



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E536 OF 2026

PHELIX ODIWOUR KODHE.....CLAIMANT/APPLICANT

VERSUS

MEDIAMAX NETWORK LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 16th March 2021 seeking to be heard for Orders:

i. *Spent.*

ii. THAT this Honourable Court be pleased to set aside and or vary its *ex parte* order made on the 16th March 2020 dismissing the Claimant's suit dated 14th September 2020 and awarding the Respondent costs.

iii. THAT the Claimant's statement of claim dated 15th May 2020 be reinstated and the same be listed for Mention to take a Hearing date on merit.

iv. THAT the cost of this application be provided for.

2. The Application is premised on the grounds that the matter was scheduled for hearing on 16th March 2021 before this Honourable Court in Court number 4 at 12:00pm and was to proceed in open court as per the Cause List on www.kenyalaw.org. That the Applicant's advocate proceeded to Milimani Commercial Courts on the said date and arrived at 11:42am just in time to conduct the hearing as scheduled. That as had been directed by a notice affixed at the court room's door, the Applicant's Advocate proceeded to the tent at the parking yard marked Employment & Labour Relations Court and waited for the matter to be called out at MIDDAY as indicated on the cause list. That when the matter had not been called out by 12:10pm, the Advocate contacted the Respondent's Advocate, Mr John Njuguna at exactly 12:15pm who informed her that the Honourable Court was sitting in Court 1 and not Court 4 and that the suit had been dismissed with costs to the Respondent. That the Applicant's Advocate confirmed the matter had indeed been dismissed upon perusing the court file with permission from the court clerk. The Application is supported by the Affidavit sworn on 16th March 2021 by the Claimant/Applicant's advocate, Doreen Wamanga who avers that she tried to seek audience with the Court after confirming that the suit had been dismissed but the Honourable Court called out the matter schedule for hearing at 1:00pm and requested everyone not in the matter before him to exit the court. She contends that they were not notified prior to the hearing that the matters for Court 4 were to proceed in Court 1 and asserts that she was notably in court on time and in compliance with the standard operating procedures of court. She further avers that the Claimant's suit has merits and an overwhelming chance of success, that the instant application has been filed without any undue delay and that her failure to attend court was neither deliberate nor intentional as indicated. She annexes in her affidavit copies of her travel itinerary by taxi; a picture taken of the said Notice at the court room door with a time stamp of 11:48am; and her call logs.

3. The Respondent filed a Replying Affidavit dated 1st April 2021 sworn by its Human Resource Business Partner, Robert Murigi who avers that the Claimant's Application is bad in law because:

a) The Order made on 16th March 2021 meets all the requirements under Rule 22 of the Employment and Labour Relations Court (Procedure) Rules 2016.

b) The Suit having been dismissed for want of prosecution and non-attendance by the Claimant is a final judgment which may only be set aside on appeal or review and not on an application for setting aside.

c) That the reasons advanced are unsatisfactory as the Respondent's witness and their Advocate were in Court in time without any

hindrance ready for the hearing.

He further avers that the Court was in fact lenient and allowed parties 15 minutes from the scheduled start time of 12noon to find their way to court while the Janitors also carried out sanitation exercise and that the matter was called out at 12:15pm. That he was informed by the Respondent's Advocate that the Claimant's Advocate, Doreen Wamanga, had earlier called Mr. Njuguna Advocate informing him that the Claimant was not ready to proceed with the hearing and intended to seek an adjournment for purposes of referring the dispute to arbitration. That the instructions to their advocate was to oppose any application for adjournment as the continued presence of the suit in court continues to subject the Respondent to unnecessary expenses attendant to law suits. That he was thus present in Court for purposes of tendering his evidence and that the absence of the Claimant in court on the other hand has not been explained or justified. That the Claimant's absence in court is also a clear indication he was not keen in prosecuting his claim despite the hearing date having been taken by consent of both parties. He further avers that the instant suit raises no triable issues that can be tried in this forum and that the Court obligated to determine the said issue considering that the Claimant had been engaged as an Independent Contractor and there is no evidence he is entitled to any rights of an employee under the Employment Act. Further, that Paragraph 6 of the Independent Contractor Agreement between the parties requires all disputes between the Parties to be referred for settlement by way of Arbitration under the Arbitration Act Laws of Kenya. That this Arbitration clause consequently disentitles the Claimant from the order of reinstatement of suit as the Court lacks jurisdiction to handle the Claim. He annexes in his affidavit copies of the said Independent Contractor Agreement and Withholding Tax Certificates in support of the Respondent's case.

