



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 97 of 2019

MARTIN L. BARASA.....CLAIMANT/APPLICANT

VERSUS

GIZA SYSTEMS SMART SOLUTIONS LTD.....RESPONDENT

RULING

1. The Application before me is dated 26th November, 2021, through which the Applicant seeks to reinstate the Claim that was dismissed on 25th November, 2021. The Application is supported by the grounds on its face and on the Affidavit of the Claimant, Mr. Martin L. Barasa.
2. The main grounds upon which the Application is premised, is that the Applicant logged into the court virtually on the hearing date, but experienced network challenges hence was not able to canvass his case. He further avers that he is desirous to prosecute his case.
3. The Respondent opposed the Application through the Replying Affidavit of Mr. Najda Khan, its Marketing Manager. Mr. Khan averred that the Application was defective and contrary to the law. That the Applicant had deliberately evaded the course of justice hence is unworthy of a favourable exercise of the Court's discretion. That it was not the first time the Applicant had failed to attend Court. That the Application contravenes the Respondent's right to a fair trial as guaranteed under Article 50 of the Constitution.

Submissions

4. The Applicant placed reliance on the provisions of **Order 51 Rule 15 of the Civil Procedure Rules** and on the case of **Shah vs Mbogo & another (1976)**. He further submitted that the Application had been filed timeously.
5. On its part, the Respondent has termed the Application as defective on account that the Applicant has not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The Respondent has further asserted that the Applicant had not complied with the provisions of Rule 33(3) of this Court's Rules as he has not extracted and annexed the dismissal order, which he seeks to be reviewed.

Analysis and determination

6. From the record, the main issue for determination is whether the Application dated 26th November, 2021 is merited.
7. The Applicant seeks an order in the nature of reinstatement of the suit that was dismissed by the Court on 25th November, 2021, on account of non attendance. The dismissal was occasioned by the absence of the Claimant and his representative on the date of the hearing. Following the dismissal order, the Claimant simultaneously filed the instant Application dated 26th November, 2021 and a Notice to Act in Person.
8. It is notable that at the time the suit was dismissed, the Applicant had instructed the firm of firm of **Samuel Nyambane & Co. Advocates** to act for him in the matter vide a Notice of Appointment dated 11th June, 2021.
9. The Respondent has faulted the Application on the basis that the Applicant did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules (CPR), which provide as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

10. The Respondent has termed the dismissal order as a judgment hence falling within the ambit of Order 9 Rule 9 of the CPR.

11. In addressing this issue, the Court of Appeal in the case of **Njue Ngai vs Ephantus Njiru & Anor [2016] eKLR** held that a dismissal is a judgment. The Court stated as follows: -

“18. Another issue may arise as to whether a dismissal of a suit for non attendance of the Plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the Plaintiff to attend Court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR. stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the Plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order;” “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

In my view, a judgment is a judicial determination or decision of a Court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the Plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends Court on the day fixed for hearing, after the suit has been called on for hearing outside the Court, the Court May dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the Plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a Plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a Plaintiff from applying for the dismissal to be set aside under Rule 8.”

12. Flowing from the above decision by the Court of Appeal, it is evident that the term “Judgement” has been given a wider interpretation and extends to a dismissal order as the one herein, hence is deemed as a final decree of the court.

13. It is also evident that the Applicant filed a Notice to Act in Person without obtaining leave of the court nor filing a consent to that effect between himself and the firm on record at the time.

14. The question then is, does that default in procedure render his Application defective?

15. As at the time the suit was dismissed, the Applicant had appointed the firm of Samuel Nyambane & Co. Advocates on 11th June, 2021, to act for him in the matter.

16. On the date the matter came up for hearing, there was no counsel from the said firm appearing on behalf of the Applicant, hence the dismissal.

17. It is notable that at the time of filing the main suit, the Applicant was acting in person and that he instructed the **Samuel Nyambane & Co. Advocates**, approximately five (5) months before the hearing.

18. On the date the matter came up for hearing, there was no representation from the said firm of Advocates. It is noteworthy that the said Advocates have never made any appearance in Court on behalf of the Applicant nor have they ever filed any documents on his behalf, save for the Notice of Appointment.

19. By and large, the said firm of Advocates have only been on record for the Applicant on paper but not in the real sense. Should the Applicant therefore be penalized for want of procedure for failing to seek leave to act in person from Counsel who has never really represented him? The answer to this question is coming shortly.

20. The Respondent has also deemed the Application defective for failure to comply with the provisions of Rule 33 Rule (3) of this court’s Rules by failing to annex and attach, the order which he seeks to be reviewed. Indeed, the said order is not annexed to the Applicant’s Affidavit.

21. The question thus is, in the face of non compliance with the procedural requirements under Order 9 Rule 9 of the CPR and Rule 33(3) of

this Court's Rules, is this a case that merits exercise of discretion in favour of the Applicant?

22. It is within the general discretion of the Court to set aside any order issued by it ex parte. This should be subject to the Applicant adducing sufficient cause for the exercise of such discretion. Discretion should also be exercised judiciously.

23. The law regarding exercise of the Court's discretion is now settled. I will draw guidance from the holding of Judge Harris (as he then was), where he had this say on the case of **Shah vs Mbogo [1967] EA 116 and 123B:-**

“The discretion is intended so 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 course of justice.”

24. The Claimant has attributed his non attendance to Court, to network challenges. He also states that as a lay person acting for himself, he was not conversant with issues of procedure.

25. Applying the principles set out in the case of **Shah vs Mbogo (supra)**, I do find that the Applicant's failure to appear in Court on the date of the hearing as inadvertent hence falling within the room for grant of discretion. Besides, the Applicant instantaneously filed the Application. This supports his assertion that he is desirous to prosecute the main suit.

26. To buttress this position, I gather support from the holding of the Court in **CMC Holdings Limited vs Nzioki [2004] 1 KLR 173**, thus:

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

27. This is therefore a perfect case for the Court to exercise discretion in favour of the Applicant.

28. His failure to comply with matters of procedure are not so fatal as to deny him an opportunity to ventilate his case. In my view, this is a proper case where the Court's discretion ought to be exercised in favour of the Applicant so as to so as to afford him an opportunity to prosecute his case on merit.

29. This determination is further fortified by the finding in the case of **Philip Chemowolo & Another vs Augustine Kubende, [1982-88] 1 KAR 103**, where Apaloo, JA (as he then was) reckoned thus:

“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 heard on merit ... 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.”

30. Over and above, the principal objective of this Court which is to be found within the provisions of **Section 3 of the Employment and Labour Relations Court Act**, requires the Court **to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by the Act.**

31. Against this background and despite noting the procedural gaps in the Applicant's case, justice would be best served by reinstating the suit. In any event, no prejudice will be occasioned to the Respondent.

32. Accordingly, I set aside the order of dismissal of 25th November, 2021 and reinstate the suit. However, the Applicant is required to take concrete steps and set down the suit for hearing within 30 days from the date of this Ruling, failing to which the suit will stand dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2022.

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STELLA RUTTO

JUDGE

APPEARANCE:

FOR THE APPLICANT/CLAIMANT IN PERSON

FOR THE RESPONDENT MR. MURAGE

COURT ASSISTANT BARILLE SORA

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 had 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 Civil 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.

STELLA RUTTO

JUDGE