TSUWI KALAMA CLAIMANT

VERSUS

THE CHAIRMAN, SECRETARY, TREASURER AND/OR

TRUSTEES OF ALMADRASA TUSALFIYAL

BURHANIYAH (BBES)RESPONDENTS

Rika J

Court Assistant – Benjamin Kombe

Mr. Mwarandu instructed by J.K. Mwarandu & Company Advocates for the Claimant

Mr. Omollo instructed by Kamoti Omollo & Company Advocates for the Respondent

RULING

The dispute was fixed for mention on 17th July 2014. Both parties did not attend Court, and an order dismissing the Claim was given.

The Claimant made an Application dated 23rd July 2014, seeking to have the dismissal order set aside, and Claim reinstated.

The Application is supported by the Affidavit sworn on 23rd July 2014, by the Claimant's Advocates Mr. Joseph Karisa Mwarandu. He explains that he was caught up in heavy morning vehicular traffic, on his way from Malindi to Mombasa on the day of the mention. He arrived at 10.00 a.m. in Court, only to find

the matter had been mentioned and dismissed in the absence of the Parties. This position is supported by the Affidavit of the Claimant himself sworn on the same date.

The Respondent filed Grounds of Opposition on 9th October 2014. Its position is that the main Claim is time barred under Section 90 of the Employment Act 2007, and it would be prejudicial to the Respondent, to reinstate a Claim which is time barred.

The two Advocates consented to have this Application disposed of on the basis of their written Submissions, Pleadings and Affidavits on record.

The Court finds:-

1. The Claim was fixed for mention on 17th July 2014, with a view to issue of procedural orders by the Court. It was not for hearing.
2. The order dismissing the Claim, would appear too harsh, while an order for indefinite postponement would have sufficed.
3. The Claimant's Advocate has in his Affidavit shown good reason for his late arrival in Court on the material date. Traffic congestion is commonplace along the route travelled by Mr. Mwarandu on the mention date. The Court agrees it was difficult for him to reach the Court earlier, particularly as he was using Public Transport.
4. His Client was in Court, but not conversant with the Court process, and did not alert the Court about his Advocate's delay.
5. The Claim could well be time barred, as stated by the Respondent in its Grounds of Opposition. This however is not the issue that is under consideration; the issue for consideration revolves around the dismissal of the Claim for non-attendance, on the 17th July 2014.
6. The Claimant is entitled to be heard.

IT IS ORDERED:

- a) ***The order for dismissal of the Claim dated 17th July 2014 is set aside.***
- b) ***Parties shall move the Court on the next course of action.***
- c) ***In the meantime the matter is Stood Over Generally.***
- d) ***Costs in the cause.***

Dated and delivered at Mombasa this 18th day of December 2014.

James Rika

Judge



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