REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2391 OF 2016

WILFRED WAFULA.....CLAIMANT

-VERSUS-

CREATIVE CONSOLIDATED SYSTEMS LIMITED.....RESPONDENT

RULING

The Claimant's application

1. The claimant through his notice of motion application dated 29th July 2021 seeks for the following orders: -

> **a. That this Honourable Court be pleased to review, vary and or set aside orders made on the 28th July 2021 by Honourable Justice Kebira Ocharo dismissing the Claimant's case.**
>
> **b. That this Honourable Court be pleased to reinstate the suit and set down the matter for hearing to be determined on merit.**
>
> **c. costs of the application be in the cause.**

2. The application is expressed to be anchored on the provisions of Article 159 of the constitution of Kenya, 2010, section 16 of the Employment and Labour Relations Court Act, 2011 section 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Order 12 rule 7 and Order 51 rule 1 of the Civil Procedure Rules, 2010, and the grounds obtaining on the face of the application and the supporting affidavit, sworn by counsel Patrick Waiganjo Wachira.

3. The application is opposed upon basis of the replying affidavit that was filed herein on the 13th September 2021.

4. The matter came up before this Court on the 28th July 2021 for hearing, when both parties were absent and without any reason given for the absence, the Court got constrained to dismiss the Claimant's claim for want of prosecution. It is the dismissal order that flowed from this that is the subject matter of the instant application.

5. In support of his application, the Claimant appreciates the fact that the claim was dismissed for non-attendance of Court when the matter was coming up for hearing. However, his failure and that of his Advocate to be in attendance of Court for the hearing was not deliberate but as a result of the latter's failure to diarise the matter in their diary. To fortify this, an extract of their diary (PK1) for the 28th July 2021, was produced.

6. The situation that led to the dismissal of the Claimant's /Applicant's claim was solely authored by counsel's mistake, mistake which should not be visited on his client, the Claimant/Applicant.

7. It was further stated that at all material times, the claimant has been and is desirous to prosecute his claim. That he Application herein has been brought timeously, without undue delay.

8. It was further contended in support of the instant application that the Respondent will stand to suffer no prejudice the notice of motion application herein is allowed.

The Respondent's response

9. The Respondent opposed the application through a replying affidavit sworn by Daniel Obwana, the Human Resource manager of the Respondent company.

10. The Respondent contended that, the matter is old, urging Court to consider that there has been undue delay in prosecution of the matter. The respondent takes a position that since counsel had express authority to act on behalf of the claimant, his actions and omissions bind the Claimant. That Order 17 (2) of the Civil Procedure Rules confers upon court the authority to dismiss a matter for the inaction of the Claimant.

11. The Respondent concludes that the Claimant's application is not made in good faith, and that it is wary that the Claimant will merely continue to hold the matter over its head for a long time to its discomfort and unease.

The Claimant's submissions

12. In the written submissions, counsel for the Claimant submitted that directions in this matter were taken on the 10th May 2021, when it was directed that the same could proceed as a formal proof. That on the 19th July 2021 a date namely 28th July 2021 was given by the Deputy Registrar for that purpose. Counsel by oversight did not capture this in his diary.

13. It was further submitted that the situation leading to the dismissal of the suit was wholly as a result of the Claimant's counsel's inadvertent mistake, and that counsel's mistake ought not be visited on a litigant. In this submissions counsel sought fortification in the decision in ***CMC Holdings Limited =vs= Nzioki (2004) 1 KLR 173***.

14. It was further submitted for the Claimant that Article 159 of the Constitution provides insistence on substantive hearing of matters. The case of ***Grace Wanjiku Ndungu =vs= Highlands Mineral Water Co. Ltd. (2016) eKLR*** where the Court stated;

> **"I recall the provisions of Article 159 (2) (e) of the Constitution which binds courts to protect and promote the principle of the Constitution and in this regard with respect to the inalienable right to a fair hearing and equality before the law,"** was cited.

15. Lastly that this Honourable Court should consider the conduct of the parties prior to the proceedings and orders that the Claimant seeks to set aside.

The Respondent's submissions

16. Counsel for the Respondent submitted that the rules of natural justice require that a party who has filed a matter should ensure that the same is prosecuted within a reasonable period without unreasonable delay. That this is what the overriding objectives put forth in the Civil Procedure Act, section 1B insists on.

17. Equity aids the vigilant, not the indolent, it was submitted. The Claimant in this matter has not been vigilant, the Court's discretion should not be extended in his favour.

18. Section 3 (1) of the Employment and Labour Relations Court Act, enshrines the principle objective of the Court, ensuring a just, expeditious, efficient and proportionate resolution of disputes. To allow the Claimant's application shall be an affront on this provision.

19. That section 17 (2) of the Civil Procedure Act, provides courts with authority to dismiss a matter where the owner thereof has not taken any steps towards having it heard within 2 years from the time it was filed. Counsel put reliance on ***Mwangi S. Kimenyi =vs= Attorney General and another, (2004) eKLR***.

20. It was further submitted that the matter has been in the corridors of justice for almost five years now. That the explanation given for non-prosecution of the matter for all this period should be found to be unsatisfactory.

21. Lastly, that the Respondent will suffer irreparable harm and/or injustice if the Applicant's application is granted. The delay by the Claimant in prosecuting the matter poses a risk to the Respondent in the nature of aggravated costs if the matter were to be determined in favour of the Claimant. Due passage to time, some personnel who, and documents which, the respondent may have wished to rely on in defending the claim may be lost.

Determination

22. The main issue here for determination is whether the Claimant/Applicant has established sufficient cause to warrant the orders sought.

23. The jurisdiction of this Court to review and set aside its orders or, judgments is unconstrained in ***Shah =vs= Mbogo and another (1967) E.A. 116*** the Court of Appeal of East Africa held that;

> **"This discretion to set aside proceedings or decisions is intended 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."**

24. An exercise of this discretion, is dependent on the peculiar circumstances of each case. It must be exercised judicially taking into account

all facts as in essence it is a matter of fairness to both sides. Among the facts usually relevant are, the degree of lateness in bringing up the application, the conduct of the parties prior to the proceedings and orders that are sought to be set aside; and the explanation for the failure to attend court.

25. The legal threshold to consider before exercising the discretion as sought by the Claimant/Applicant is whether he or she has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In **Wachira Karani =vs= Bildad Wachira [2016] eKLR** Mativo J. held that;

> **"Sufficient cause is thus for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and that the court has to exercise its discretion in 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 reason."**

26. The Supreme Court of India in ***Civil Appeal No. 1467 of 2011* – Parimal =vs= Veena Bhari [2011]** observed that:

> **"Sufficient cause meant that parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been not active diligently ……."**

27. The reason given by the Claimant for non-attendance of court on the hearing date is that his counsel by oversight did not diarise the matter, consequently the hearing date passing, without the counsel and/or the Claimant participating in the proceedings. The extract of the counsel's diary was exhibited, the matter herein was not one of those that were diarised. I am of the view that the Claimant has demonstrated a sufficient reason why his counsel and him failed to attend Court.

28. From the court record, it is clear that at various times, the Claimant undertook steps towards having the matter heard. The Claimant is clearly a party who has been at all material times keen to prosecute its matter, therefore.

29. The mistake of not diarising the matter is a mistake that is excusable and that was not of the Claimant's making but his counsel's. Counsel's mistakes ought not be visited on an innocent litigant.

30. Mistakes are bound to happen and shall continue to happen. It will not be for the interest of justice if every matter were to be dismissed or parties driven off the seat of justice because a mistake happened, without considering the circumstance under which the same occurred.

31. In ***CMC Holdings Limited =vs= Nzioka [2004] 1 KLR 173***, the Court held;

> **"In law, the discretion that a Court of law has, in deciding whether or not to set aside 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. It would ……. not be of proper use of such a 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 in our mind be wrong in principle …… In doing so, she drove the Applicant out of the seat of justice empty handed where it had what might have very well amounted to an excusable mistake visited upon the appellant by its Advocate."**

32. Considering the above premises, I am of the view that the claimant's application herein is merited. Consequently, it is allowed. Costs of the application shall be in the cause.

33. Orders accordingly.

READ, SIGNED AND DELIVERED THIS 5TH DAY OF NOVEMBER, 2021

OCHARO KEBIRA

JUDGE