



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 331 OF 2017

(Before Hon. Justice Ocharo Kebira)

WAMBUA KALINDA.....CLAIMANT

=VERSUS=

RACE GUARDS LIMITED.....RESPONDENT

RULING

Introduction

1. The matter herein came up before this Court on the 6th October 2021, slated for notice to show cause as to why it would not be dismissed for want of prosecution. It came up as such in the presence of Ms. Omamo for the Claimant and Mr. Karanja for the Respondent. Counsel for the Claimant pointed out to Court that the matter was improperly cause listed as coming up for the show cause. It had a hearing date for the same day.
2. True, the record was testament of what counsel was raising. On the 11th day of August 2021, counsel for the Claimant had fixed the matter for hearing for the 6th October 2021. Upon this premise the Court got constrained to order that the listing of the matter for notice to show cause was misplaced. The matter was consequently removed from that day's cause list and fixed for hearing for the 14th October 2021. The hearing date was by consent therefore.
3. On the 14th October 2021, when the matter was called out at around 9.30 a.m., neither the Respondent's witness nor its counsel was on call. The matter was given a time allocation for 12.25 p.m., when it proceeded in absence of the Respondent and its counsel. They were not present notwithstanding that the hearing had been taken by consent. At the close of the Claimant's case, the Court fixed the matter for judgment for the 1st August 2016.

The Applicant's application

4. Before the Court would prepare and deliver the Judgment, the Respondent filed an application dated 21st October 2021, seeking for the following orders:
 - a) *THAT this matter is certified as urgent and service of the same be dispensed with in the first instance and the same be heard "exparte".*
 - b) *THAT given the urgency of the matter herein this Honourable Court be pleased to review and or set aside its decision to proceed with the main suit in the Nairobi Employment and Labour Relations Court Cause No. 331 of 2017: Wambua Kalinda vs Raceguards Limited exparte, and subsequent setting down the claim herein for Judgment.*
 - c) *THAT this Honourable Court do give directions as to the retrial in the aforesated Nairobi Employment and Labour Relations Court Cause No. 331 of 2017: Wambua Kalinda vs Race guards Limited and service thereof.*
 - d) *Costs of this application.*
5. On the 4th November 2021, the Respondent/Applicant managed to convince the Court to grant a stay of preparation and delivery of the Judgment pending the hearing and determination of this application *inter-partes* on merit.

6. The application is premised upon the grounds obtaining on the face of the application, grounds buttressed by the supporting affidavit sworn by Alfred Muia on the 21st day of October 2021.
7. The Respondent contended that on the 6th October 2021 it filed a Notice of motion dated 6th October 2021, and upon engaging the registry as regards hearing of the same, the registry informed its counsel that directions thereon could be given on the 14th October 2021 when the main suit was set to come up for hearing.
8. On the 8th October 2021, its counsel instructed Messrs. J. N. Karanja & Associates Advocates to hold his brief on the 14th October 2021, and seek the Court's directions on the above-mentioned Notice of motion application, and the hearing of the main suit. Counsel gave instructions for an application for adjournment in the circumstances. The Respondent/Applicant placed on record a letter dated 8th October 2021 by its counsel to counsel whom he had instructed to hold his brief.
9. The counsel for the Applicant was not to be present in Court on the 14th day of October 2021, since he was to attend a colleague's funeral at Mitaboni sub-county Machakos County whose demise was sudden. He exhibited the eulogy of the departed colleague to demonstrate that he attended the funeral.
10. The Applicant contended that unfortunately the law firm that its counsel had engaged to hold his brief on the 14th October 2021 did not manage to join Court virtually, owing to the challenge they had in logging in due to power outage at that chamber, that persisted till 1 p.m. that day.
11. It was asserted that it subsequently dawned on counsel for the Respondent that the matter had proceeded *ex parte* on the 14th day of October 2021, when he received a notification from the judiciary short messaging service, regarding the hearing, and that the matter was slated for judgment.
12. The Respondent contends that the Claimant shall not suffer any prejudice if this matter is allowed to proceed on merit so that the parties can be fully heard on their respective cases. Further that the application herein has been brought timeously.

