REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 686 OF 2018

MILICENT INGOSHI...CLAIMANT

VERSUS

EMACULATE BAGUMA..1ST RESPONDENT

ROSE BAGUMA... 2ND RESPONDENT

RULING

1. The Application herein is the Respondent's Notice of Motion dated 6.12.2019 seeking the following orders, THAT: -

(a) Directions by the court issued that the matter proceeds by formal proof be set aside.

(b) Leave be granted to file defence out of time.

(c) Costs of this application be provided for.

2. The Application is premised on the grounds set out on the body of the motion and the supporting Affidavit sworn by Ms. Rose Baguma on 6.12.2019. In brief, the Applicant's case is that, after receipt of the summons to enter appearance, they instructed counsel to defend them; that they are resident in Juba and as such they did not know that their counsel did to file defence on their behalf until the court directed the matter to proceed by formal proof; that the failure to file defence was due to mistake on the part of their counsel; that mistake of counsel should not be visited on them; that they stand to suffer irreparable harm if they are not accorded the constitutionally guaranteed right to hearing; that it is the interest of justice that the application be allowed.

3. The Claimant opposed the application by her Replying Affidavit sworn 20th July, 2020. She contended that the Applicant entered appearance on 23.5.2018 through MJD Associates Advocates but no defence was filed; that on 31.1.2019 the Deputy Registrar fixed the suit for pre-trial conference on 20.3.2019 and directed the defence counsel to file defence before then; that as at 20.3.20219, no defence had been filed and the counsel sought more time to do so because his client was out of the country; that the request for more time was strongly opposed by her (claimant) counsel and the court directed that the matter proceeds by formal proof. She contended that the application should be dismissed because it is without merits, frivolous, vexatious and an abuse of the process of the court. However, she urged that should the court decide to allow the application, then she should be awarded throw away costs of Kshs. 40000.

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

Summary of Submissions

5. The Applicants submitted that the application is merited, it has been brought in good faith and it is seeking to ensure that justice is served on them by giving them their day in court so that the matter is determined on merits. They contended that there are numerous precedents to the effect that an advocates should not and cannot be visited on the client. They maintained that they should not be punished for the mistake of their counsel who had full instruction to file the necessary documents but defaulted.

6. For emphasis they relied on **Shah v Mbogo & another [1967] EA 116** at 123 where it was held that a court has discretion to avoid injustices or hardship resulting from accident, inadvertence or excusable mistake, or errors but not to aid a person who is deliberately obstructing or delaying the cause of justice.

7. The Claimant submitted that the Applicant has not shown sufficient cause to warrant granting of the orders sought and prayed for the application to dismissed with costs. She contended that the applicants are delaying justice by the application. She further submitted that the matter had been to court on 31.1.2019 and the applicants were directed to comply with the rules before the pre-trial date on 20.3.2019 but they defaulted.

8. The foregoing notwithstanding, the claimant urged that, should the court be inclined to allow the application, throw away costs of Kshs. 40000 should be awarded to him as a condition for the leave to file defence.

Issues for determination and analysis

9. Having considered the application, affidavits, submissions and the Court record, there is no dispute that the applicant's counsel filed Memorandum of appearance but failed to file defence and the court directed that the matter proceeds by formal proof. There is further no dispute that the said direction amounted to a regular interlocutory judgment in favour of the claimant. The main issue for determination is therefore whether the applicant has met the legal threshold for setting aside a regular judgment.

10. 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,** the Court of Appeal held that: -

> ***"…the Court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence on time as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among others."*** [emphasis added]

11. In **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P. held that:

> ***"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

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

> ***"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)*

13. From the foregoing binding precedents, it is clear that setting aside of judgment or court orders is not a matter of cause but one that must be grounded on demonstration by the applicant that the impugned decision was not occasioned by wilful negligence on his part. It therefore behoves of the applicant to establish by affidavit evidence a sufficient cause to warrant granting of the order. 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..."***

14. In this case the reason given for the respondent's failure to file defence is that they instructed counsel to represent them by filing the necessary pleadings but the counsel defaulted; that they were away in Juba and as such they were not physically able to follow up the proceedings in Kenya but had to solely rely on the representation by the counsel; and that if the application is disallowed they will suffer irreparable harm. The court has considered the contention by the applicant as well as the claimant and it is satisfied with the explanation given by the applicant that the failure to file defence cannot be blamed on them but their counsel MJD Associates Advocates.

15. The court accepts the explanation that while abroad, they depended fully on the professional services of their said counsel because they could not physically pursue the matter to ensure that all the pleadings were filed. Whereas it would be in order to direct the applicants to seek remedy elsewhere against their counsel for professional negligence, I hold the view that this is a good case to find that a mistake of counsel should not be visited on an innocent client. The said mistake is excusable on the part of the applicants who gave full instructions and remained abroad with honest belief that the counsel would execute the instructions.

16. As regards the time taken before making the instant application, the court wonders why the applicant took 9 months after the impugned orders before making the instant application. Such delay is unreasonable by all standards and it has not been explained. I agree with claimant that the applicants are delaying the finalization of this suit.

17. On the issue of arguable defence, I have noted that there is no draft defence filed nor has the applicants indicated what issues they intent to raise in their defence. Consequently, the court has been denied crucial information which is relevant in determining whether or not to exercise discretion in favour of the applicant as per the precedents above.

18. On the other hand, I have considered the respective prejudices that the parties may suffer should the court grant or decline to grant the orders sought and found that the respondent will suffer irreparable harm by being condemned without a hearing as compared to the claimant who can be adequately compensated by costs. Considering the totality of the material presented to the court, and the request for throw away costs by the claimant, I am satisfied, notwithstanding the delay in making the instant application and the default by the applicant to file a draft defence for consideration, that the interest of just demands that the application be allowed because the applicants have shown that there is sufficient cause warranting the exercise of this court's discretion in their favour.

19. Consequently, I allow the application dated 6.12.2019 in the following terms:

(a) The directions by the court issued on 20.3.2019 that the matter proceeds by way of formal proof, be and is hereby set aside.

(b) The respondent has 14 days of this ruling to file and serve Response to the Memorandum of Claim herein.

(c) The Respondent is condemned to pay thrown-away costs of Kshs. 15,000 within 14 days to the Claimant and in default leave is hereby granted her to execute for the said costs.

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

ONESMUS N MAKAU

JUDGE

<u>ORDER</u>

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