REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 19 OF 2019

ELOSY MURUGI NYAGA...CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.................1ST RESPONDENT

THARAKA NITHI PUBLIC SERVICE BOARD.............2ND RESPONDENT

RULING

1. The Claimant/Applicant's notice of motion application dated 4th November 2019 seeks to have the order of the Court made on 4th October 2019 dismissing the Applicant's suit for non-attendance of the Claimant and her Advocates be reviewed varied and/or set aside. The notice of motion application brought under a certificate of urgency sought the following orders:-

a. Spent

b. The order of this honourable court made on 4.10.2019 dismissing the suit for non-attendance by the Claimant and her advocates be reviewed, varied and/or set aside.

c. The main suit filed herein on 12.9.2017 be reinstated.

d. The costs of the application be provided for.

The application was supported by the Claimant Elosy Murugi Nyaga who deponed that the suit was set down for hearing on 26th June 2019 but on application by counsel for both parties was adjourned to 2nd October 2019. The Claimant deponed that the court did not sit on 2nd October 2019 and that the matter thus did not proceed to hearing as scheduled. The Claimant deponed that neither she nor her advocate attended the hearing of the suit on 4th October 2019 when the matter was dismissed for non-attendance. The Claimant deponed that the fact of the dismissal of the suit was only brought to her attention on 31st October 2019 by the advocates now on record for her. The Claimant deponed that she was keen on prosecuting the matter and had brought the application without undue delay. The Claimant urged that in the interest of justice, fairness and equity that the orders of 4.10.2019 be reviewed, varied and/or set aside and the suit herein be reinstated for hearing and determination on merit.

2. The Respondents were opposed and filed grounds of opposition on 13th November 2019 in which the said Respondents asserted that discretion to set aside a judgment/order is never exercised in favour of a person, like the Applicant, who has sought, by evasion and other ways to block the course of justice. The Respondents assert that the onus to prove lies on he who alleges and that the Applicant has averred to matters which are not within her knowledge and which matters should be averred to by the previous advocates on record as provided for under Order 19 of the Civil Procedure Rules. The Respondents assert that the Claimant/Applicant had failed to annex a copy of the order sought to be reviewed as mandated by both Rule 33(3) of the Employment & Labour Relations Court (Procedure) Rules and Order 9 Rule 9 of the Civil Procedure Rules. The Respondents assert that reinstatement of the suit will prejudice them as the Claimant had failed to prosecute her suit since it was filed before this court. The Respondents sought the dismissal of the motion as the same contravenes the Respondents right for a fair trial under Article 50 of the Constitution.

3. The Claimant's motion was argued through written submissions and in her submissions the Claimant/Applicant submitted that the issues that arise for determination are:

i. Whether the Applicant has evaded the course of justice and therefore unworthy of a favourable exercise of the Court's discretion in setting aside the dismissal order;

ii. Whether the Applicant averred to matters not within her knowledge;

iii. Whether the Application dated 4.11.19 is fatally defective for not complying with Rule 33(3) of the Employment & Labour Relations Court (Procedure) Rules and Order 9 Rule 9 of the Civil Procedure Rules, 2010.

iv. Whether the pendency of this suit is prejudicial of the Respondents and a denial of their right to a fair hearing under Article 50 of the Constitution.

The Claimant/Applicant submitted that the exercise of judicial discretion in setting aside *ex parte* orders is to be exercised judiciously and not spitefully. She submitted that failure to attend court on 4.10.2019 when the matter was coming for hearing was due to her former advocates mistake in failing to notify her, should it turn out that her advocate was properly notified of the date. The Claimant cited the case of **Edney Adaka Ismail *v* Equity Bank [2014] eKLR** which cited with approval the case of **CMC Holdings Limited *v* Nzioki [2004] 1 KLR 173** which stated as follows:-

"*That discretion must be exercised upon reasons and must be exercised judiciously...... 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 amongst others an excusable mistake or error. It would not be proper use of such 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 wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate.*"

The Claimant submitted that she was vigilant and not indolent contrary to the assertions of the Respondent. The Claimant submitted that in the case of **Edney Adaka Ismail *v* Equity Bank** (*supra*) where the suit had been dismissed for non-attendance it was reinstated for the plaintiff who had been diligent in following up the matter. The Claimant submitted that the court observed

It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter. From the Plaintiff's Supporting Affidavit of 6th May, 2013, it is clear that the Plaintiff was keen on his case as he followed up on the dates of the hearing of the application, a fact that has not been disputed by the Defendant.

