IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 20 OF 2016

PATRIOTIC GUARDS LTD …….APPELLANT

AND

JAMES KIPCHIRCHIR SAMBU ……..RESPONDENT

*(Being an appeal from the Ruling and Order of the Employment and labour Relations Court at Nairobi (**Nzioka wa Makau, J**.) delivered on 31st December, 2015*

in

E.L.R.C. No. 12535 of 2012)

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JUDGMENT OF THE COURT

Vide a memorandum of claim dated 19th December 2012, the respondent instituted a suit against the appellant in the Employment and Labour Relations Court, the predecessor to the Industrial Court. He averred that he was employed by the appellant as a training officer in May 2005. That in March 2008, his Kshs. 80,000/- monthly salary was abruptly and unilaterally reduced by the appellant without any reasons being proffered. The respondent averred further that he nonetheless continued to receive salary below what he was contractually entitled to until May 2010 when the appellant stopped payment of his salary forthwith. He eventually resigned in November 2012 citing frustrations and increasing financial obligations. He thereafter instituted the claim seeking to recover his outstanding dues/arrears and terminal benefits.

The appellant filed its reply and counterclaim observing that the respondent was remunerated for work done by way of salary, which salary was increased from time to time; that at the time the respondent left its employment, he had embezzled Kshs. 160,000/-; that no salary and terminal dues of the respondent were withheld and in any event, the claims by the respondent were statute barred. By way of counterclaim, the appellant demanded payment of Kshs. 80,000/- being one month's salary in lieu of notice and Kshs.160,000/- that the respondent had embezzled.

The suit eventually proceeded to trial. It is stated that the respondent concluded his examination-in-chief on 29th July, 2015 and the matter was adjourned to 30th September, 2015 when counsel for the appellant was scheduled to cross-examine him. On the scheduled date, it is claimed by the appellant that its advocate arrived in court when the matter had already been called out and the respondent's case closed

without it having had an opportunity to cross-examine the respondent and prosecute its defence and counterclaim. The appellant immediately filed an application dated 1st October, 2015 seeking to set aside the proceedings culminating in the closure of the respondent's case before cross-examination. The application was fixed for hearing on 3rd December 2015. Upon engagement by counsel for the appellant, counsel for the respondent became amenable to conceding the application and in effect pave way for the recalling of the respondent for cross-examination. The respondent exhibited a letter dated 29th October, 2015 showing that the respondent had agreed to concede to its application and further that the parties would seek court's directions on 3rd December, 2015 when the application was to come up for hearing.

According to the appellant, attempts to file the letter in court were futile as the court file could not be traced. On 4th November 2015, the appellant's advocate received a letter from the respondent's counsel informing him that the court had rendered its judgment and determined the claim in the respondent's favour in the sum of Kshs. 3, 568, 210/-. Following those events, the appellant filed another application seeking to stay the execution of the court's judgment of 3rd November 2015 and to further set it aside. The application was premised on the grounds that the appellant had a good defence to the respondent's claim which raised triable issues that it ought to be permitted to urge at the trial. The appellant pleaded that the respondent would not be prejudiced as any inconvenience caused to him could be remedied by an award of costs and that it was in the interest of justice that its application to set aside the judgment be allowed. The appellant's counsel indicated the reason for not appearing for the cross-examination being that he had appeared before another High Court Judge, **Ochieng' J**, and had overshot his time thus his failure to attend court in time. Pertinently, the appellant's counsel maintained that mistakes of counsel ought not to be visited on an innocent litigant and that his absence from court on the material day was excusable.

The application was opposed by the respondent in terms of grounds of opposition dated 27th November, 2015. According to the respondent, there was no evidence that counsel for the appellant appeared in court for cross-examination of the respondent. According to the respondent, the appellant's counsel had properly diarized the scheduled date for cross-examination but chose to attend a different court and overshot his time. He argued that before rendering his judgment, the learned Judge had considered and factored the appellant's defence and counterclaim on record and that upon delivery of judgment, the court stood *functus officio.* On those set of facts and circumstances the Judge dismissed the appellant's application to set aside its judgment, while observing that:-

> "***There is nothing remotely suggestive of the failure to attend Court being a mistake, inadvertence, accident or error. Counsel and his client knew the matter was cross examination (sic) of the Claimant and the defence case. No evidence has been led to show the defence witness was present in court. It is clear there was no intent to appear and the casual approach by the Respondent and its counsel to this matter cannot be called a mistake, inadvertence, accident or error. The Court did consider the defence raised and counter claim and determined them on merit. Nothing persuades the Court that its discretion should be exercised to set aside the decision made on 3rd November 2015.***"

