CNR v Freight in Time Limited & another (Cause E204 of 2021)
[2022] KEELRC 3799 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 3799 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E204 OF 2021

NZIOKI WA MAKAU, J

JULY 28, 2022

BETWEEN

CNR ..... CLAIMANT

AND

FREIGHT IN TIME LIMITED ..... 1ST RESPONDENT

JT ..... 2ND RESPONDENT

RULING

1. The respondents have sought the following vide the notice of motion application dated May 12, 2022:-

    1) Spent.

    2) Spent

    3) That the proceedings, interim orders and consequential orders and decree herein by Hon Justice Nzioki wa Makau be set aside and the respondent be allowed to defend or prosecute the claim.

    4) That pending the hearing and determination of this application there be a stay of execution of the award/judgment by the honourable judge Nzioki wa Makau at the Labour Court delivered on April 26, 2022 pending the hearing and determination of it is application.

    5) That the honourable court be pleased to re-open the claimant's case and recall the claimant CNR (name redacted) and the respondent's witnesses VB and JT (names redacted) be allowed to give evidence in chief and for further cross examination respectively for purpose of adducing evidence of the documents found statement to reply and referred to in the witness statement herein.

    6) That in the alternative, the claimant be recalled for purpose of examination.

7) That the costs of this application be in the cause.

2. The motion is opposed by the claimant who filed a replying affidavit. The claimant asserts in her Replying Affidavit that on the said date the trial judge called out the matter at 9.05 hours and allocated the hearing time for 10.30 a.m in open court when the claimant and her lawyer appeared in court and proceeded to have the matter heard accordingly. She states that here was no indication whatsoever that the respondent's counsel was having any connection challenges as alleged and upon conclusion of the matter submissions were filed and served upon the respondent's counsel before judgment was delivered on April 26, 2022. She asserts that it is not true that the respondent's representative and their counsel would remain logged into the system and not follow the directions given by the honourable court regarding the physical hearing of the matter. And that indeed after judgment was delivered the respondents were sent a copy of the same. She deponed that the respondents are not deserving of the grant of orders sought and the motion should be dismissed with costs.

3. The motion was disposed of by way of written submissions. The respondents on their part submit that an application to set aside such judgement must be brought under order 12 rule 7 of the *Civil Procedure Rules*. The respondent submits that the claimant proceeded *ex-parte* with the main hearing following non-attendance of the respondents advocates and witnesses who have given sufficient reasons for non-attendance owing to the fact that they were not admitted through the link provided to get directions. The respondents submit that the *ex-parte* judgement if not set-aside, the respondent will suffer irreparable harm and colossal damages as the decretal sum is to the tune of over 2 million shillings. The respondent submits that the application herein deserves the grant of the discretionary orders sought. The respondent submits in the case of *Shah v Mbogo & Another* [1967] EA 116 it was held as follows; -

> Applying the principles that the courts discretion to set-aside an *exparte*judgement is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence or excusable mistake or error but not assist a person who deliberately sought (whether by evasion or otherwise) to obstruct in delay the cause of justice the motion should be refused in which Case the judgement is regular and properly entered.

4. It was submitted that in the instant case the Respondent had complied with pre-trial directions and was ready to prosecute the matter save for technological failures and network. The respondent submits it was not accorded the opportunity to controvert the evidence and the claimant was not cross examined. The respondent further submitted that under order 18 rule 10 the court may at any stage of the suit recall any witness who has been examined and may subject to the law evidence for the time being in force put such questions to him as the court thinks fit. The respondents submit that a court of law cannot turn its eyes away from what is in law not proper and do not need to be moved by the counsel or by affidavit to see an irregularity in law as it is supposed to be the custodian of law and should be then to correct it. It is submitted that section 3A of the *Civil Procedure Act* provides that nothing should limit the inherit power of the court to make orders that may be necessary for the courts of justice or to prevent an abuse of the court process and indeed nothing shall limit the power of the court to make orders that may be necessary to prevent the course of justice for being defeated.

5. The respondent submits that as to whether they have a good defence that ought to proceed for hearing, they filed a joint defence in which they denied each and every singular allegation of facts in the Statement of Claim and stated that the Claimant absconded duties before resigning out of her own volition after she had been taken to a different department in a bid to resolve the issues, she raised in her report to the directors who acted swiftly as stated in the statement of reply. The respondents submit that under order 12 rule 7, the decision to set aside a default judgment is discretionary and that

the principles of setting aside a judgement/award in default of appearance was discussed in the case of *Philip Kepto Chemwolo & Mumias Sugar Co Ltd v Augustine Kubende* (1982-88) I KAR 1036 per Platt J (as he then was) stated thus at page 1038:-

1. "The main concern was to do justice to the parties and would not impose conditions on itself, to fetter the wide discretion given it by the rules. On the other had where a regular judgement had been entered, the court would not usually set aside the judgement, unless it was satisfied that there were triable issues which raised a prima facie defence which should go far trial.

2. The discretion is in terms unconditional. The courts however had laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgement was obtained regularly there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he has prima facie defence.

3. It is primarily important to ascertain whether there are merits which ought to be tried. At the same time this court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision or unless is manifesto on the case as a whole that judgement was clearly wrong in the exercise of its discretion and that as a result there has been a miscarriage of justice.

6. The respondents submit that in the instant case there are triable issues in regard to the alleged sexual harassment and alleged failure of the 1st respondent to have measures of prevent sexual harassment at the place of work and taking disciplinary action against 2nd respondent. The respondents cite the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at page 76 where Duffus P stated that the defence on record should be a *prima facie* defence that raises triable issues which warrant a trial. Moreover, the exercise of the discretion is not designed to assist a party much deliberately sought to obstruct or delay the course of justice as held in the case of *Maina v Muruiri [1984] KLR 409*.

7. The respondents submit that the non-attendance was inadvertent on the date of the hearing as they logged in but owing to technological and network failure could not be admitted through the court official link and were not aware of the directions given for physical hearing in court and the matter proceeded *ex-parte* on March 17, 2022 and that before the submissions were filed made an application dated March 22, 2022 immediately upon realization that the matter proceeded on the said date which application has not been given directions or determined by the honourable court. The respondents submit that the advocates on record further swiftly made efforts and filed the instant application on May 12, 2022 and have moved and filed the Notice of Appeal and the Memorandum of Appeal being Civil Appeal no E311 of 2022 and has further taken steps to prosecute the instant application giving plausible reasons and./or evidence has been presented to the court for failure without any inconsistency and/or contradictions dictions without any delay. Further to the above the mistake of the advocate and/or the witnesses if any which is denied should not be visited on the respondent/applicant. The respondents thus humbly pray that the court grants the motion as sought.

8. The claimant on her part submits that from the pleadings on record, the honourable court is being asked to set aside its decree of May 11, 2022 on the grounds that the respondents were not able to attend court on April 26, 2022 when they were aware that the matter was indeed scheduled for hearing. The claimant submits that the reasons given by the respondent is that although they were aware of the hearing date and time they did not attend court and as such the matter proceeded *exparte* and judgment was issued in favour of the claimant. The reason given in the Supportive Affidavit to the application

is that the respondents' advocate on record dropped off the line as the matter was being called out by the court which is highly unlikely as the counsel would have walked to court the same day to lodge his protest which was not done.

9. The claimant submits that further, the respondents have taken more than 1 month to move the court for reopening of the case and/or setting aside the *exparte* proceedings if at all which clearly means they were not interested in pursuing the matter until judgment was entered against them and they were put on notice for execution by the claimant. The claimant submits that whereas the respondents have filed their Notice of Appeal against this honourable court's judgment which is their right, they are misguided in seeking to set aside the judgment as an option. The claimant submits the honourable court can only consider granting of stay of execution if merited which is not the case before the court as no offer of adequate security has been made nor are there any reasonable grounds of appeal which can form the basis for grant of the orders being sought by the respondent. The claimant submits that the reasons for non-attendance are not only an afterthought but intended to hoodwink the court into believing in the actions of non-vigilant parties to the suit. The claimant submits the respondents should face the consequences of not attending court at their own instigation as they were fully aware of the scheduled hearing date and time as cause listed on the material day.

10. The claimant submits that the respondent's defence is a mere sham which if they seriously wanted to defend they would have been in court to do so and that in view of the foregoing, there are no good grounds on which this honourable court should exercise its discretion by setting aside the judgment in favour of the respondents. This proposition is supported by the findings in the following case-law: *Hellen Waikunu v Dotsavy Limited* [2013] eKLR where the honourable court dismissed an application seeking to set aside *exparte* orders and to reopen the matter *de novo* for hearing on the basis that the application lacked merit and was misconceived. The claimant also cited the case of *Victor Amos Nandi Otipa v Malplast Industries Ltd* [2018] eKLR where the honourable court dismissed an application seeking to set aside *ex-parte* orders having considered the respondents' Defence and Statement and finding them to be devoid of merit. The claimant thus urged the court to find that the respondents are not only forum shopping by lodging a Notice of Appeal in the court of Appeal but also lack the basis or grounds on which the prayer they seek should be granted and pray for the dismissal of the application with costs.

11. The respondents seek to reopen the case before the Employment and Labour Relations Court, have the claimant recalled and the respondents' 2 witnesses called to testify. There is evidence there is an appeal pending against the decision of the court from the Notice of Appeal indicated to have been filed as Civil Appeal no E311 of 2022. As such, this court is hamstrung as it cannot reopen a case that is now subject of an appeal as to do would be to subvert the intended appeal against the court's decision. As such this motion is devoid of merit. Regarding the stay sought, the respondents assert that the payment of the decretal sum to the claimant will lead to eventual shut down and closure of the respondent/ applicants operations rendering the appeal and application nugatory. It is asserted the respondent will suffer substantial loss. The respondent then proceeds to assert that it is ready and willing to abide by any condition given by the court and that the application will not occasion any prejudice as the decretal sum may be deposited in an interest earning account to safeguard the interests.

12. In an application such as this for grant of stay pending appeal, the factors that a court will consider include whether the respondent will suffer irreparable loss if stay is not granted, the ability to provide security for the decretal sum as well as whether there is an arguable appeal. It is intended to consider whether there is an arguable appeal and not the merits of the appeal. The respondent has not attached a draft memorandum of appeal to help the court ascertain the arguability of the intended appeal. Being

bereft of this, the court is not persuaded there is an arguable appeal and is therefore unable to grant the stay sought. The result is the motion is dismissed with costs to the claimant.

It is so ordered.

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

Nzioki wa Makau

JUDGE