REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 276 OF 2003 (OS)

DOCKWORKERS UNION…………………………………………………PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY…………………………………………….RESPONDENT

R U L I N G

1. My view and understanding of the dictates of substantive justice is that very court must all at times bear in mind that it is an enduring and endearing dictate and principle of the administration of justice that before a of law court decides a matter on the merits, it reserves the right and power to visit every order and decision arrived at on account of default whether occasioned by default, inadvertence or just negligence, provided, however, that no prejudice or injustice is visited on the party in whose favour such orders exist which cannot be made good by an award of costs[1]. For that reason the court's discretion is said to be wide an unfettered[2] with the overriding question being whether or not the interests of justice would suffer or be served best by setting aside[3].

2. Before me for determination is the defendant application seeking that the proceedings taken on the 26/8/2010 resulting in a decision in the ruling dated the 24/9/2010 be set aside on account of the fact that such proceedings were taken *ex-parte* by reasons that there was posted on the court's notice board, a notice to the effect that that all judges at the station would not sit on the 26/8/2010 because they would be travelling to Nairobi to take oath of office necessitated by the promulgation of the new constitution. The application was disclosed to be premised on the provisions entrenching the overriding objectives as well as the inherent power of the court beside the rules on setting aside default judgments or orders. It was supported by the Affidavit of the late **SYED KASSIM SHAH advocate** as well as the supplementary affidavit of one **JOSEPHAT MUNIKA SORE**, a clerk with the applicant's lawyers. Those affidavits explained in details the reason the advocate did not attend the court on the date fixed being the information in the notice and an alleged confirmation from a Secretary to the Presiding Judge of the station at the time.

3. The application was opposed by the affidavit of **MR. GIKANDI NGIBUINI ADVOCATE** as well as a notice of preliminary objection dated the 4.2.2011. The two document underscore the fact that the date 26.8.2010 was set by the judge himself the previous date and that a notice by the chief magistrate could not have had the effect of setting the order aside. In any event it was contended that by the time the judge fixed the matter he must have had knowledge of the swearing ceremony in Nairobi due for the 27.8.2010. it was equally contended that that there was no jurisdiction upon the court to entertain the chamber summons because the orders sought to be set aside were made on an application for review and could not be revisited and that the delay in bringing the application had not been explained.

4. I have given due regard to all the matter deponed to in the affidavit by Mr. Syed Kassim Shah Advocate in the Affidavit in Support, those by Mr. JOSEPHAT MUNIKA SORE in the Supplementary Affidavit as well as the Replying Affidavit sworn by Mr. Gikandi Ngibuini Advocate and the notice of preliminary objection and I have come to the conclusion that the sole issue for determination is whether or not a cause has been shown to merit setting aside the proceedings of 26/8/10 and thereby setting aside of the ruling of 24/9/2010. The resolution of that single issue would demand for an answer to the question whether the Applicant had acted in a manner as to depict a person who ha by design set out to defeat, delay or otherwise frustrate the cause of justice by evasion of just dexterity.

5. The fact that all the serving Kenyan Judges were due to swearing in on the 27/8/2010 is neither challenged nor challengeable. If it was challenged I would not hesitate to take judicial notice of that momentous and turning point in Kenyan history in ushering a new era and dispensation. That a notice was posted at the notice bard to that effect is not also undisputed. The plaintiff's position is however that parties having attended before the judge on 25/8/2010 when the judge fixed the matter for hearing on the 26/8/2010 at 10am, It was not open for the defendants advocate to take the notice posted at the notice board as having the force of setting aside the order by the judge, which must be taken to have been given with the swearing in date in mind.

6. While the applicants advocate has argued vehemently and very forcefully that to refuse the application would be to deny his client the right to be heard, i do not wholly agree. I would rather take the view that to refuse the application would be to punish and drive that litigant away from the seat of justice on account of a notice issued by an officer of the court or at the worst on account of inadvertence or blunder of a counsel. This view I would take without necessarily disbelieving the position taken by Mr Gikandi that Mr Shah was actually in court that

morning. I would attribute the failure to attend on the undenied fact of a notice posted by the chief magistrate. That Mr shah could have taken more cautionary measure to check if judge Sergon was in deed not sitting, might as well been a reckless act or just lack of diligence but that is all it amounts to. It cannot be the only reason to deny the applicant a chance to say a thing about the application for review. The jurisprudence that emerges from the superior is that mistake, blunder or inadvertence should not deny a litigant the right to put forth his case. ***Madan, J.A***, in the case of ***Belinda Murai & Others vs Amos Wainaina*, [1979] eKLR in his known traits** underscored that principle in the following words:-

> ***"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."***

7. The plaintiff's counsel has maintained that Mr Shah was in a court the court precinct and that courtroom then ordinarily used by Ojwang j was directly adjacent to courtroom then used by judge Sergon and that Mr Shah was obviously aware of the activities in Judge Sergon's courtroom. That averment must be seen in the light of what the late Mr Shah says at paragraphs 6,7,8 &9 of his affidavit that he was indeed in court for two matter, came by the notice on the board and to be double sure consulted with Judge Ojwang's court clerk who then consulted with the judge's secretary and was informed that the judge was already at the airport headed for Nairobi. Would such a conduct on the counsel be deemed less wanting of a person in his position so as to be deemed a design to delay or obstruct the course of justice? I do not think so. May be he ought to have done more by going to the chambers and courtroom for judge Sergon. However that would have been only necessary if the counsel had a reason to doubt the authenticity of the notice posted by the chief magistrate who is the known administrator of the court. But again may be that was less cautious but lack of extreme caution on a counsel should not be the reason to punish his client by closing the door for him never to be heard. Apaloo JA, in ***Philip Chemwolo & Another vs Augustine Kubende*, [1986] eKLR** followed the theme earlier set by Madam JA, (supra) and set out how mistakes need to be treated by courts. He said:-

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit. I think the broad equity approach to this matter 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 for the purpose of imposing discipline".***

8. One may ask the obviously relevant question of how the decision sought to be set aside impacts on each party to the dispute as a way of interrogating what is it that the defendant stands to lose if the order is left undisturbed. The flip side of that question is what prejudice the plaintiff stands to suffer if the order is set aside. If I set aside the orders of 24.9.2010 I would have set a stage for the parties to argue the application for review afresh. However, even if I refuse to set aside, the originating Summons is yet to be determined. The obvious position is that the parties still have to spend some time in court whichever way my ruling goes. In that scenario, I do find, being convinced that Mr Shah had no reason to doubt a notice given in the name and hand of the chief Magistrate that the proceedings taken on 26.8.2010 in the absence of defendant need to be revisited. I do revisit same and order that those proceedings and the ruling ensuing therefrom be set aside.

9. On costs I have taken note that a cautious act by Mr Shah would have demanded that he finds out from the judge who had given him a date just a day before if indeed he would sit. That he did not do and for that reason these proceedings have been necessitated. To award to his client the costs of the application would not be just. I order that costs be in the cause

Dated, signed and delivered this **8th** day of **February 2019**

P J O OTIENO

JUDGE

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[1] **Mbogo & Another** **V** **Shah** (1968) EA 93.

[2] CMC Holdings vs Nzioki (2004) 1 LR 173

[3] Chemwolo vs Kubende (1986) KLR 492