Aggrieved by those findings, the appellant filed the present appeal. Through its memorandum of appeal dated 4th February 2016, it complains that the Judge misdirected himself by failing; to find that mistakes of counsel should not be visited upon an innocent litigant; to exercise his discretion in favour of the appellant and thus condemning it unheard; to appreciate that the door of justice is not closed on account of an advocate's mistake and the court was bound to rectify the same in the interest of justice; misapprehending the reasons given for non-attendance which arose as a result of a mistake and the appellant should not be made to suffer the penalty of not having its case heard on merit since a court exists for the purposes of deciding the rights of parties and not for the purpose of imposing discipline; to appreciate that the inconvenience caused by the appellant's' counsel failure to attend court could have been compensated with costs; to appreciate that the right to be heard is a constitutional right and a cornerstone of the rule of law such that courts ought to only dismiss suits where there is need to protect the integrity of the court process from abuse that amounts to an injustice and avoids proportionality and lastly, failing to appreciate that the appellant's defence and counterclaim raised the issue of the

respondent having committed a criminal offence which issue raised a *prima facie* defence and which necessitated a trial.

The parties canvassed the appeal by way of written submissions. In its submissions, the appellant pointed out that the findings of the trial Judge were *ex parte*, biased and unconstitutional for violating the right to a fair trial as per Article **50 (1)** of the Constitution. It claimed that it had a right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, that it had a good defence to the respondent's claim as the latter had been involved in embezzlement of funds which warranted summary dismissal. It accused the trial court of acting unfairly by making findings and determinations on contested matters of fact without taking evidence and without having accorded it an opportunity to test the veracity of the respondent's evidence through cross- examination. It maintained that non-attendance by counsel on the material date was excusable and the Judge erred in dismissing its application to set aside the judgment as counsel had attended another matter that took too long.

According to the appellant, the discretion whether or not to set aside an *ex parte* judgment was meant to ensure that a litigant does not suffer injustice or hardship as a result of among things, an excusable error. It faulted the trial court of failure to consider whether it had a reasonable defence to the respondent's claim which raised triable issues and which also contained a substantive counter-claim. It was also the appellant's contention that the door of justice is not closed because a mistake has been committed by a lawyer who ought to know better. That since counsel's mistake or error was not fraudulent or with an intention to overreach, there was no error that cannot be put right by payment of costs. The appellant also submitted that the award by the trial court was contrary to section **49** of the Employment Act which gives remedies for wrongful dismissal and unfair termination. The trial judge awarded the respondent Kshs. 3, 568, 210/- which the appellant terms as arbitrary, unreasonable and unlawful since according to it, the respondent was entitled to salary not exceeding 12 months. In the appellant's view, as wrong for the trial judge to determine the claim when such issues as whether or not the respondent embezzled a sum of Kshs. 160,000/-; the appellant withheld the respondent's salary and terminal dues; the respondent gave notice or paid one month's salary in lieu of notice and whether it was entitled to dismiss the respondent summarily remained answered. It contended that section **44** of the Employment Act gave an employer power to summarily dismiss an employee where the latter has been involved in a case that would lead to imprisonment or detention for more than 14 days. Further that the trial judge violated section **45** of the Employment Act.

The respondent on his part submitted that the issue for determination by this Court was whether the trial court exercised its discretion properly in refusing to set aside the *ex parte* judgment. He submitted that there were no reasons to warrant this Court interference with the exercise of the trial court's judicial discretion as the Judge considered both parties pleadings and made a just award. According to the respondent, the trial judge refused to exercise his discretion in the appellants favour not just because of failure of counsel to attend court but also because there was no witness for the appellant present despite it being the appellant's turn to adduce evidence. It maintained that the appellant could not claim denial of its right to a fair trial as per Article **50 (1)** of the Constitution since it was accorded an opportunity to present its case but it failed to take up the opportunity. He supported the Judge's findings that the absence of both the appellant and its advocate in court on the material day could not be taken as a mistake but showed that they were not keen to appear and approached the suit casually.

The respondent accused the appellant of being indolent in defending the suit. He pointed out that as at 24th July 2013, the appellant had yet to file a response to the claim despite the claim having been filed way back on 19th December, 2012. Further that despite the appellant having been granted leave to file the response out of time on 3rd June 2014 within 14 days, the appellant still breached the timelines set and filed the same outside the set time limit. Then on the scheduled date for cross-examination, the appellant failed to appear leading to the closure of the hearing and directions to file written submissions by the learned Judge. According to the respondent, the court duly considered all the pleadings on record and sworn evidence and came to a reasonable judgment which to date has not been appealed against.

During the oral hearing of this appeal, learned Counsel **Mr. Elvis Obok** appeared on behalf of the appellant and reiterated his written submissions. He emphasised that the trial Judge had failed to take into

account the reasons advanced by counsel for not coming to court; that mistakes of counsel ought not to lead to a party being denied justice and that the judge exercised his discretion injudiciously. **Mr. Wathome Ndamu,** learned counsel who appeared for the respondent on the other hand submitted that the reasons advanced by counsel for failing to attend court had been considered by the trial court. Further, that the record showed that counsel for the appellant was consistently absent and conducted the case casually.

The sole issue for consideration in this appeal is whether or not the trial Judge judiciously exercised his discretion in refusing to set aside the *ex parte* judgment. It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit. Chief Justice, **John Marshall**, the 4th Chief Justice of the United States, delivered himself in **Osborn V. Bank of the United States, 22 U. S. 738 [1824]** on the issue as follows;

> ***"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."***

The Supreme Court of India, Civil Appellate Jurisdiction in **Civil Appeal No.9047 of 2014; K. Praksh v B.R. Sampath Kumar**, quoting with approval the King's Bench in Rookey's Case, 77 ER 209, described exercise of discretion as follows;

> *"**The King's Bench in Rookey's Case [77 ER 209; (1597) 5 Co.Rep.99] it is said: "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to 16 Page 17 be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with**"*

The principles upon which this Court will interfere with the exercise of a judge's exercise of discretion in the lower court are also well known and settled. The Court of Appeal can only interfere with the exercise of a trial court's judicial discretion if satisfied that the judge misdirected himself on law; or that he misapprehended the facts; or that he took into account considerations of which he should not have; or that he failed to take into account considerations which he should have; or that his decision, albeit a discretionary one, was plainly wrong. (See **Mbogo & Another v Shah (1968) EA 93**; **Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) eKLR)**.

Do factors that would warrant this Court to interfere with the Judge's refusal to set aside the *ex parte* judgment exist in this appeal? As earlier stated, after the respondent was stood down on 29th July 2015 following his examination-in-chief, the matter was adjourned to 30th September 2015 when counsel for the appellant was to cross-examine him and thereafter pave way for the prosecution of its defence and counter-claim. On the scheduled day, when the matter was called out, there was allegedly no appearance by the appellant and or its counsel. As a result, the respondent's case was closed by the Judge without him having been cross-examined and without the appellant having advanced its defence and counterclaim. According to the appellant's counsel, he had two matters diarized on that day. He stated that he first proceeded to court at around 9.00 a.m. to attend to the matter giving rise to this appeal and found that the same had been scheduled for hearing at 10.05 a.m. He alleges that he had a chat with the respondent before proceeding to **Ochieng J**.'s court where he had a mention. The cause list before that court shows that indeed his matter was to be mentioned last at number 17 and after about seven (7) applications had

been heard. He alleges he overshot his time and as a result arrived late in the trial court.

However, the very next day, on 1st October, 2015, counsel filed an application seeking to set aside the orders issued by the trial court and the same was fixed for hearing on 21st October, 2015. On that day the application was not heard for some reason and parties were directed to take another hearing date. The appellant took another hearing date for 3rd December, 2015. In the meantime, he engaged counsel for the respondent who agreed to the said application and in effect conceded to the recalling of the respondent for cross-examination and defence hearing. Indeed the record reflects a letter addressed to the respondent's advocate dated 29thOctober, 2015 from their counterparts confirming the contents of their enThe said letter reads as follows;

> ***"In our discussion, we agreed as follows;***
>
> ***1. That you have no objection to the Respondent's application dated 01/10/2015 seeking to have the Claimant recalled for cross-examination.***
>
> ***2. That we shall seek court's directions on 03/12/2015 when the application comes up for hearing."***

The appellant's advocate, Mr. **Titus Kigen**, swore that attempts to file the letter in court proved futile as the court file could not be traced. The reason as to why the court file could not be traced was known when on 4th November, 2015, the appellant's counsel received a letter from the respondent's advocate informing him that judgment in the cause had been rendered the previous day. The letter could not therefore have been filed since the court file was obviously with the trial Judge for the crafting of the judgment as is the practice.

