Nyantabagia v Kenya Plantation and Agricultural Workers Union (Cause 114 of 2018) [2022] KEELRC 1739 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1739 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE 114 OF 2018

ON MAKAU, J

JULY 27, 2022

BETWEEN

MARY K NYANTABAGIA ..... CLAIMANT

AND

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION ..... RESPONDENT

RULING

1. This ruling relates to the Claimant'sNotice of Motion dated April 23, 2022 which seeks the following orders; -

    a. That the *ex parte* dismissal order dated November 16, 2021 be set aside and this suit be reinstated to hearing and same be heard and disposed of on merits.

    b. That the costs of this application be provided for.

2. The application is based on the grounds on its face and it is supported by the affidavit sworn by Jeremiah OnsareSoire advocate. According to the counselthe failure to attend court on November 16, 2021, when the suit was dismissed was not intentional. He explained that he inadvertently failed to diarize the date for the hearing of the case. Further, Hearing Notice was not placed in hisfile. He took blame for the said mistake and urged that his mistake should not be visited upon his client who is innocent in the circumstances.

3. He avers that he learned of the dismissal of this case on February 2, 2022 upon perusing the court file with the intention of fixing a hearing date only to learn that a hearing notice was served upon his law firm on October 3, 2021. He exhibited a copy of his diary for November 16, 2021 as annexure 1.

4. In opposition to the application, the respondent filed a replying affidavit sworn by Thomas Kipkemboi, the respondent's deputy General Secretary, on May 31, 2022. According to the affiant the

application ismala fide, incompetent, misconceived, bad in law, defective, meritless and an abuse of court process.

5. He further deposed that the claimant and her advocates have formed ahabit of missing court hearing despite being served with mention and hearing Notices, demonstrating their lack of interest in this case.

6. He states that the claimant's advocate was served with a hearing notice on November 3, 2021 for hearing on November 16, 2021. Their failure to attend on allegation of failing to diarized is not proper considering that this application is made three months after the suit herein was dismissed.

7. In the respondent's view the explanation given by the applicant for non- attendance is vexatious and devoid of merit. Consequently, the court was urged to the suit dismissed.

Applicant's submissions.

8. The gist of the applicant's submission is that the failure to attend court was not deliberate butit was caused by inadvertence on the part of the applicant's advocates who misplaced the hearing notice received and failed todiarize the date for the hearing. He argued that the failure to attend court has been explained and urged this court to allow the application as prayed. In doing so they relied on the case of *Richard Ncharpi Leiyagu V Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR where the court held that;

> "We agree with those noble principles which go further to establish that the court's discretion to set aside an *exparte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice."

Respondent's' submissions.

9. The respondent submitted on two issue; whether the claimant is keen in prosecuting its suit and whether the application should be allowed.

10. On the first issue, it was submitted that Rule 22 of the *Employment and Labour Relation Court Procedure Rules, 2016* provides for when a court can make order in absence of any party. In its view there is no doubt that the impugned orders made were in tandem with this court procedure rules since the claimant was served with a Hearing Notice but failed to attend court.

11. The respondent maintained that, this matter had been mentioned severally before the court in absence of the claimant yet she is the one who filed it in court. According to the respondent, the claimant has lost interest in this suit. For emphasis, the respondent cited the case of *Pius Wanjala V Permanent Secretary, Ministry of medical Services and 4 others* [2021] eKLR and the case of *Ivita V Kyumbu* [1975] eKLR where the court held that;

> "Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time."

12. They also relied on the case of *Nzoia Sugar Company Limited v West Kenya Sugar Limited* [2020] eKLR, where the court opined that;

> " Parties should file suits in court with a view to prosecute them. It should never be the case that suits are filed for the sake of it. They should not remain parked in the court's registry, filling space and creating a false sense of backlog of cases. A suit should be prosecuted, failing which it should meet the fate of dismissal for want of prosecution. I have not been persuaded that the plaintiff has any interest in the prosecution of the suit before me. I am persuaded that I should grant the application before me, dated 7th July 2020 which I hereby do with costs."

13. In conclusion, the respondent maintained that the claimant has lost interest in this suit and thereforereinstating the same will serve no useful purpose, but rather waste precious judicial time.

Analysis and determination.

14. Having considered the material presented to the court by the parties, the main issue for determination is whether there is a basis for the court to exercise its discretionary power to set aside the order of November 16, 2021 and reinstate this suit.

15. Section 3A of the *Civil Procedure Act* gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the *Civil Procedure Rules* gives the court power to set aside any order made *ex parte*. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

16. The guiding principles in the court's exercise of this judicial discretion was laid down in *Mbogo& Another Vs Shah*// EALR 1908, thus:-

> " This discretion (to set aside decisions) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice." (emphasis added)

17. Accordingly, the court's discretion to set aside an *ex-parte* order of the nature of a dismissal order is intended to prevent injustice resulting from excusable mistake or error. The corollary to the foregoing that the discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

18. The applicant avers that the suit was dismissed for want of prosecution because her advocate failed to diarize for the hearing that had been scheduled on November 16, 2021 and even misplaced the hearing notice. The applicant's counsel further submitted that the applicant has been keen on having the matter heard.

19. However, the respondent maintains that, it is the applicant's primary duty to follow up and take steps on the progress of his case. In its view, there is no evidence that the applicant has been following up on her case.

20. I have perused through the record and I note that, before this case was dismissed, this matter was mentioned three time in presence of both parties, once in absence of both parties and once in presence of the respondent's advocates who was directed to issue a hearing notice, which they did informing the explanation given by the applicant that they misplaced the said hearing notice. From that Record alone,

it evident that the applicant has been vigilant in following up this matter and has always appeared in court with counsel save for that one time they both failed to appear.

21. The foregoing is not consistent with conduct of a person has lost interest in her claim. The advocate has exhibit a copy of his diary showing that indeed the said case was not diarized informing his absence in court on November 16, 2021. Whereas, the conduct by the counsel in handling the said Hearing Notice leaves a lot to be desired, I will treat it as an honest mistake by the counsel.

22. Apaloo JA while faced with a comparable situation in the case of *Philip Chemwolo& Another Vs Augustine Kubede* (1982-88) KAR 103; held that;

> " Blunder 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. I think 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 the purpose of imposing discipline".

23. In the instance case, it has not been shown that the respondent will suffer prejudice which cannot be compensated by costs. However, declining the application will send away the claimant from the seat of justice forever. Accordingly and guided by the overriding objective of our constitutional to achieve substantive justice to the litigants, I will allow the application and set aside the orders of November 16, 2021, which dismissed the suit.

24. Consequently, the suit is reinstated, but with thrown-away costs of kshs 10,000 to the respondent to be paid before the hearing date which shall be on September 20, 2022.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF JULY, 2022.

ONESMUS N MAKAU

JUDGE

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 April 15, 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulingsshall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE