



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO E332 OF 2020**

**MARK THEOPHIL ODERO ADOYO.....CLAIMANT**

**VERSUS**

**KCB GROUP PLC.....RESPONDENT**

**RULING**

1. By his Notice of Motion dated 14<sup>th</sup> June 2021, the Claimant asks the Court to set aside the order issued by **O.N Makau J** on 10<sup>th</sup> June 2021, allowing the Respondent's Notice of Motion dated 10<sup>th</sup> May 2021 *ex parte*, and to direct that the said application be heard afresh.
2. The Claimant further seeks leave to file his replying affidavit dated 8<sup>th</sup> June 2021 in opposition to the Claimant's application dated 10<sup>th</sup> May 2021.
3. The present Motion is supported by an affidavit sworn by the Claimant's Counsel, Jaoko Alexander and is based on the following grounds:
  - a) That the Claimant's Advocate on record attempted and struggled to log into the link for Court 3 on 10<sup>th</sup> June 2021, from 8.50 am to 10.40 am but failed, the system only displaying a message 'Bad Gate Way 504' with the result that the Respondent's application was heard *ex parte* and declared unopposed, a situation beyond the Claimant's Advocate's control;
  - b) That the Claimant's replying affidavit dated 8<sup>th</sup> June 2021, in opposition to the Respondent's application dated 10<sup>th</sup> May 2021, annexed to the supporting affidavit herein, raises triable issues which need to be placed before the Court for determination, among them that the cause of action arose on 11<sup>th</sup> September 2017 as can be seen from pages 164,165,166,171,172,174-179 of the Memorandum of Claim, read together with pages 48,50,55,56,57 and 58, which clearly demonstrate that the cause of action arose on 11<sup>th</sup> September 2017, when the Respondent failed to pay the Claimant those claims. As such, limitation would crystallise on 11<sup>th</sup> September 2022;
  - c) That a close perusal of pages 48-58 of the Memorandum of Claim, shows that the demand to pay those claims was made vide a letter dated 27<sup>th</sup> June 2017; the approval for payment having been confirmed but not effected. Similarly, pages 171 to 197 of the Memorandum of Claim, show that the parties attempted an internal dispute resolution mechanism but no payment was made as at 11<sup>th</sup> September 2017 and the Claimant subsequently filed a claim;
  - d) That this Court has unfettered jurisdiction to correct the mistake and allow hearing of the application *inter partes*;
  - e) That it is trite law and/or the practice that in exercising discretion, the Court's concern is to do justice between the parties and avoid hardships resulting from mistakes or inadvertence;
  - f) That mistakes, faults/lapses or dilatory conduct of Counsel or his office staff should not be visited on the Claimant; errors or faults of the Counsel or his office staff should not necessarily debar a litigant from enforcing his rights;
  - g) That the Claimant's case should at least see the light of day. Otherwise, he will suffer prejudice, noting that the prayers the Respondent sought to strike out alleging limitation of time are the key prayers sought by the Claimant in the claim;
  - h) That the door of justice should not be closed to the Claimant's claims against the Respondent because a mistake has been committed, which mistake was not committed by the Claimant directly or indirectly;
  - i) That no prejudice will be suffered by the Respondent if the application is heard on merit since they will still have a chance to argue

their case;

j) That it is in the best interest of justice to grant the prayers sought herein.

4. The Respondent's response to the Claimant's application is by way of a replying affidavit sworn by the its Head of Employment Relations and Wellness, Robley Ngoje on 24<sup>th</sup> September 2021.

5. Ngoje depones that the Claimant's Advocates were served with and acknowledge receipt of the Respondent's application and a hearing notice dated 18<sup>th</sup> May 2021.

6. Ngoje further depones that on 10<sup>th</sup> June 2021, when the Respondent's application came up for hearing, the Claimant's Counsel was not present; the Respondent's application was heard and orders granted as prayed.

7. Ngoje takes the view that before the Court granted the orders, it satisfied itself that the Claimant's Advocates had been served with the Respondent's application and duly notified of the hearing date. However, the Claimant neither filed a response nor attended the hearing on the scheduled date.

8. Regarding the averment by Counsel for the Claimant that he was unable to log into the Court's link, Ngoje states that the Claimant's Counsel has not demonstrated that he took any steps to mitigate the technical challenge. He notes that there was no communication to the Respondent's Advocates, the Court Assistant or the Court Registry on this challenge.

9. Ngoje further depones that the averment that the Claimant's Advocate was unable to log into the court session remains unsubstantiated.

10. Moreover, Ngoje states that the Claimant has not offered any explanation for the failure to file the replying affidavit before the date scheduled for hearing date of the application.

11. The application was urged by way of written submissions.

12. In the submissions filed on behalf of the Respondent, reference was made to the decision in ***Shah v Mbogo [1967] EA 116*** where it was held that the discretion of the Court to set aside an *ex parte* order is intended to be exercised so as to avoid injustice or hardship that may result from an accident, inadvertence or excusable mistake.

13. I have considered the reasons given by Counsel for the Claimant for failure to defend the application, which gave rise to the impugned order. To my mind, these are errors that may be made by an Advocate in the ordinary course of work and are therefore excusable.

14. I have further taken into account the effect of the subject order being, striking out some of the Claimant's prayers on account of limitation of time. Moreover, the Claimant's replying affidavit dated 8<sup>th</sup> June 2021 which is attached to this application, raises triable issues which ought to be fully ventilated.

15. In the circumstances, the Claimant's application dated 14<sup>th</sup> June 2021 is allowed, the order issued on 10<sup>th</sup> June 2021 is set aside and the Claimant's replying affidavit dated 8<sup>th</sup> June 2021 is admitted. The result is that the Respondent's application dated 10<sup>th</sup> May 2021 will be heard *inter partes*.

16. The costs of this application will be in the cause.

17. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2021**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Jaoko for the Claimant

Miss Aremo h/b Mr. Wetangula for the Respondent