



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 254 OF 2004

IN THE MATTER OF ENFORCEMENT OF AN AWARD
IN THE INDUSTRIAL COURT AWARD CAUSE NO. 61 OF 1988
JOHN KOTINGO.....PLAINTIFF/RESPONDENT
BENSON KILUNGU.....PLAINTIFF/RESPONDENT

**(Filing this application in a representative capacity for and on
behalf of 16 former employees of Warren Enterprises Limited)**

-VERSUS-

WARREN ENTERPRISES LIMITED.....DEFENDANT/APPLICANT

RULING

On 19th November, 2004 I delivered a ruling after hearing the Notice of Motion application by the respondents herein, dated 4th March, 2004. That was a short application which came before me as a Friday matter on 17th September, 2004. The applicants' advocates were not, on that occasion, present in Court; they now come before me by their Chamber Summons dated 7th December, 2004 and filed on 8th December, 2004. The applicant prays that there be a stay of the decision of 19th November, 2004 and that the same be set aside, so that the matter do proceed to *inter partes* hearing.

The grounds given in support of the application are as follows:

- (a) that, the applicant herein was not heard on 17th September, 2004;
- (b) that, failure to attend Court by the applicant's advocate on 17th September, 2004 was not deliberate and/or intentional;
- (c) that, the applicant herein had filed grounds of opposition, which are part of the Court record;
- (d) that, it will serve the greater interests of justice that this matter be heard and determined on its merits;
- (e) that, the respondent is ready and willing to abide by such orders as the Court may impose, including those for costs which may be payable to the applicant in the Notice of Motion of 4th

March, 2004;

(f) that, a mistake of counsel should not be visited upon the litigant.

Evidence in support of the application is in the supporting affidavit of **Geoffrey Orao Obura**, the advocate with the conduct of this matter on behalf of the applicant. He avers that the respondents' application had come up for hearing on 30th April, 2004 but was stood over generally on the application of the plaintiffs' counsel. Subsequently, the deponent's firm was served with hearing notice "stating that this matter be fixed for hearing as shall be shown on any Friday list of Judge matters." The deponent avers that he thereupon instructed his clerk to keep an eye on the Friday cause list and to diarise the matter for his attention. He avers that the clerk fell ill, and only after the hearing had taken place was it realised that the matter had appeared on the 17th September, 2004 Friday cause list. The deponent avers that failure to attend Court on 17th September, 2004 was not deliberate or intentional. He states thus: "unless an order for stay of execution, setting aside of judgement and an order that the matter proceeds to *inter partes* hearing is issued, the defendant will suffer gross injustice as the defendant will be condemned unheard."

The deponent's clerk, **Violet K. Ndombi**, has also sworn an affidavit, dated 7th December, 2004. She avers that on or about 1st July, 2004 she had received a hearing notice from M/S Gachuki & Company Advocates showing that this matter was serialised as 0853D, and she discussed it with the advocate with the conduct of it, **Mr. Obura**, who instructed her to keep an eye on the daily cause list and also diarise the motion appropriately for his attention. She avers that she had been an expectant mother, and had to visit the clinic from time to time. On or about 16th September 2004, she took leave to attend the clinic but by oversight had not asked her colleagues to keep watch on the cause list for the following day, 17th September 2004. She had also forgotten to request **Mr. Obura** to keep watch on the cause list. The deponent avers that when she resumed duty on Monday 20th September 2004 she realised that the matter had appeared on the cause list for Friday 17th September 2004.

In **John Kotingo's** replying affidavit dated 1st April 2005 and filed on 6th April, 2005 he avers that the defendant's advocates had a duty to keep abreast of the Friday cause lists and so they should have known that this matter was coming up for hearing on 17th September 2004. He avers that the defendant has occasioned delay in disposing of this matter time after time, since the decision of the Industrial Court had been rendered on 28th January 1999, and in consequence the plaintiffs and their families had suffered prejudice. He depones that the plaintiff's claim is for Kshs.1,076,001/85 which has remained outstanding since 1998 and has attracted interest at the rate of 12% per annum so that today the sum payable is Kshs.2,108,953/50 which should be deposited in the joint names of the advocates having the conduct of this matter, if the Court should be inclined to grant the prayers now being sought.

This application was heard before me on 11th July 2005 when the defendant/applicant was represented by **Mrs. Onyango** while the plaintiffs/respondents were represented by **Mr. Mungu**.

Learned counsel, **Mrs. Onyango**, restated the prayers set out in the application. She was seeking the setting aside of the ruling of 19th November, 2004 — because the respondent had not been heard; failure of the respondent to attend Court wasn't deliberate; the respondent had filed grounds of opposition; greater interests of justice required both parties to be heard; non-attendance in Court had been occasioned by the mistake of counsel rather than of the litigant.

Mrs. Onyango submitted that the Court had an unfettered discretion to set aside a ruling such as that of 19th November 2004. She relied on the decision of this Court (**Ringera J**) in **Trust Bank v. Portway Stores (1993) Ltd & 4 others**, HCCC No. 413 of 1997. In that case, in which the subject was the setting aside of a default judgment, the learned Judge thus stated:

"I may state straight away that the principles applicable to the setting aside of default judgments which are regular on their face – as is the judgment in this case – are not in doubt.