The Claimant's response

13. The Claimant opposed the application upon premise of the grounds obtaining on the affidavit that was sworn by counsel Owour Omamo, sworn on the 24th November 2021.
14. It is argued that when the matter came up for hearing on the 6th October 2021 for notice to show cause, counsel for the Respondent indicated that they were not ready to proceed and that they have a preliminary objection on record which needed to be canvassed first. The preliminary objection is yet to be served on the Claimant.
15. The hearing date for the 14th October 2021 was taken by consent, this notwithstanding the Respondent and its counsel did not attend Court on the date for hearing of the matter.

The Claimant's submissions

16. Counsel for the Claimant takes the position that the Respondent's assertion that they were unable to log in constitutes pure lies. That prudence, if at all the counsel was in the situation that they allege they were, demanded of them to call counsel for the Claimant and explain their predicament, a thing they never did.
17. Citing the case of **Shah vs Mbogo and another [1967] E.A. 116**, where it was held:

“This discretion (to set aside ex parte proceedings or decision) 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 a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”
18. Counsel submitted that the Court's discretion to review or set aside an order or judgment is wide and unfettered, however it should be exercised in line with the test established in the cited authority.
19. That in an application to set aside a judgment, the Applicant is expected to demonstrate a sufficient cause warranting an order for setting aside. To buttress this submission, the holding in the case of **Wachira Karani vs Bildad Wachira [2016] eKLR**, was cited thus:

“Sufficient cause is thus the cause which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances at hand. There cannot be a straight jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending Court by a sufficient cause.”

20. On sufficient cause, counsel further cited the Supreme Court of India decision in **Civil Appeal No. 1467 of 2011 – Paramal vs Veena Bharti [2011]**, where it held:

“Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of

the facts and circumstances of a case or the party cannot be alleged to have been not acting diligently.....”

21. According to counsel for the Claimant, the Applicant’s application is an abuse of the Court process, only intended to delay the final determination of this matter, to fortify their submissions that the application is such an abuse, reliance was placed upon the holding in **Muchaga Investments Limited vs Safari Unlimited (Africa) Limited & 2 others Civil Appeal No. 25 of 2002 [2009] eKLR 229** thus:

“The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fide and is frivolous vexations and oppressive.”

22. It was argued that Applicant’s application offends the overriding objective of the Civil Procedures Act.

Determination

23. The only purpose for which the law allows Courts to exercise a discretion to set aside their own orders or judgments either *suo moto* or at the instance of litigants is to aid the dispensation of justice. The general principle being that there should be a strive to have matters heard and determined on merit, not unless there are compelling reasons for a departure from this general principle. The reasons for the departure would be inter *alia*, the conduct of the Applicant and the old age and nature of the matter.

24. In my view, in considering whether or not an application for setting aside an order or judgment, the first point of consideration should be the command postulated under Article 159 of the Constitution.

25. I have carefully considered the Applicant’s application, the grounds upon which it is premised, the Claimant’s response to the application and his submissions, and come to a conclusion that in the circumstances of this matter, the Court should head the constitutional commandment, and allow the Respondent’s Notice of motion dated 21st October 2021.

26. The aforestated conclusion is further informed by the fact that considering that the counsel for the Respondent was absent from Court on the 14th October 2021 as he was attending to a departed colleague’s burial, and I do not doubt his account, on this and that he met a prior arrangement to have a colleague stand in for him to seek for an adjournment of the matter, colleague who apparently let him down, it cannot be said comfortably that the Respondent and its counsel had acted in a negligent manner or that there is destituteness of bona fide in the Respondent’s application, to disentitle it a favourable exercise of the Court’s discretion.

27. In the upshot, the Respondent’s/Applicant’s Notice of motion application dated 21st October 2021 is allowed in the following terms:

- a) The proceedings herein of the 14th October 2021 are set aside.
- b) Consequently, the matter shall be set down for hearing on merit on a priority basis.
- c) The Respondent/Applicant shall pay the Claimant throw away costs of Kshs. 5000, within 21 days of the date of this ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2022.

OCHARO KEBIRA

JUDGE

In Presence of:

Ms Omamo for the Claimant.

No appearance for the Respondent.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE