



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 20 OF 2018

CHRISTOPHER OSIKO.....CLAIMANT

VERSUS

ISIOLO TEACHERS SACCO SOCIETY LIMITED....RESPONDENT

RULING

1. The Claimant's notice of motion application dated 5<sup>th</sup> October 2019 seeks to set aside the court orders of 3<sup>rd</sup> October 2019 when the suit was dismissed for non-attendance. The Claimant asserts that he wishes to have the case heard and determined on the merits. The Claimant argued that it was an inadvertent mistake of counsel which should not be visited on the Claimant. The advocate asserted that the case was the first that he had handled for the court and that he had not attended before the court. He stated that the court used to sit in CM's Court 2 and that on this day it sat at ELC Court. He asserted that he asked his client to proceed to CM's Court 2 and the client called telling him the court was not sitting and he requested the client to wait for him and on arrival they ascertained the court was sitting at the ELC court and the matter had been dismissed. During the hearing of the application counsel stated that he had learnt from the Court Assistant that the court sent someone to check for parties in CM's Court 2 and he surmised that this may be the time they were moving around to see where the court was sitting. He asserts that the Claimant is a resident of Migori and he comes to court religiously. He submitted that it was sad the case was dismissed yet the Claimant was within the court precincts. He urged the Court to set aside the dismissal order and reinstate the suit.

2. The Respondent in opposition to the motion filed a replying affidavit and argued that the court was being asked to exercise discretion to grant the orders sought. The Respondent asserts that the Claimant had not availed sufficient grounds why the motion should be granted. It was argued that as a matter of practice when parties find the matter was called and dismissed in their absence on appearance they seek to have the case called. The Respondent submitted that nothing of that sort was done and as such there was no indication in the 2 affidavits filed in support of the motion. Counsel for the Respondent submitted that no compelling reason had been advanced to have the orders granted.

3. In a brief rejoinder, counsel for the Claimant applicant submitted that the 2 affidavits give compelling reasons why the court should exercise discretion and set aside its earlier orders. It was stated that when the applicant realized the matter had been dismissed he moved with speed to have the suit reinstated as that was the only reasonable way he could have moved the court and he could not have done so in the absence of counsel for the defendant.

4. The Claimant seeks to have the suit reinstated while the Respondent is opposed arguing no compelling reasons were given. For a court to set aside the dismissal, there have to be grounds for doing so. The Court's power in considering an application to set aside is discretionary. As held in the case of **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**

“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

Similarly the case of **Shah v Mbogo [1967] EA 166**, held that

“this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

5. The setting aside that is sought is on the same footing as that considered in the two cases cited as the orders that issued determined the matter meaning it caused the cessation of the suit. As the discretion to be exercised is meant so as not to assist a party who has deliberately sought whether by evasion or otherwise to delay the course of justice, the mistake of not attending court was not inadvertence or excusable mistake. Parties come to court and cannot assume that the court is sitting at the usual place. In the case of the Applicant, it is of note that at Meru Law courts there is an announcement every morning as to where the court cases will be held be it labour, land and environment or the high court or even the matters appearing before the subordinate bench. In this case the applicant has not demonstrated that he was in the court premises on that day. The application is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Meru this 4<sup>th</sup> day of March 2020

Nzioki wa Makau

JUDGE