REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 303 of 2009

REPUBLIC……..…..APPLICANT

VERSUS

THE DISCIPLINARY COMMITTEE.....RESPONDENT

EX PARTE: KARIMI C. NJAU

RULING

1. On 28th March 2012 when this matter came up for Highlighting Submissions, the Court dismissed the matter for want of prosecution.

2. The applicant has now moved the Court by way of a Notice of Motion dated 24th August 2012 seeking in the main an order setting aside the said order dismissing the applicant's motion dated 3rd June 2009.

3. The application is supported by an affidavit sworn by **Elijah Bitange Mageto**, the applicant's advocate on 24th August 2012. According to him when the Court fixed the Motion for hearing on 28th March 2012, he erroneously diarised the same for 28th May 2012 instead of 28th March 2012. On the said 28th May 2008 he attended Court for hearing but the Court file could not be traced and it was not until 22nd August 2012 that the same was availed to him and on perusal he realised that the matter had been dismissed on 28th March 2012. He contends that the non-attendance on 28th March 2012 was not deliberate but mistaken and takes responsibility for the same. In the deponent's view the applicant is interested in having his case, which is based on breach of the rules of natural justice heard on merits. It is further deposed that pursuant to the provisions of Article 159(1)(d) of the Constitution, the court should adjudicate the matters without undue regard to technicalities. According to him no prejudice will be occasioned to the respondent by allowing the application hence it is fair and just that the dismissal order be set aside and the application be reinstated.

4. The application was however opposed by a replying affidavit sworn by Apollo Mboya, the respondent's secretary. According to him, the application is totally unfounded, misconceived, trivial, frivolous and a waste of judicial time. In the deponent's view the application seeks to reinstate an application which was dismissed in March 2012, an act which will be prejudicial to the respondent. According to him the applicant's past conduct in failing to attend court on 24th January 2012when the matter was scheduled for hearing is an indication of lack of interest in the application. On advice given by the deponent's counsel, it is contended that Civil Procedure Act and rules cannot be invoked in judicial review matters and that pursuant to the provisions of the Law Reform Act the only option is to appeal. The application, according to him will not meet the ends of justice but to the contrary will lead to further costs. Since the proceedings sought to be quashed have been concluded it is deposed that the orders

sought will not bear any fruit and the application is only designed and intended to delay execution by the Respondent against the advocate and to defeat the respondent's pursuit of justice hence the application ought not to be allowed.

5. The first issue for determination is whether the Court has power to entertain an application for reinstatement of a judicial review application dismissed as a result of default in attendance when the matter came up for hearing. It has been argued by the respondent that since the Civil Procedure Act and Rules do not apply to judicial review applications the only option available is for the applicant to appeal.

6. In **Jotham Mulati Welamondi vs. The Electoral Commission Of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4**, it was held that Judicial review being a special procedure as the Court is exercising neither a civil nor criminal jurisdiction in the strict sense of the word the invocation of the provisions of section 3A and.....the Civil Procedure Rules...render the application wholly incompetent and fatally defective. Accordingly the provisions of the Civil Procedure Act and Rules thereunder are inapplicable to judicial review application.

7. However, the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] EKLR** held that the superior court in the matter before the court had the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the Civil Procedure Act. It follows that the Court has jurisdiction to entertain the present application.

8. In **CMC Holdings Ltd vs. Nzioki [2004] KLR 173** it was held:

"**That discretion must be exercised upon reasons and must be exercised judiciously….. In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's**

appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed".

9. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. However, in considering whether or not to set aside the default judgement a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is *prima facie* defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte* judgement. See **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.**

10. The Court recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline.

11. In this case the failure to attend is attributed to the failure to diarise the correct date by the applicant's advocate. In **Kalemera vs. Salaama Estates Ltd [1971] EA 284** a matter that has striking similarities to the present case, the Court expressed itself as follows:

"the failure to attend at the hearing was due to the fact that the applicant's advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the circumstances. The court prefers to treat the circumstances as arising out of honest mistake...The test to be applied under section 101 which speaks of "the ends of justice" is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always remembered that to deny the subject a hearing should be the last resort of a court.. In this suit, the plaintiff's claim is for damages for wrongful dismissal. The defendant contends that the dismissal was justified under the terms of the written contract between the parties. Clearly, the circumstances require that the defence be heard on its merits. The defendant is here and is anxious to be put in a position to defend. Looking at the matter from the plaintiff's side, the court does not think that he will be

prejudiced or suffer hardship if he can be adequately compensated by costs...The circumstances of this case are such that "ends of justice" require that a rehearing should take place. To avoid any misunderstanding about this conclusion, the court has riveted its attention to the circumstances of the error in this particular case, and not attempted to prescribe a general rule for dealing with all errors because there can be errors and errors involving circumstances of infinite variety."

12. Accordingly, the reason given for the failure to attend the Court on the hearing date is not altogether unheard of. Yes the setting aside of the judgement or order will inevitably lead to some delay but it is my view that the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the applicant to put forward its case on merits. In considering the exercise of discretion, the Court must consider the risk of injustice if the court found in favour of the applicant, than if it determined this application in favour of the respondent and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective. That delay as rightly submitted, may be compensated by an award of costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

13. Taking into account all the circumstances of this case I am satisfied that the justice of the case mandates that the applicant be given an opportunity of being heard. In making that decision I have taken into account the fact that the cause of action herein is alleged to be an action taken by the respondent against the applicant without the applicant being afforded an opportunity of being heard; the fact that the present application was made immediately the applicant's legal advisers discovered that the matter had been dismissed; the fact that the respondent will not be unduly prejudiced since it will be afforded an opportunity of being heard; the fact that the consequences of not hearing the applicant far outweighs prejudice, if any that the respondent stands to suffer. Lastly I have considered the issue whether it was in order for the respondent to apply for dismissal of the matter for want of prosecution when the matter was coming up for the highlighting of submissions which were already on record and which could be deemed to be a mode of prosecuting the application. I have also taken into account the fact that a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

14. I have said enough to show that I find merit in the Notice of Motion dated 24th August 2012. Accordingly, the order dismissing this application is set aside and the matter is reinstated to hearing.

15. In setting aside, the Court is however, required to do so on terms that are just. The terms in question must be just to both parties. The condition that commends itself to me is that the applicant pays thrown away costs assessed in the sum of Kshs. 15,000.00 within 15 days from the date hereof and in default execution to issue.

Dated at Nairobi this day 27th of February 2013

G V ODUNGA
JUDGE

Delivered in the presence of:

Mr. Ombete for Mageto for Applicant

Mr. Olembo for Respondent