In his determination, the reasons given by the trial judge for failure to exercise his discretion in the appellant's favour was that there was nothing even remotely suggestive, that failure to attend court was by mistake, inadvertence, accident or error. The Judge was of the view that counsel knew of the matter and that even the appellant's witness was not present in court. The Judge also alluded to the fact that the appellant had been indolent in the conduct of its case. Though the trial Judge did not go into the details of how the appellant had been indolent, the respondent has in its submissions stated instances when the appellant had failed to comply with timelines. For example, he stated that as 24th July 2013, the appellant had yet to file a response to the claim despite the claim having been filed back on 19th December, 2012. Further that despite the appellant having been granted leave to file the response out of time on 3rd June 2014 within 14 days, it still breached the timelines set and filed the same outside the set time limit. Probably the trial Judge considered those factors.

Be that as it may, we take the view that the Judge was wrong in failing to exercise his discretion in the appellant's favour. There is nothing on record to infer that failure to attend court by the appellant's counsel was meant to delay the determination of the claim, or had ulterior motives or was meant to defeat the ends of justice. As was stated in **Mbogo v Shah** (supra),

> ***"…the 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice"***.

The reason given by counsel in our view was excusable; he had two matters before two courts of equal status and considering that his matter was to be mentioned last and after hearing of several applications, it might as well be that he overshot his time past the 10.05 am that the matter had been allocated, a fact conceded to by both parties. That was the reason given and we find it hard to appreciate what the judge meant by saying that **"there is nothing remotelysuggesting of the failure to attend court being a mistake, inadvertence, accident or error…."**

No doubt the appellant's counsel should have been more prudent in conducting his affairs. He had an opportunity to instruct another advocate to hold his brief in one matter rather than attempting to shuffle between two courts. There is also no evidence that the respondent moved court to close his case; the trial court appears to have proceeded *suo motu*. The claim that appellant was not in Court is not discernable or verifiable from the record. The record does not show that the appellant or its representative was called out in court and there was no response. Nor does the record show, as we have already stated, that the respondent and/or his counsel applied for the closure of the case and or that of the appellant. The court moved *suo motu* and without invitation which in our view was wrong.

Even so, the appellant filed an application to set aside the orders closing the case the very next day, without delay. That conduct shows a litigant willing to rectify its shortcomings. The respondent's own counsel was willing to concede to the application seeking to set aside the orders granted on 30th September 2015 closing the case. That in our view suggests that the respondent would not have been prejudiced by the case proceeding on another date, more so, when it is conceded again by both parties that the appellant's counsel sauntered into court from **Ochieng' J's** court, minutes after the judge had made the impugned orders. In **Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**, the Court of Appeal held that in determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled *vis-a-viz* the prejudice to be visited on the opposing party. Our take is that the respondent stood to suffer no prejudice by the claim proceeding on merit. None has been alleged or inferred. On the other hand, the appellant was locked out of the seat of justice and possibly penalized in damages for a claim it maintains has a good defence to.

The appellant has also argued that mistakes of counsel should not be visited on an innocent litigant. In the **Tana case** (supra) the Court observed as follows;

> ***"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."***

In the above case however, the court also stated that legal business should be conducted efficiently and we can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.

In this case however, counsel for the appellant explained himself as to why he was late in availing himself in court. The reason was plausible. Clearly, this is a case where the sins of counsel should not have been visited upon a litigant.

The appellant has also contended that the judgment of the Court which directly affected it, was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). There is no need to restate the importance of a fair trial as guaranteed by the Constitution. The right to a fair trial remains at the heart of any judicial determination and courts should endeavor to protect and uphold the same. It is a cardinal rule and it emanates from the principle of natural justice. In **M K v M W M & another [2015] eKLR** it was reiterated that;

> ***"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456, Nyarangi, JA asserted at page 459:***
>
> > ***"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."***

At page 460 the learned Judge added:

> ***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

And in **MBAKI & OTHERS V. MACHARIA & ANOTHER** (**2005) 2 EA 206**, at page 210, this Court stated as follows:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

In the circumstances of this case, there was no reason grave enough that would warrant the locking out of the appellant from pursuing its defence and counterclaim and allowing the trial to proceed to its logical conclusion. The interest of justice warrants this Court's intervention.

Accordingly, the appeal is allowed. The ruling and order dated 21st December, 2015 is set aside. In lieu thereof, we allow the appellant's notice of motion dated 6th November, 2015 in terms of Prayer No. 4 with consequence that the respondent's claim shall proceed to hearing on merit before any other judge of ELRC other than **Nzioki wa Makau, J**.

We make no order as to costs.

Dated and delivered at Nairobi this 9th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR