



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. 38 OF 2019

NICHOLAS K. CHERUIYOT.....CLAIMANT

VERSUS

KENYA MIDLAND SACCO LIMITED.....RESPONDENT

RULING

1. The Application herein is the Claimant's Notice of Motion dated 1.10.2019. it is brought under Order 12 Rule 7 of the Civil Procedure Rules 2010 and section 3 A of the Civil Procedure Act and it seeks the following orders: -

(a) THAT this Honourable Court be pleased to reinstate the main suit and set down for hearing.

(b) THAT the Honourable court be pleased to reinstate the orders issued on 30.1.2020 pending the hearing and determination of the suit.

(c) THAT upon granting the above orders, the Honourable Court to transfer the suit to Kericho Chief Magistrate Court for hearing and determination.

(d) THAT costs of this application be in the cause.

2. The Application is premised on the grounds set out on the body of the motion and the Supporting Affidavits sworn by claimant on 6.3.2020 and by his counsel Mr. Rongers Mugumya on even date and on 20.7.2020. In brief, the Applicant's case is that, the suit was dismissed for non- attendance on 4.3.2020; that the failure to attend was not deliberate but due to matters beyond his control; that his counsel was arrested on the evening of 3.3.2020 from Bomet vide warrants of arrest issued by Nakuru Chief Magistrate Court in Criminal Case number 604 of 2020 and on 4.3.2020 he was paraded before the Nakuru court; that it is in the interest of justice that the application be allowed; and that the respondent will not suffer any prejudice if the application is allowed.

3. The Respondent opposed the application vide the Replying Affidavit Sworn on 14.7.2020 by its counsel Mr. Nelson Cheruiyot Kenduiwa. He deposed that on 30.1.2020, the suit was fixed for hearing on 4.3.2020 by the court; that the claimant's counsel was present when the said hearing date was fixed; that on 4.3.2020, he attended court for hearing but the claimant and his counsel did not attend and the suit was dismissed for non-attendance; that the claimant's counsel did not send any person to hold his brief; that no sufficient reason has been shown to warrant reinstatement of the suit; that it is trite law that litigation must come to an end; and that the application should be dismissed.

4. The application was canvassed by written submissions which I have carefully considered.

Applicant's Submissions

5. The Applicant filed submissions on the wide discretion of the court to set aside orders and cited several persuasive precedents including **Nairobi ELCC No. 27 of 2017 Gold Lida limited v NIC Bank Limited & another** and **Kakamega HCCC No. 6 of 2019 David Oscar Okwako v Chemelil Sugar Company Limited & 7 others**.

6. As regards the order for transfer of the suit to the lower court, he cited the Gazette Notice number 6024 of 2018 by which the Chief Justice appointed Magistrate of the rank of Senior Resident Magistrate and above to determine the employment relations dispute where the employee's gross monthly pay does not exceed Kshs. 80,000. He submitted that since the claimant's salary herein was Kshs. 17,519, the suit ought to be transferred to the lower court as prayed.

Issues for determination and analysis

7. I have carefully considered the material presented to me by both parties. It is a fact that the suit was by consent of the counsel for the two

parties fixed for hearing on 4.3.2020. It is also clear that 4.3.2020 the claimant and his counsel failed to attend for the hearing and the court dismissed the suit for non-attendance. The issues for determination are:

- a) *Whether the suit should be reinstated.*
- b) *Whether the order issued on 30.1.2020 should be reinstated.*
- c) *Whether the suit should be transferred to the lower court.*

Reinstatement

8. Rule 22 (2) of the ELRC Procedure Rules provides that: -

“Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good cause to be recorded.”

9. The ELRC Procedure Rules 2016 are silent on the court’s power to reinstate a suit after dismissal for non-attendance. Therefore, I will seek guidance from the Civil Procedure Rules. Order 51 Rule 15 of the Civil Procedure 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.”

10. It is trite law that the court has unfettered discretion to set aside its decisions, including a regular judgment or court order. In **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR**, where the 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]

11. Again in **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

“This discretion 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.”

12. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J appreciated that the threshold for setting aside a court order is prove of sufficient cause when he 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...”

13. Flowing from the foregoing Rule of procedure and the precedents, it is clear that for the court to exercise its wide discretion to set aside a default judgment or an order for dismissal of a suit for non-attendance, the applicant demonstrates to the court by affidavit evidence that-

- a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;
- b) The application for setting aside was made without unreasonable delay;
- c) The suit is meritorious and the applicant has not lost interest in prosecuting the same;
- d) The applicant stands to suffer more prejudice compared to the opposing party if the application is declined;
- e) The interest of justice demands that the application be allowed.

14. In this case the reason given for the claimant’s failure to attend court is that the Advocates was arrested on the eve of the hearing and transported from Bomet to Nakuru to face criminal charges. It has not been denied that the arrest took place on 3.3.2020 and that the counsel was arraigned before a Nakuru Magistrates court. In all fairness I would not in the circumstances treat the failure to attend the court by the counsel to be wilful or negligent. The counsel was arrested and kept in a lawful custody.

15. It is natural that during that period he was in police custody his priority must have been how to secure his freedom as opposed to work. Consequently, I find and hold that the failure by the claimant and his counsel to attend hearing of this suit on 4.3.2020 was not wilful or due to any act of negligence. I further hold that being held in lawful custody is good cause for a party not to attend court and the court ought to

exercise its discretion in favour of such party by reinstating a suit dismissed for non-attendance.

16. As to whether the application was filed without unreasonable delay, it is clear that the application was made only 2 days after the dismissal of the suit. Consequently, I find that there was no unreasonable delay.

17. As regards the issue of prejudice, I am satisfied that the respondent has not shown that it will suffer any prejudice that cannot be adequately remedied by costs if the application is allowed. However, it is obvious that dismissing the application will occasion more prejudice to the claimant because he will be permanently banished from the seat of justice. Consequently, I allow the request for reinstatement of the suit.

Transfer of the suit to the lower court.

18. The claimant contends that his gross monthly pay was Kshs.17519 and pursuant to the Gazette Notice No. 6024, by the Chief Justice issued in 2018, his suit ought to be transferred to the lower court as prayed. The respondent did not dispute the existence of the said Gazette notice. I therefore see no reason to decline the request for the transfer since the suit was filed during the transition period after the publication of the said Gazette Notice.

Reinstatement of the order issued on 30.1.2020

19. The court has not been told the status of the alleged attachment of the claimant's assets from 4.3.2020 when the said interlocutory orders lapsed after the dismissal of the suit. Consequently, I decline to reinstate, I grant the claimant leave to renew that request before the trial court if necessary.

20. In conclusion, I allow the application dated 6.3.2020 in the following terms:

- (a) The Orders made on 4.3.2020 dismissing the suit for non-attendance is hereby set aside and the suit reinstated as prayed.
- (b) The suit is hereby transferred to Kericho Chief Magistrate Court for hearing and determination.
- (c) The claimant to pay the respondent Kshs. 5,000 being throw-away costs before the hearing date.

DATED, SIGNED AND DELIVERED AT NAKURU HIS 4TH DAY OF NOVEMBER, 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 Rule28(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