



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 723 OF 2014

MARGARET LIHABI NGAIRA.....CLAIMANT/RESPONDENT

VERSUS

WINFRIDA NGUMI CHARLES.....RESPONDENT

RULING

1. By a notice of motion dated 16th November, 2018, the applicant seeks an order in the following terms:-

(i) Spent

(ii) Spent

(iii) That this Honourable Court be pleased to set aside the exparte

proceedings of the 1st day of October, 2018 together with the Judgment and/or Decree entered against the Respondent/Applicant and allow the Respondent/Applicant to ventilate her defence before the Court.

(iv) Costs of the application.

2. The application is premised on grounds set out on the notice of motion and supporting affidavit of the applicant to wit; that the suit proceeded exparte on 1st October, 2018 and judgment entered.

3. That the Applicant was served with a hearing notice on 28th September, 2018 at 12.02 p.m four (4) hours to the hearing date and on a Friday afternoon, when the matter was meant to come up for hearing on Monday, the 1st October, 2018. That failure to attend the hearing was therefore not intentional and the applicant has suffered prejudice consequently. That the right to hearing is anchored under Article 50 and 159 of the Constitution of Kenya and the overriding objective of the Court should be to render substantive justice to the parties upon hearing them and in an expeditious manner.

4. That the claimant/respondent will not be prejudiced by re-opening of the trial in a manner that cannot be compensated by way of costs.

5. That the notice was dropped at the Advocate's dropping zone on 28th September, 2018 at 12:02 and it being a Friday afternoon yet the hearing notice was dated 26th June, 2018 almost three months prior to the service.

6. That this conduct smacks of deceit, ill will and geared towards denying the Applicant the right to be heard.

7. That the application be granted with costs.

8. The application is opposed by grounds of opposition dated 4th February, 2019. The claimant states that the applicant was fully aware of the hearing date but chose not to attend Court.

9. That on the hearing date, both the respondent and her advocate did not attend Court and no reason has been put forward for their inability to attend.

10. That the case proceeded to hearing after the learned Judge was satisfied of service.

11. That the statement of defence dated 12th June, 2014 and filed in Court on 20th June, 2014 does not raise any triable issues at all.
12. That the Court had regard to both the statement of defence and the witness statement filed by the respondent before delivering judgment. That the application is frivolous, vexatious and an abuse of Court process and it be dismissed with costs.

Determination

13. The guiding principle in the Court's exercise of its judicial discretion to set aside an *ex parte* judgment was laid in the case of **Mbogo & Another –vs- Shah EALR, 1908**. It was held that the order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error.

14. The applicant relied on the case of **Jones Makau Nthenya and Another –vs- Principal Magistrate Court Mavoko & Another [2017] eKLR** in which **Republic –vs- Kenya Medical Training College** *ex parte* **James Chepkonga Kandagor [2006] eKLR** was cited as follows:-

“The rules of natural justice impose a duty on the body, tribunal or Court vested with powers to resolve a dispute to hear both parties, and consider both sides of the case before making a decision on the matter.”

15. In this particular case, and from the Court record of 1st October, 2018, the trial judge noted that the claimant had attended Court in person and the respondent had failed to attend the hearing. In the application before Court, the applicant other than stating that the hearing notice was served on them three days to the hearing date does not attempt at all to explain why the respondent or her advocate failed to attend Court on 1st October, 2008 even to seek an adjournment of the matter if indeed, the notice served was short.

16. It is important to note that this suit was first heard to conclusion and a judgment delivered on 4th December, 2015. In those proceedings, the respondent did not appear and judgment was entered in favour of the claimant.

17. The trial judge observed in his Ruling dated 1st October, 2018 that the respondent by an application dated 16th March, 2016 sought to set aside the judgment of the Court and requested for a fresh hearing. That on 6th April, 2017, the parties consented to the setting aside of the judgment and a trial date set.

18. That on 18th September, 2017, the matter came up for hearing and the respondent sought and was granted adjournment. On 26th June, 2018, the matter was fixed for hearing for 1st October, 2018 and the respondent was duly served and an affidavit of service duly filed on 1st October, 2018 showing how respondent's counsel was served.

19. The judge went on to state:-

“The Court had heard the claimant and wrote its judgment. From the record, it would seem the respondent is bent on wasting judicial time on a matter the Court had decided conclusively. This cannot be allowed. In the circumstances, the judgment of the Court delivered on 4th December, 2015 is hereby reinstated and the claimant shall have the liberty to enforce the same.”

20. It is abundantly clear that the applicant has not proffered any reason at all why they failed to attend Court on 1st October, 2018 for the hearing of the suit.

21. The respondent appears as was stated by the trial judge, bent on obstructing the cause of justice, in this matter through deliberate avoidance to attend Court followed by application to set aside.

22. Accordingly, the application lacks merit and is dismissed with costs to the claimant.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17TH DAY OF FEBRUARY, 2022.

Mathews N. Nderi

Judge

Appearances

D W Muyundo for the Respondent/Applicant

Khalwale for Claimant/Respondent

Ekale – Court Assistant