4. The Claimant/Applicant submits that the change of courts and non-issuance of a prior notice informing the advocate to wait in Court 1 instead of Court 4 and at the tent was beyond the advocate's control. That it was therefore an inadvertent mistake that the advocate on record did not attend the court session on the material day. That this Honourable Court is clothed with the discretion to set aside an *ex-parte* order and which is intended to avoid injustice or hardship resulting from an accident inadvertence or error. The Claimant/Applicant cites the case of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** where the Court of Appeal further held that the discretion to set aside an *ex parte* judgment is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. The Applicant seeks this Court's indulgence and submits that non-appearance of his advocate was not meant to delay the realms of justice. The Claimant/Applicant further submits that an advocate's mistakes should not be visited upon the client who was not a party to the misadventures. That the High Court sitting as an Appellate Court in **Burhani Decorators & Contractors v Morning Foods Ltd & Another [2014] eKLR** aligned itself with the sentiments in the case of **Belinda Murai & Others v Amoi Wainaina, [1978] LLR 2782 (CALL)** by Madan, J.A. (as he then was) when he described what constitutes a mistake in the following words:

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip, it is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

5. He further cited the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 104** where Apaloo, J.A. (as he then was) posited that a party should suffer the penalty of not having his case heard on merit because a mistake has been made and that the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court further observed that it is often said that the court exists for the purpose of deciding the rights of the parties and not to impose discipline. The Claimant/Applicant submits that Article 25(c) of the Constitution of Kenya 2010 stipulates that the right to a fair trial shall not be limited and that he should thus be accorded a fair hearing, a platform to converse his case, so that the matter is determined on merit. The Claimant submits that Njoki Ndungu SCJ in Supreme Court Petition **Gladys Boss Shollei v Judicial Service Commission & Another [2018] eKLR** opined that it is important to note from the onset that pursuant to Article 25(c) of the Constitution, the Right to a fair trial is non-derogable.

6. The Respondent submits that the dismissal of the Suit for want of prosecution and Court attendance met all the requirements under Rule 22 of the Employment and Labour Relations Court and that the Claimant has failed to provide sufficient reasons as to why the Order should be reviewed or set aside and that this is purely a commercial claim that should have been filed somewhere else from the word go. The Respondent submits that the Court's obligations is to enforce the contract and not to re-write the contract and that since parties agreed to attend before an arbitrator, it is only fair that parties abide by their contract. Further, that it will be a grave mistake for the parties to crowd the Court's diary with a matter where jurisdiction is expressly ousted. The Respondent further submits that the Court should not exercise its discretion in favour of an Applicant who failed to attend court for the hearing of his case, gives no reason at all or even satisfactory reasons for the non-attendance then states that he is prejudiced by the dismissal order. It urges the Court to disallow the application with costs to the Respondent.

7. The main issue for determination is whether the Court should set aside and or vary the orders for dismissal and reinstate this suit for hearing. It is trite that the right to a fair hearing is non-derogable under the Constitution of Kenya. In the matter before me the Claimant's counsel was absent at the hearing of the case. She now seeks to have the order issued by the Court to be set aside. The Court has carefully perused the application before it and nowhere is it indicated that the Claimant was in Court ready to proceed. The Counsel for the Claimant was curiously absent yet the Counsel for the Respondent was able to trace the correct court where proceedings were being conducted as the Court had made elaborate arrangements for the seating of Counsel and witnesses in the waiting area and ushers to direct parties to Court. The claim also suffers a handicap in that the agreement of parties per clause 6 of the Agreement between the Claimant and the Respondent provides that in the case of a dispute over the same, it would be referred to arbitration. As parties had agreed to refer the matter to arbitration the jurisdiction of the court is ousted in this regard. Parties are at liberty to pursue arbitration as the suit herein fails to be reinstated. Each party is to bear their own costs for the unsuccessful notice of motion application before me.

It is so ordered.

Dated and delivered at Nairobi this 3rd day of June 2021

Nzioki wa Makau

JUDGE