REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 89 OF 2013

KENYA NATIONAL PRIVATE SECURTY

WORKERS UNION.....CLAIMANT

VERSUS

EXCELLENT SECURITY SERVICES.....RESPONDENT

RULING

1. The Application before me is the one dated 17th December 2020. It is an amended notice of motion by the Applicants seeking orders issued on 21st April 2016 dismissing the suit for want of prosecution. The Applicants advance the argument that the Applicants were at the time represented by the Union which did not take steps to prosecute the matter. It was argued that the mistake of the Union should not be visited on the litigants. Counsel for the Applicants cited the case of **John Nahashon Mwangi *v* Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** where Gikonyo J. set out principles for consideration in setting aside. Counsel argued that the delay was excusable in the circumstances. It was argued that the Applicants were taken around in circles at the Union office and that the Union filed suit in Nairobi yet the case was due in Mombasa as the litigants were domiciled in Mombasa and the cause of action accrued in Mombasa. He submitted that the case raised triable issues as the Applicants served the Respondent for decades and the fault of the Union should not be visited upon them. He relied on Article 48 and 50 as read with Article 24 of the Constitution and argued that these rights are absolute rights that must be upheld and cannot be vitiated. He stated that if the motion is not granted the employees will be driven away from the seat of justice. He submitted that the Court is also required to consider if the Respondent will suffer prejudice. He argued that the Court can grant them costs and that would, compared to the loss of justice for loss of employment is lesser. He stated that the Court has the jurisdiction to set aside any orders that infringe on the rights of a litigant. He cited the case of **Lochab Brothers Ltd *v* Peter Kaluma t/a Lumumba, Mumma & Kaluma Advocates [2013] eKLR**. He argued that in the interests of meeting the ends of justice the Court should set aside the orders to enable the Applicants to prosecute their claim legitimately filed in court but mishandled by their representatives.

2. The Respondent was opposed and through its Counsel submitted that the motion was a non-starter and dead on arrival. She submitted that the parties before the Court had no *locus* as the dispute was referred to Court by the Claimant which is a Union. She argued that the Claimant failed to attend Court. She cited the case of **Kenya County Government Workers Union *v* County Public Service Board Kitui [2017] ekLR** and submitted that the suit is a referral of a trade dispute between the Claimant (Union) and the Respondent (employer). She argued that there are no secondary parties. She relied on the case of **Banking Insurance & Finance Union of Kenya *v* Capital SACCO Society Limited [2017] eKLR** where it was argued that the Union could pursue the matter in its name not that of its member. She submitted that the Union is a competent party and the Court should decline to grant the prayers sought. She stated that if the Court is however persuaded to grant the prayers sought, the Court should note the same would adversely affect the Respondent as the suit was filed in 2013, instructions given, fees paid and it is now 7 years since the suit was filed and as such the motion represents inordinate delay. She argued that the reinstatement motion was filed in 2019 and an amendment made one year later after failing to prosecute it for over one year. She stated that the same advocate who filed the motion in the previous firm of advocates on record was the one who filed the amendment. She argued that justice should also be served to the Respondent as a party to a suit should take steps to prosecute their matter seeing as it is that they dragged the Respondent to court. She stated the subject to the suit should have attended Court prior if they wished as there was no bar to them pursuing their case as the Courts were not closed to any person. She argued that they have not shown any proof of the attempt prior to the motions in 2019.

3. The Applicants' Counsel responded that the Union was the principal and the agency relationship between the Union and the Applicants broke. Since the Union stood in their shoes upon breach of duty by the Union the dismissal of the suit permits the Applicants to now approach the Court personally or through Counsel. He submitted that the anomaly of naming the Union can be cured in amendment and if the motion is granted it would be advised to amend. He stated that the Court should not drive them away from the seat of justice. He argued that the Covid 19 pandemic took on most of 2020 and the moratorium plus the frequent lockdowns and the nationwide curfew had affected access to Courts. He thus urged the grant of the motion.

4. The Court is required to consider various factors in an application such as this. In the case of **CMC Holdings Limited *v* Nzioki [2004] 1**

KLR 173, the Court of Appeal considered the grant of discretionary orders to set aside and the learned judges of appeal, Tunoi, O'Kubasu JJA, Onyango Otieno Ag. JA (as they then were), held as follows:-

> *1. In an application before a court to set aside an* ex parte *judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.*
>
> *2. On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.*
>
> *3. In law, the discretion on whether or not to set aside an* ex parte *order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.*
>
> *4. 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 in principle.*
>
> *5. In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.*
>
> *6. In an application for setting aside* ex parte *judgment, the Court must consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raised triable issues.* (emphasis mine)

5. The Claimant Union was handling the dispute when it suffered the fate that has now brought the case before me. In the suit, the Claimant stood in the shoes of the Applicants. However, that did not alter the suit to the extent that it became the Claimant's case. It was the Applicants' case at all times and the fact that the Claimant failed to take steps or that it filed the suit in Nairobi when the Applicants are domiciled in Mombasa did not absolve them from pursuing their case. Prior to March 2020 when the Covid pandemic took a toll on the normal operations of Court, the Applicants could have accessed the Courts in 2014, 2015, 2016, 2017, 2018, 2019 and early 2020 but did not pursue their claim. As pointed out by the Respondent this motion is inordinate in its presentation. From the reasons articulated above the motion is devoid of merit and is accordingly dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 12th day of March 2021

Nzioki wa Makau

JUDGE