REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 602 OF 2009

J W M.....1ST PLAINTIFF

Z.N.(a minor suing through her mother & next friend

J W M).....2ND PLAINTIFF

VERSUS

AAR HEALTH SERVICES LTD.....DEFENDANT

RULING

Coram: Mwera J.

Michuki for Defendant

Mwenesi for Plaintiff

Court clerk Njoroge

The notice of motion dated 16.12.10 was brought by the defendant under the now repealed Order L rule 1 Civil Procedure Rules and sections 1A, 1B, 3A, 63 (e) of the Civil Procedure Act. The prayers therein were:

a) that the order of 22.9.10 be set aside with all consequential orders thereto;

b) that on granting prayer (a) (above) –

i) the ***ex parte*** judgement herein be set aside; and

ii) the defendant's motion dated 26.2.10 be reinstated as well as that of the plaintiff dated 30.6.10 so that both are heard on their merits; and

iii) that in the meantime there be a stay of further proceedings.

It was stated in the grounds that the defendant's counsel's failure to attend court on 22/9/10 was due to an inadvertent and excusable mistake. The defendant had a good defence to the claim. The striking out order of 22.9.10 was drastic and so unfair and unjust. The defendant had moved with due dispatch to

seek the orders in review. No prejudice will befall the plaintiff, in the event the court exercised its inherent power to grant the orders.

David Muthee Michuki, advocate for the defendant, deponed in the supporting affidavit that on instructions of their client a memorandum of appearance was entered in this cause on 25.11.09. But a defence followed 8 days out of time. On that basis the defendant filed an application dated 26.2.10 seeking extension of time to file the defence and that the defence filed in court on 17.12.09 be deemed filed within time.

That application came up for hearing on 17.5.10 but the plaintifs' lawyer sought time to file a replying affidavit. The next hearing date was 12.7.10 and the defendant served a hearing notice. The plaintiffs filed a replying affidavit but also filed a motion of their own dated 30.6.10 for orders that the defendant's application dated 26.2.10 as well as the defence be struck out and judgement entered for the plaintiffs.

On 12.07.10 when the defendant's application dated 26.2.10 was due for hearing, Khamoni J permitted both sides to file whatever affidavits within 7 days in connection with the defendant's application dated 26.2.10 and the plaintiffs' application dated 30.6.10

Mr Michuki averred that the learned judge directed that here be a mention on 27.9.10. But the record shows that the court directed that the two applications be consolidated for hearing on 22.9.10 and this was by consent. The record does not indicate that a mention was fixed for 27.9.11, and Mr. Michuki appears to admit as much in his affidavit. He prepared whatever affidavits in respect of the two applications and:

> **"10. That regrettably and due to an inadvertence, I forgot to diarise the hearing of the application (s) on 22nd September 2010……"**

Counsel then added that in the meantime he had been served with a hearing notice in other matters. He did not specify which these other matters were or whether they had a bearing on the 2 applications due for hearing on 22.9.10.

With failure to indicate this 22.9.10 in the diary (Ann DMM3), Mr. Michuki was surprised at 11 am on that day to notice the cause in the day's list before Dulu J. Immediate attempts to contact Mr. Mwenesi (for the plaintiffs) on this issue were unsuccessful. He could only manage to leave a "short message" that he was in a meeting.

It was added that between 24/9/10 and 23.11.10 his staff were engaged in frantic efforts to trace the file and extract the order in question. The file could not be traced or it went for scanning at one time or another. Only when the file was available, was the defendant's present application filed.

Counsel deponed further that his failure to reflect in his diary the date of 22.9.10 was inadvertent. It was not meant to delay proceedings in this matter. The applicant was always ready to attend court and had filed in time affidavits as ordered by the court regarding the two applications that were due to be heard on 22.9.10. There was, on the part of Mr. Michuki, mistake or oversight that this court should excuse in the interests of justice. The orders of 22.9.10 were so drastic that if left to stand, the applicant may be denied the opportunity to be heard on the merits of the case.

In the replying affidavit by J W M, the mother of the minor 2nd plaintiff, deponed that her lawyers had explained to her the legal and procedural implications of the present application and she believed that it was defective. The overriding objective provisions were not applicable in situations like this. Those provisions only guided the court in interpreting sections and rules relied on by a party. Dulu J properly decided the application before him on 22.9.10 and that should not be set aside. The applicant should have appealed against those orders but it has not. Neither has it applied for a review of the same. So all in all, the present application was misconceived and misplaced. The deponent then went off as if at this point the curt was entertaining the prayer to enlarge time to file a defence. Then about the termination of her insurance cover with the defendant, she added that the defendant had no defence to that and so the court should go ahead and assess damages by way of formal proof. Directed to submit each side more or less

repeated what was stated in the affidavits but added authorities.

The applicant urged the court to grant the orders sought on the basis that the counsel's failure to reflect the date of 22.9.10 to appear in court was inadvertent ; this court had the jurisdiction to consider and grant the orders sought. Justice would thus be served. The applicant's lawyer had sufficiently explained how the default occurred and cited relevant authorities obtaining e.g. in **CMC Holdings Ltd Vs Nzioki [2004] eKLR.** If the plaintiffs sustained any loss may they be compensated by an award of costs.

And on the plaintiff/respondents' side, the court was asked to decline orders as prayed. That the defendant filed the application dated 26.2.10. But it was not prosecuted; it was struck out. So there is no application to review or reinstate. Perhaps it would be pertinent to remark that it is a judgement or ruling, giving rise to decree or order which comes for review in court – not a case or an application. Then the court heard that when that application dated 26.2.10 was thrown out, so was the defence of 15.12.09. Further, the court was told that the inherent powers of the court were not applicable in the present proceedings. That the applicant had not given cogent reasons to compel the court to grant it the orders. The applicant did not file the affidavit as ordered by Khamoni J in time. Counsel did not exhibit his page in the diary of 27.9.10 to show if this cause was entered therein as a mention. Mr. Michuki himself ought to have visited the registry to find out the position of the case rather than send a court clerk. There was no need for all that process either. The present application was filed after a long delay which has not been explained. When the application was dismissed as Dulu J ordered, then the only course open to the defendant was to appeal or apply for review. Otherwise the present application is only meant to delay expeditious disposal of this matter, a thing that militates against justice.

The foregoing are strong arguments for and against the present application. This court's determination takes in regard the claim herein. The plaintiffs claim that their membership with the defendant (in regard to medical insurance cover) was unlawfully terminated. So they claimed general damages. Also claimed were special damages amounting to sh. 223,540/=, together with costs and interest.

The defence said to have been filed out of time on 17.12.09 was followed by an application dated 26,2.10 filed in court on 4.3.10. It denied the claim as per the plaint. As noted above, Khamoni J ordered that this application be consolidated with the plaintiffs' application dated 30.6.10, for hearing on 22.9.10. The application dated 30.6.10 sought ***inter alia*** orders that the defendants motion dated 26/2/10 be struck out and it be dismissed.

On 22.9.10 when the defendants lawyer did not appear Mr. Mwenesi for plaintiffs, argued their application dated 30.6.10 which was allowed.

It is true that the defendants' application dated 26.2.10 was dismissed by virtue of the order the court made after hearing the plaintiff's application dated 30.6.10. The order of 22.9.10 was ***ex parte***, no doubt. Yes. That order could be appealed against or even subjected to a review. But such orders can also be validly subjected to setting aside and that is the course the defendant/applicant opted for. It cannot be faulted. Only it must demonstrate that taking that course is backed by reasonable explanation and not intended to delay the final determination of the cause which would otherwise amount to doing an injustice. The explanation set forth as to why the orders of 22.9.10 should be set aside were, in the main that Mr. Michuki failed to reflect in his diary the consent date of 22.9.10 when the two applications were due to be heard. He concedes this unreservedly. He deponed that on 12.7.10 when he with a Mr. Ndolo, holding brief for Mr. Mwenesi, initially appeared before Khamoni J, the two were considering to mention the matter on 27.9.10. But then Mr. Mwenesi stepped in:

> **"8…… and we proceeded to agree that the matter would be listed on 22nd September,2010."**

Mr. Michuki proceeded to place before court the minute he extracted from the internet with the mention on 27.9.10 (see DMM2). This was with Mr. Ndolo. He proceeded to depone that that is what remained (in his mind?) and he did not place in the diary the hearing date of 22.9.10 agreed when Mr. Mwenesi entered. To this court's mind, that sounds quite plausible and reasonable. Such an error and oversight

could inadvertently occur and that cannot be ruled out in human activities. Mr. Michuki added in his affidavit that by 11 am on 22.9.11 when in his office, going over the day's cause list he spotted the cause before Dulu J. Efforts to telephone Mr. Mwenesi did not yield fruit, so he sent a text message to him:

"In meeting pls SMS."

Perhaps such text cannot be easily placed before court but Mr Mwenesi did not deny it.

So all in all this court is inclined to grant the orders sought. It is not oblivious to the court that the plaintiffs have since been moving nearer to having their claim proved by formal proof and so to end litigation herein, probably with the enjoyment of the fruits to follow.

In the discretion of this court and so that all parties move quickly to get to the end of this matter, and on perusing the principal pleadings and the 2 applications that were to be heard together on 22.9.10, justice ought to be done and this court thinks it will be done if the prayers ought in the present application are granted. They are granted.

The court goes further to grant the prayers sought in the defendant's application dated 26.2.10. The application was not argued before this court for determination. But from the submissions and as said earlier, the perusal of the affidavits regarding that application, may orders issue as sought therein. This court is focusing on the aspect of hearing the suit herein on its merits so that not only will it become a statistic in one of the cases finally determined, but the parties will sooner than otherwise, get to know the fate of the claim. Entertaining interlocutory proceedings may only prolong time.

Accordingly, orders as granted above. The costs herein assessed at sh. 10,000/= in the circumstances, to be paid by the defendant to the plaintiffs in the next 21 days – in default the orders to lapse. The parties then to take course to prepare the suit herein for trial in accordance with Civil Procedure Rules 2010. Mention in 30 days for directions regarding trial.

Orders accordingly.

Delivered on 4.7.11.

J. W. MWERA

JUDGE