Mokono v Mills Industries Limited (Cause 1778 of 2015) [2022] KEELRC 7 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEELRC 7 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1778 OF 2015

NZIOKI WA MAKAU, J

APRIL 28, 2022

BETWEEN

GEORGE MORARA MOKONO .... CLAIMANT

AND

MILLS INDUSTRIES LIMITED .... RESPONDENT

RULING

1. The Respondent's application in the main seeks that the Honourable Court be pleased to set aside the judgment entered on 28th February 2020 against the Respondent/judgment debtor and that the costs of this application be provided for. The motion was premised on the grounds on the face of it as well as the supporting affidavit of Mr. Anthony King'ara Advocate. In reply, the Claimant/Respondent filed his Replying Affidavit dated 25th November 2021 and the Applicant filed their Further Affidavit dated 25th January 2022. The application was disposed of by way of written submissions.

2. The Respondent submits that the issues for consideration are whether mistakes of counsel should be visited on the client and whether the Applicant is deserving of the orders sought. The Respondent submits that the principles guiding the setting aside ex-parte orders are trite and the court has wide powers to set aside such *Ex-parte* orders save that where the discretion is exercised the court will do so on terms that are just. It submits that as a general principle of law, mistake of counsel ought not to be visited on an innocent litigant. The Respondent asserts that that the Advocate who was handling the matter had earlier on in 2019 been involved in a grisly road accident along Jogoo Road and that as a result of the accident the advocate on record was bedridden for the rest of the year and although the Advocates were served with notices and documents received by their receptionist, there had not been a proper handover of the files he was handling. The Respondent submits that the non-attendance was

a result of miscommunication on their end and further Order 10 Rule 11 of the *Civil Procedure Rules* provides that;

> "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree of order upon such terms as are just"

3. The Respondent's counsel submits that there was indeed a mistake and inadvertence on their part that the dates were not diarized. The Respondent cited the case of *Peter Mwangi Macharia v Alphaxard Warotho Komu & 2 others* [2019] eKLR, where the Environment and Land Court in allowing an appeal due to failure by an advocate to diarize stated:

> "...It is evident that Advocates are mostly guided by their diaries and having numerous files to deal with, one may not know exactly what date each matter has been placed unless they check their diaries. In failing to diarize the matter, it might therefore have escaped the mind of the Counsel. This Court therefore finds that such a mistake may happen to anyone and therefore excusable."

They submit that however the inadvertent error on the part of their office, which they urged this Honourable Court not to condemn the Respondent/Applicant unheard and close the door of justice on account of the Advocates' mistake. They cite the case of *Belinda Murai & others v Amos Wainaina* [1978] LLR 2782 (CALL) on the definition of a mistake as held by Madan JA (as he then was) where he stated:

> 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 lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

4. The Respondent cites the case of *CMC Holdings Limited v Nzioki*[2004] 1 KLR 173 was held as follows; "That discretion must be exercised upon reasons and must be exercised judiciously...... 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 amongst others an excusable mistake or error. It would not be proper use of such 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 be wrong principle...The answer to that weighty matter was not 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 it might have well amounted to an excusable mistake visited upon the appellant by its advocate".

5. The Respondent referred to the case of *Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 others* [2013] eKLR the court stated that;

> "It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits."

The Respondent submits that the non-attendance arose as a result of miscommunication and failure of a proper handover and therefore the Respondent/Applicant should not be made to suffer the penalty of not having their 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. The Respondent further submits that the non-attendance was not deliberate and this application is not aimed at obstructing and/or denying justice to the claimant and the application was made without delay. The Respondent submitted that it has observed the maxim that he who comes to equity must come with clean hands and that the Applicant herein has proved this by depositing the decretal amount with the court as directed by this honourable court. The Respondent cites the case of *Anne Atieno Adul v Patrick Lang'ata & another* [2020] eKLR where the court quoted with approval the cases of *John Peter Kiria & another v Pauline Kagwiria* [2013] eKLR and *Kenya Pipeline Company Limited v Mafuta Products Limited* [2014] eKLR where it was held;

> "Amongst several other cases where their gist was that no party should be shut out from ventilating its defence, that a court may set aside interlocutory judgment if a party had a reasonable defence and that at all possible times, cases should be heard on merit, this court was persuaded to find and hold that despite the very poor handling of this matter by the 2nd Defendant's Legal Officer, it was only fair and just to allow the Defendants to exercise their fundamental right to be heard as enshrined in Article 50 (1) of *the Constitution* of Kenya.
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> The fact that the Defendants filed the present application in an attempt to be given an opportunity to defend the case herein persuaded this court to find and hold that it would not be in the best interests of justice to deny them an opportunity to be heard. The prejudice that the Plaintiff would suffer for the delay in the conclusion of his case by having it heard on merit was one that could be compensated by way of costs"

6. The Respondent further submits that the Honourable Court has a duty to dispense substantive justice in line with the constitutional imperative in Article 159 of *the Constitution* of Kenya, 2010 that justice shall be delivered without undue regard to procedural technicalities and that if the order sought herein are granted the claimant/respondent does not stand to suffer prejudice as the decretal amount has already been deposited in court. In the event the claimant is successful in his claim the monies deposited will be released to him. The Respondent thus therefore urge this honourable court that it is in the interest of justice that the application be allowed as prayed and the applicant be heard on merit.

7. The Claimant submitted that the issues for determination were

   i. Whether the Respondent is entitled to the prayers being sought?

   ii. Who should bear the costs of this application?

   As to whether the Respondent is entitled to prayers being sought, the Claimant reiterated that from the evidence adduced, the Respondents were not only invited to fix a hearing date and failed to attend the fixing but were also served with a hearing notice dated 29th August 2019. The Claimant submits that this case proceeded for hearing on the 9th of December 2019 and the Respondents failed to show up. The Claimant went ahead and served his submissions upon the Respondents and thereafter judgment was delivered in favor of the Claimant. Further to that, the Claimant served the Respondent with a Bill of costs and Taxation notice dated 23rd September 2021. He submits that after learning that the matter had proceeded and judgment delivered on merit, the Respondents did not do anything even after taxation. The Claimant proceeded to instruct Auctioneers to execute for the judgment sum and the costs therein and that is when the Respondent and their Advocates remembered that the Court exists.

8. The Claimant submits that the Court has no duty whatsoever to force parties to follow up on their cases and on the court process and that there is no reason to warrant the deprivation of fruits which the Claimant/Respondent has become entitled to. The Claimant submitted that this is after he has followed through all the requisite legal steps and even went an extra step to inform the Respondents and serve them with hearing notices time and again plus a Judgment Notice and Taxation Notice. The Claimant submits that the principles and standards for setting aside a judgement delivered on merit were summarized in the case of *James Wanyoike & 2 others v CMC Motors Group Limited & 4 others* [2015] eKLR, where the court stated as follows:

   That the tests for setting aside a judgement are: -

   a. Whether there is a defence on the merits.?

   b. Whether there would be any prejudice to the plaintiff.?

   c. What is the explanation for any delay?

9. The Claimant submits that as to whether there is a defence on the merits, the Applicant had filed a Response to the Memorandum of claim. It was on record at the hearing and was duly considered by the Court during its judgment. The defence is spent and its merit already considered. Restarting the case will not change the substance standard and contents of the Defence. As to whether there would be any prejudice to the Claimant, the Claimant submits the case proceeded accordingly, the Claimant's case was heard and a procedural judgment on merit was entered in the favour of the claimant. The Claimant submitted that he cannot suffer at the whims of a reckless Respondent forever and that litigation must come to an end. The Claimant submitted that great prejudice awaits the Claimant if Judgment is set aside. In fact, the dignity of the court will be eroded if such a judgment were to be set aside and the case restarted in the circumstances. As to the explanation for the delay, the Claimant submitted that the Applicant was served with the Hearing notice when the matter proceeded for hearing but they did not show up. Furthermore, they were served with submissions, a judgment and taxation notice but still remained complacent and only woke up from deep slumber when the Auctioneers came knocking at their doors. The Claimant submitted that the explanation of an Advocate having exited the firm is a red herring. No evidence or name of the Advocate is given. Where is his or her Affidavit. Secondly, the lie that they were not served has been debunked. For over a year, they were served with submissions Judgment notice and taxation notice all physically. They took no remedial action. After judgment, it has taken them 1 year, 8 months to come to court. That is obviously and by all standards a reckless and inordinate delay.

10. The Claimant cited the case of *Charles Nyamwega v Asha Njeri Kimata & Another* [2017] eKLR where the court found 5 months to be unreasonable delay, what about one year 8 months. The Claimant submits that this Court should not reverse its judgment. As to who should bear the costs of this Application, the Claimant submitted that costs follow events. Such applications as brought by the Respondent herein must be discouraged by award of costs. The Claimant submits that the Respondents must be ordered to pay the costs of this unnecessary application. The Claimant submitted that the Overriding Objective of the *Civil Procedure Act* as captured in Sections 1A, 1B and 3A provides that the objective of the court process and procedure should be Just, Expeditious, Proportionate and Affordable resolution of civil disputes. The Claimant submits that it would be a total breach of *the Constitution*, the principles enshrined therein and the Civil Procedure Act for this honourable court to entertain the Application before it and reopen the case. The Claimant thus prays that this Application be dismissed with costs to the Claimant/Respondent.

11. The parameters for setting aside a judgment are clear and it is apparent each of the parties before the Court understands this. The Respondent/Applicant asserts that mistake of counsel should not be visited on the litigant. The Respondent does not disown the service of process on the firm of advocates appointed by it. It is alleged an advocate handling the matter was involved in a serious accident along Jogoo Road and only after the attachment was the matter revived by the Respondent. This does not fall within the category of mistake. It was a deliberate effort to refuse to participate in trial and the outcome is this – application is completely devoid of merit and is accordingly dismissed with costs to the Claimant. No meaningful purpose will be served in reopening the case as the defence by the Respondent was duly considered by the court prior to making the determination the Court made in the judgment that is now impugned. In the final analysis the sum deposited in Court shall be released to the Claimant forthwith with authority to seek from the Respondent/Applicant any additional costs incurred in the defence of this application before the Court.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022

NZIOKI WA MAKAU

JUDGE