



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1485 OF 2015

CHARLES KIPKEMOI CHEBII.....CLAIMANT

VERSUS

NATIONAL HOSPITAL INSURANCE

FUND MANAGEMENT BOARD.....RESPONDENT

RULING

1. The Respondent/Applicant moved the Court seeking the setting aside of the Judgment entered herein on 20th January 2021. The Respondent argues that on the date the matter was scheduled for hearing, the same did not proceed and the Claimant failed to notify the Respondent by way of a hearing notice of the next date for hearing which was on 7th December 2020 when the matter proceeded in the absence of the Respondent. The Respondent argues that it was not able to attend on a date it was not aware of and thus beseeched the Court to set aside the judgment aforesaid. It argued that the Claimant never even served his submissions on the Respondent.

2. The Claimant is opposed and asserts that equity does not aid the indolent and that the Respondent ought to have followed up to ascertain the directions issued in the matter. The Respondent was thus accused of failing to participate in the hearing out of its own failure.

3. The parties argued the matter through written submissions filed in Court. In its submissions, the Respondent argued that basing its argument on the case of **Esther Wamaitha Njihia & 2 Others v Safaricom Limited [2014] eKLR** citing *inter alia* **Patel v EA Cargo Handling Services Ltd** and **Shah v Mbogo** that the nature of the action ought to be considered as well as a question as to whether the plaintiff can be reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of the Court. It argued further that it goes without saying that the reason for the failure to attend should be considered. The Respondent also cited the case of **Wachira Karani v Bildad Wachira [2016] eKLR** and submitted that a court in deciding whether there is sufficient cause or not must consider the object of doing substantive justice to parties concerned. The Respondent submitted that the Claimant mischievously failed to serve a fresh hearing notice and that it therefore was entitled to the orders sought.

4. The Claimant submitted that setting aside is a discretionary remedy and that in **Shah v Mbogo & Another [1967] EA 116** it was held that the court should exercise its discretion so as to avoid an injustice but not to aid an indolent party. The Claimant argued that the sufficient reason has been held by courts to be as the cause in which the defendant or his counsel cannot be blamed for his absence. The defendant ought to demonstrate that his absence was not deliberate or caused by negligence. The Claimant submitted that the reason advanced by the Respondent for not attending is that they were not aware of the date. The Claimant submitted that when a court does not sit on a date it was intended to, then it is the duty of parties to follow up and that the Respondent ought to have noted that the Court had issued a notice that the matter would be heard on 7th December 2020. The Claimant submitted that the notice for hearing on 7th December 2020 was issued by the Court hence the satisfaction of the court that the parties had been notified of the date. He submitted that equity aids the vigilant and not the indolent. He cited the case of **Nathan Ogada Atiagaga v David Engineering Limited [2016] eKLR** as well as the ensuing appeal. The Claimant asserts that litigation must come to an end stating that he has been in court for 6 years waiting for justice. The Claimant submitted that the setting aside will mean another beginning with endless trips from Eldoret to Nairobi as he was doing, while he was already suffering as he had been unfairly dismissed from employment. He submitted that the Respondent had not indicated what prejudice it would suffer if the judgment is not set aside. He thus urged the dismissal of the Respondent's motion with costs.

5. The power to set aside is discretionary. As held 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)

6. The Respondent was aware of the date of 2nd December 2020 and the Court issued a notice to the parties for the deferment of cases to 7th December 2020. The notice was issued to parties on Thursday 26th November 2020 to all advocates for the parties via email. The mailing list includes the Respondent's advocate. From the reasons articulated herein the motion is devoid of merit and is accordingly dismissed with costs to the Claimant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2021

NZIOKI WA MAKAU

JUDGE