The Court has an unfettered discretion. Such discretion is exercised in order to do justice as between the parties. In weighing the interests of justice the Court has to consider, among other things, the reasons, if any, why the particular default was committed. The conduct of the parties and in particular such conduct as has a bearing on the course of justice in the case, whether the applicant has a defence on the merits, whether the respondent can be compensated by costs for any delay that may be occasioned by the setting aside of the judgment, and of course it should always be borne in mind that to deny a person a hearing should be the very last resort of a Court of justice.”

Mrs. Onyango urged that in the instant matter, there had been a genuine mistake made by the advocate’s clerk; and as soon as the advocate learned of the entry in the Friday Cause list on a past occasion, he promptly filed the application. He prayed for a setting aside of the judgment, and for an opportunity to be heard.

Learned counsel for the plaintiffs/respondents, *Mr. Mungu*, contended that the advocates for the applicant had not shown diligence, as they had an obligation to keep checking the Friday cause list. He submitted that as the matter had been determined by the Industrial Court as far back in time as 1998, the applicant had always known it would have to pay a certain amount of money to the respondents.

Mr. Mungu contended that the principle in the Trust Bank case, relied on by the applicants, was not just that a party in the position of the applicants herein must be heard, but that *justice must be done to all parties*. Counsel urged that if the Court should be inclined to give the orders sought, then it would be proper to take into account the vigilance with which the respondents have constantly followed up on this matter, and the fact that the applicant has been dilatory in giving fulfilment to the rights of the respondent issuing from the Industrial Court decision in 1998; and it is meet that the total sums due, being Kshs.2,108,953/50 be ordered to be deposited in Court. Counsel pleaded that if the applicant company were to go into liquidation, the respondents would be exposed to the risk of losing the fruits of their judgement.

In her rejoinder, learned counsel, *Mrs. Onyango*, stated that no evidence had been given that the applicant company may not be in a position to pay up if required to do so by the Court. She offered to pay thrown-away costs to the respondents, and urged that the judgement be set aside.

On 28th January, 1999 the Industrial Court, in exercise of its special jurisdiction under the Trade Disputes Act (Cap. 234), Section 17, in Cause No. 61 of 1988, delivered an award in favour of the respondents. The applicant took no action in response to that award, and so it has remained outstanding for some six or so years. This is the reason why the respondents herein had come to Court by the Notice of Motion of 4th March, 2004.

The applicant pleads that it had erred in not being represented in Court on 17th September, 2004 when the respondents’ Notice of Motion was heard and judgement delivered on 19th November, 2004 – which judgement adopted the said award of the Industrial Court.

Mr. Justice Ringera, in *Trust Bank v. Portway Stores (1993) Ltd & 4 Others*, had clearly laid out the principles to guide this Court in considering an application such as the instant one, for setting aside judgement and creating a fresh opportunity for both parties to be heard. The pertinent principles may here be restated:

(i) *unfettered discretion – guided by the object of ensuring that justice is done;*

(ii) *why was the particular default committed?*

(iii) *how has the applicant conducted itself?*

(iv) *has the applicant a defence on the merits?*

(v) is the applicant going to compensate the respondents for loss of their judgement – advantage?

(vi) is it vital, in the circumstances of this case, that an opportunity be created for the applicant to be heard?

As I have noted earlier, the authority of the Industrial Court to determine employment questions comes from the Trade Disputes Act (Cap. 334). The Industrial Court gave its award on 28th January, 1999 in favour of the respondents herein. The applicant took no action on that award; was, I think, dilatory; and it made no recourse to a forum of law, at which any grievances it may have heard could have been considered. When ultimately the respondents sought redress in the High Court, the applicant failed to turn up in Court; and judgement was delivered, favouring the respondents.

It may be that the applicant was not deliberate or intentional in not coming to Court to meet the case of the respondents. I will grant them that. But I will attach *conditions*. The applicant must deposit in Court three-fourths of the sums claimed by the respondents; and it must pay the respondents' costs of the Notice of Motion of 4th March, 2004; and the applicant must bear the respondents' costs in the instant application.

Specifically I will order as follows:

1. On the conditions set out hereafter, the Court's decision of 19th November, 2004 is hereby set aside:

(a) Within 30 days of the date hereof, the applicant shall deposit in Court *three-fourths of the amount of money claimed to-date* by the respondents, i.e. three fourths of Kshs.2,108,953/50;

(b) Within 30 days of the date hereof, the applicant shall pay the respondents' costs accrued in the Notice of Motion of 4th March, 2004 – the sum being agreed between the parties or failing agreement, upon taxation of costs;

(c) The applicant shall bear in any event the respondents' costs in the instant application.

2. If the applicant shall fail to comply with the conditions as specified above, the orders herein shall be automatically vacated without any further action on the part of the respondents, and the Court's decision of 19th November, 2004 shall thereupon take effect, and the respondents will be at liberty to extract and enforce the decree therein.

3. Provided there is compliance with the terms of the orders herein, the plaintiffs' Notice of Motion of 4th March, 2004 shall be listed for hearing on the basis of priority, after the expiration of 30 days from the date hereof.

DATED and DELIVERED at Nairobi this 23rd day of September, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendant/Applicant: Mrs. Onyango, instructed by M/s. Obura Mbeche & Co. Advocates

For the Plaintiffs/Respondents: Mr. Mungu, instructed by M/s. Gachuki & Co. Advocates.