REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1626 OF 2014

CAROLINE MWIRIGI.....CLAIMANT

VERSUS

AFRICAN WILDLIFE FOUNDATION.....RESPONDENT

RULING

1. The Applicant herein is the Claimant's Notice of Motion dated 1.10.2019 seeking the following orders: -

(a) THAT this Honourable Court be pleased to review, vary and/or setting aside the Orders made on 18.11.2019 dismissing the suit for non- attendance ex parte proceedings of 18/06/2019.

(b) THAT the Honourable Court be pleased to revive the suit.

(c) THAT the Honourable Court be pleased to give the earliest hearing date possible.

2. The Application is premised on the grounds set out on the body of the motion and the supporting Affidavit sworn by Mr. Ian Maina Mbuthia, the Applicant's Advocate, on 2.7.2019. In brief, the Applicant's case is that, his counsel perused the Court file and realized that the suit was fixed for hearing on 3.4.2019 and was dismissed for non-attendance; that the failure to attend the hearing on 3.4.2019 was caused by the failure to diarize the matter at his counsel's office; that the Counsel was unaware of the hearing date; that the mistake of the counsel should not be visited on the claimant; that the application has been made without undue delay; and that it is in the interest of justice that the application herein is allowed.

3. The Respondent filed Grounds of Opposition 17.1.2020 contending that the application offends the provisions of Rule 33(1) of the ELRC Rules; that the application is brought under the wrong provisions of the law; that the application is frivolous and vexatious since no justifiable reason for non-attence has been shown; that the application is prejudicial to it because the suit is fairly old and there is possibility of losing witnesses and losing documentary evidence.

4. The application was canvassed by written submissions which I have carefully considered herein.

Applicant's Submissions

5. The Applicant filed submissions dated 19.2.2020. In brief, submitted that the failure to cite the correct provision of the law upon which the application brought is not fatal to the application.

6. She further submitted that the application is not frivolous because she has shown a justifiable reason for the non- attendance. She referred to the copy of the Diary attached to the application as evidence that the failure to attend court was due to the mistake by her counsel, of not diarizing the matter on 3.4.2019. She relied on **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR** and **Burhain Decorators & Contractors v Morning Foods Ltd & another [2014] eKLR** where it was held that the mistake of Counsel should not be visited on the innocent client when the situation can be remedied by costs.

7. She urged the court to reinstate the suit because she has always been diligent to prosecute the matter save for the said mistake of counsel. Finally, she submitted that the respondent will not suffer any prejudice if the suit is reinstated but she is the one who will suffer irreparable harm if the suit is not reinstated because she will have been send away from the seat of justice without being heard.

Respondent's Submissions

8. The respondent filed its submissions dated 30.6.2020. It contended that the claimant has all through demonstrated that she is not a vigilant person. It further set out a chronology of events in the journey of the suit to substantiate the foregoing contention, that on 14.10.2014, the

claimant failed to attend court for a mention; on 22.11.2017 she again failed to attend court for fixing of a hearing date following an invitation by the Deputy registrar; on 11.12.2018 she failed to attend hearing and the suit was adjourned; on 28.2.2019 the suit was by consent fixed for hearing on 3.4.2019 but again she failed to attend the hearing and the suit was dismissed.

9. The respondent urged the court to reject the application because equity does not aid the indolent. It maintained that the claimant has not justified why the court should exercise discretion in her favour. Finally, it submitted that the suit is six years old and any reinstatement will be prejudicial to it because of possibility of losing witnesses and human memory resulting from lapse of time.

10. For emphasis, it relied on **Fran Investments Limited v G4S Security Services Limited [2015] eKLR** and **Standard Chartered Bank (K) Ltd v Ondieki Ayuki [2018] eKLR.**

Issues for determination and analysis

11. Having carefully considered the material presented to me by both parties herein, there is no contention that both parties were represented when the suit was fixed for hearing on 28.2.2019 by the Deputy Registrar. It is also clear that 3.4.2019 the claimant and his counsel failed to attend the hearing and the court dismissed the suit for non-attendance. Obviously the said dismissal amounted to a regular judgment entered by the Court in favour of the respondent. The main issue for determination is whether the applicant has met the legal threshold for setting aside a regular judgment.

12. The legal threshold for setting aside a regular judgment entered in default of attendance is demonstration of a good cause by the claimant. Rule 22 (2) of the ELRC Procedure Rules provides that: -

> ***"Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good cause to be recorded."*** [emphasis add]

13. The jurisdiction of the court to review and set aside its decisions, and the legal threshold for setting aside a regular judgment or court order was discussed in **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR, where** the Court of Appeal held that: -

> ***"…the court has unfettered discretion in determining whether or not to set aside the default judgment, …***[emphasis added]

14. Again in **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

> ***"This discretion (to set aside ex parte Court decisions) is intended 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]

15. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that:

> ***"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."***

16. Flowing from the foregoing rule and the precedents, it is clear that the court has a wide discretion to set aside default judgment or an order for dismissal of a suit for non-attendance, provided the applicant demonstrates to the court by affidavit evidence that-

a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;

b) The application for setting aside was made without unreasonable delay;

c) The suit is meritorious and the applicant has not lost interest in prosecuting the same;

d) He/she stands to suffer more prejudice compared to the opposing party if the application is declined;

e) The interest of justice demands that the application be allowed.

17. In this case the reason given for the claimant's failure to attend court is the Advocates failure to diarize the matter and as such the Counsel in conduct of the matter was not informed that the matter was fixed for hearing on 3.4.2019. The question that arises is whether the applicant failed to attend the hearing on 3.4.2019 due to wilful neglect or deliberately to delay the course justice.

18. Having carefully considered the explanation given by the applicant and the circumstances of this case, I am satisfied that the failure to attend the hearing by the applicant was not due to her negligence but a genuine error on the part her lawyer.

19. As to whether the application was filed without unreasonable delay, it is clear that the application was made 5 months after the dismissal of the suit. The delay of 5 months has not been explained by the claimant nor has she and her counsel stated when they became aware that the

suit was dismissed. I therefore find that a delay of 5 months without any justifiable cause is unreasonable.

20. As regards the issue of prejudice to be occasioned by allowing or dismissing the application, the respondent argued that it will suffer prejudice if the application is allowed since the suit is now over six years old and their risk of losing witnesses and memory. However, the claimant argued that disallowing the application will permanently send her away from the seat of justice without being heard on her suit.

21. Having considered the revival submissions, I appreciate that indeed the suit is over six years without being prosecuted and any further delay will be prejudicial to the defence. However, my perusal of the court record shows that the respondent has also contributed to the delay in concluding the suit because it sought adjournment on 21.6.2017. It has also not shown that the prejudice it stands to suffer cannot be remedied by costs. I agree with the claimant that dismissing the application will occasion irreparable and permanent harm to her because she will be send away from the seat of justice without being heard. Consequently, despite the said delay in making the instant application, I proceed to allow the application dated 1.10.2019 in the following terms because the claimant has shown a sufficient cause for allowing the application:

a) The Orders made on 3.4.209 dismissing the suit for non-attendance is hereby set aside.

b) The suit is hereby reinstated for hearing and determination on merits.

c) A hearing date shall be granted on priority basis due to the age of the matter.

d) The claimant to pay the respondent Kshs. 10,000 being throw-away costs before the hearing date.

Dated and delivered at Nairobi this 22nd day of January, 2021.

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE