REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO E093 OF 2021

SHARON MAVIALA.....CLAIMANT

VERSUS

HORIZON GROUP LIMITED T/A HORIZON OFFICES..... RESPONDENT

RULING

1. The Claimants filed a Statement of claim dated 5.3.20201 seeking payment of terminal benefits plus compensatory damages for unlawful termination of her employment contract by the respondent. She further filed a Notice of Motion dated 10.3.2021 seeking for an order directing the respondent to release to her the undisputed and admitted sum of $13,948.41 pending the hearing and determination of the suit.

2. The application was heard by the Duty Judge on 19.3.2021 in the first instance and fixed the same for hearing on 26.4.2021. The respondent did not attend court and at 10.45 hours, the application was allowed as prayed after the applicant proved service on the respondent's counsel.

3. The respondent has now filed the Notice of Motion dated 27.4.2021 under Section 3 and 3 A of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procure Rules. The application seeks the following orders:

a) That the orders issued by this court on 26.4.2021 be set aside or be vacated.

b) ***Costs of the application be provided for.***

4. The application is supported by the Affidavit sworn on 27.4.2021 by the respondent's counsel Mr. Mwangi Munyuga and it is opposed by the claimant vide her Replying affidavit sworn by her on 7.5.2021.

5. On 5.6.2021, the parties agreed to dispose of the motion by written submissions.

6. The gist of the applicant's case is that its counsel filed Replying Affidavit on 13.3.2021 and served the same on 14.3.2021; that on 26.4.2021 he dutifully attended virtual court ready to oppose the claimant's application dated 10.3.2021 but to due to technical and downtime from his internet service provider, he was ejected from the court room multiple times and for long periods; that by the time reconnection resumed the matter had already been called out and the impugned orders granted; and that when he requested the court for indulgence, the court advised him to make a formal application if he was dissatisfied by the orders granted.

7. The respondent further argues that granting the impugned orders was unjust and punitive to it because that order touches on the flesh of the claim and it is in contention and disputed; that the court is aware of the fickleness and unreliability of technology; and that in the interest of justice the instant application ought to be allowed.

8. The claimant's case is that the applicant was aware of the hearing and he failed to attend the virtual court; that the allegation that he had challenges joining the court cannot been verified by evidence; that even if such challenges occurred the respondent's counsel never notified her counsel or the court so as to be indulged; that the amount granted is admitted liquidated claim and as such the instant motion is only delaying tactic by the respondent; that setting aside the impugned order will result to injustice to her; that the applicant will suffer no prejudice if the application is dismissed; and that it is in the interest of justice that the application be ought dismissed.

Analysis and determination

9. The issue for determination is whether the application meets the legal threshold for setting aside regular judgment or an order.

10. Order 51 Rule 15 of the Civil Procure Rules provides that:

> ***"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as to costs."***

11. 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,** wherethe 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]

12. 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."***

13. 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)*

14. From the foregoing binding precedents, it is clear that the court has unfettered discretion to set aside of judgment or court orders but the same is not a matter of cause. It must be grounded on demonstration by the applicant that the impugned decision was not occasioned by willful negligence on his part. Consequently, the applicant must establish by affidavit evidence, a sufficient cause to warrant granting of the order.

15. 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..."***

16. In this case the reason given for the respondent's failure to attend court was internet problem which ejected him from the virtual court. The claimant contends that such allegation cannot be verified. That view was taken by Sila Munyao J in **Flora Impex limited v Kenya Rural Roads Authority & 4 others [2021] eKLR** when he held that:

> **"In the present application, counsel for the applicant alleges that he had technical difficulties in joining the virtual court platform when the dismissed application came up for hearing. He further states that he only managed to join the virtual proceedings after the matter had already been called out and subsequently dismissed… This application is principally based on grounds that counsel did not attend virtual court due to technical glitches. This may be a possibility, though going forward, I would urge any counsel having difficulties to either contact his or her counterparts or the court assistant, to alert them of any challenges that they are having. There is no evidence that the counsel tried these options and he can blame nobody but himself for the dismissal."**

17. In this case the applicant's counsel has not proved that he made effort to reach the claimant's counsel or any other counsel in attendance or the court assistant or even the court administrators to indicate that he had challenges joining the court. Therefore like my brother Sila J in the above case, I hold that the applicant cannot blame either the court or the claimant for the impunity orders. The applicant has not in my view satisfied the court that the failure to attend was not due to negligence. Consequently, I hold that the applicant has not established a sufficient ground warranting setting aside of the impugned orders.

18. The foregoing notwithstanding, the court a duty to consider whether the claim granted is contested. I have indeed considered the several correspondences filed by both parties including computation and payment schedules which I must agree with the claimant that they all show that the amount granted is not and cannot be reasonably be in contention. There is no reasonable defence against the same and therefore the applicant will not suffer prejudice if the application is dismissed.

19. Having considered all the circumstances of the case, I find that the application by the respondent has no merits and consequently, I dismiss it with costs to the claimant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OCTOBER, 2021.

ONESMUS N MAKAU

JUDGE

ORDER

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 ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(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