



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 223 OF 2016

STANSLOUS MANGI KAHINDI.....CLAIMANT

- VERSUS -

AUTO CONTINENTAL LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 13th May, 2021)

RULING

The respondent filed on 10.07.2020 an application by notice of motion through Khatib & Company Advocates. The application is under section 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act Cap 21, Order 51 rule 1 and Order 12 rule 7 of the Civil Procedure Rules 2010 and all enabling provisions of law. The applicant prays for:

- 1) (Spent)
- 2) (Spent)
- 3) That the orders of 02.12.2019 closing the respondent's case be set aside and vacated and the respondent be granted leave to prosecute his case unconditionally.
- 4) Any other relief deemed fit to grant.

The application was based on the annexed supporting affidavit of David Mwathi, the respondent's Transport Coordinator and upon the following grounds:

- 1) On 07.10.2019 the respondent obtained leave to file substituted witness statement and which was filed on 08.10.2019 and case fixed for mention on 02.12.2019.
- 2) On 02.12.2019 the applicant and its advocate were inadvertently absent and the Court closed the respondent's case for non-attendance and directed parties to file submissions. The case was fixed for mention on 13.02.2020 to confirm filing of submissions.
- 3) The failure to attend Court on 02.12.2019 was due to inadvertent and erroneous date recording on the part of the advocates which should not be visited upon the client and the applicant is ready to call its witness to testify.
- 4) The applicant will promptly prosecute its defence and the claimant will suffer no prejudice.

The claimant opposed the application by filing on 26.10.2020 grounds of opposition through IRB Mbuya & Company Advocates. The grounds of opposition are as follows:

- 1) The application is mischievous, bad in law, an abuse of the court process and devoid of merit.
- 2) The applicant has not demonstrated that it is deserving of the orders prayed for.
- 3) The application is filed with *mala fides* because applicant failed to comply with court's orders even after ample time given to substitute witness and chance to file submissions but failed to do so.

- 4) The Court is set to deliver judgment in the matter. The application is therefore overtaken.
- 5) The application is defective and bad in law and should be struck out with costs to the claimant.

Parties filed their respective submissions. The Court has considered the submissions and the parties' respective positions for and against the application.

The main reason urged for the applicant is that failure to attend Court was due to the advocate's mistake in recording the correct date for the scheduled mention on 02.12.2019. The claimant has not disputed that fact and reason. It is submitted for the applicant that it was held in **Pithon Waweru Maina –Versus- Thuka Muguria (1983) eKLR** thus, **“The main concern of Courts is to do justice to the parties and the Court will not impose conditions on itself so as to fetter the wide discretion given by the rules. The discretion is intended to be exercised to avoid injustice or hardships resulting from incidents of accidents, inadvertence, or excusable mistakes or error, but is not designed to assist the person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.”** Further, it was submitted that in that cited case it was held that even where a mistake by counsel for the applicant is established to amount to negligence, any delay occasioned in that regard can be compensated by awarding the respondent the costs.

For the claimant it was submitted that the applicant failed and ignored to attend Court on 02.12.2019 despite the date having been taken by consent of the parties. Thus the Court ordered proceedings closed and parties to file submissions. The order was extracted and served upon the applicant's counsel. On 13.03.2020 the respondent's Counsel failed to attend Court despite being duly served with the mention notice. The matter was adjourned to 11.06.2020 and a mention notice duly served together with the claimant's submissions. It was submitted that the Court should follow the holding by Ringera J in **Omwoyo – Versus- African Highlands & Produce Company Limited [2002] 1 KLR** thus, **“Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's advocates. This is a proper case where the Defendants remedy is against its east-while advocates for professional negligence and not setting aside the judgment.”** It was further submitted that the applicant took almost a year to bring the application before the Court despite the case being mentioned severally and the issue of being heard as prayed for not having been raised.

The Court has revisited the record. On 02.12.2019 both parties' advocates were absent and the Court (Rika J) ordered:

- 1) Respondent is not here to appraise the Court on its compliance with orders granted on 07.10.2019.
- 2) Proceedings shall be marked as closed.
- 3) Parties to file and exchange their submissions within 30 days.
- 4) Mention 13.02.2020.
- 5) Court to notify the parties.

On 13.02.2020 the claimant's counsel was present and the applicant's advocate was absent. The claimant's counsel applied for another mention date which was granted as 13.03.2020 (As of that date no submissions had been filed and the claimant's submissions dated 18.03.2020 were actually filed on 02.06.2020.) On 13.03.2020 the claimant's advocate attended Court and applied for another mention date (in absence of the applicant's advocate) and the Court ordered mention to be on 11.06.2020. There is no indication that as of that date the claimant's counsel had sought and obtained leave to belatedly file the submissions. The Court finds that by that conduct, the claimant substantially contributed to the delayed submissions and progression to delivery of the judgment. The Court has taken judicial notice that soon after 13.03.2020 the Government declared the Covid 19 pandemic and which has continued to persist. Thus, the record shows that the Court did not sit on 11.06.2020 as had been fixed but instead the matter came up on 16.09.2020 when the Court considered the present application for the first instance. Taking into account the record of proceedings together with the principal objectives guiding the Court under section 3 of the Employment and Labour Relations Court Act, 2011 of fair, expeditious and proportionate determination of disputes before the Court, the Court finds that both parties' advocates have one way or the other contributed to the delay in the anticipated judgment in the suit. Further, though the claimant belatedly filed submissions, there is no Court order regularising the same and at the same time, the mistake by the applicant's counsel for non-attendance as urged is not in dispute. Accordingly, towards the ends of justice for both parties and in view of the Covid 19 situation that was likely disruptive of the proceedings herein, the application will be allowed with costs in the cause.

In conclusion, the application is hereby allowed with orders:

- 1) The orders given by the Court on 02.12.2019 marking the proceedings herein closed are set aside and the respondent is hereby granted leave to prosecute his case unconditionally.
- 2) Parties to take directions and fix a date for further hearing of the suit on priority basis.
- 3) The costs of the application in the cause.

Signed, dated and delivered by video-link and in court at Mombasa this Thursday 13th May, 2021.

BYRAM ONGAYA

JUDGE