The Claimant submitted that the application did not breach any mandatory statutory requirements in filing the notice of change since no judgment of the court had been passed. She submitted that the dismissal of a case for non-attendance does not amount to a judgment. The case of **Cosmas Mrombo Moka *v* Co-operative Bank of Kenya Limited & Another [2018] eKLR** was cited in support of the argument that the dismissal was not a judgment as contemplated in the Rules. She submitted that the real issues in the suit are yet to be determined on merit with any sense of finality. She submitted that she deponed to matters within her knowledge in her affidavit in support in line with Order 19 of the Civil Procedure Rules 2010. The Claimant submitted that the Respondent would have an equal chance to respond to claims raised in the main suit and there being equality of arms for either party the Respondent cannot be heard to complain that pendency of the suit would be prejudicial to the Respondent's right to a fair trial. She cited the case of **Karen Blixen Camp Limited *v* Kenya Hotels and Allied Workers Union [2018] eKLR** where the Court of Appeal held

The appellant pleads prejudice if the matter proceeds in court but we cannot see how this can arise. There is equality of arms as both parties have filed their pleadings and will be afforded an opportunity to present their cases by calling witnesses whose evidence will be tested in cross examination and a judicial decision with some finality will ensue. At all events, as correctly held by the trial court, the court is at liberty at all times, in appropriate cases, to stay its proceedings and refer parties to explore any ADR, including the conciliation suggested under Part 8 of LRA.

The Claimant submitted that to disallow the motion and deny the Applicant an opportunity to have the suit herein heard and determined on merit will amount to a denial of the Applicant's right to access justice under Article 48 of the Constitution as well as her unfettered and unqualified right to a fair hearing under Article 50 as read together with Article 25(c) of the Constitution. The Claimant urged the court to find the application meritorious and allow it and permit the suit herein to be heard and determined on merit.

4. The Respondent submitted that the discretion to set aside is never exercised in favour of someone who deliberately by evasion or otherwise seeks to block the course of justice. The Respondent submitted that guided by the decision in **Shah *v* Mbogo [1968] EA 93** and **Pithon Maina *v* Mugiria [1982-1988] 1 KAR 177** and this court's decisions in **John Kabira Kioni *v* George Namasaka Sichangi t/a Sichangi & Co. Advocates [2019] eKLR** and **Franklin J. B. Chabari *v* Tharaka Nithi County Government & Another [2019] eKLR** the factors to consider are:

3. The motion seeking the setting aside of the order dismissing the suit was made timeously meaning there was no delay. In the case of Mbogo & Another v Shah [1968] EA 93 and Pithon Waweru Maina v Thuku Mugiria [1983] KLR 78, the law on setting aside of ex parte judgment or order was considered in great detail. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in default of either party to attend the hearing are:

i. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

ii. Secondly, this discretion 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 the person who has deliberately sought, whether by evasion or otherwise, to

obstruct or delay the course of justice.

iii. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically

4. The Claimant/Applicant asserts accident, inadvertence and excusable mistake or error. The Claimant is an advocate of the High Court of Kenya and practices before this court. He knows that the court sets time for cases and hears them at the appointed time without deviation. His advocate also practices in this court and he too is aware of the same. They both were absent when the matter was called leading to the dismissal of the suit. Was this a mistake or error that is excusable? I think not. Discretion to be exercised in setting aside is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. The failure to attend by the 2 advocates is a deliberate delay of the course of justice. In the final result the motion is dismissed with costs to the Respondent.

The Respondent submitted that the onus of proof lay on the Claimant to show that the facts are as deponed. Since there was no affidavit from M/s Warutere & Associates Advocates confirming the deposition by the Claimant these remain unproved facts as they are not supported by any proof of communication between the Claimant and her former counsel. The Respondent cited the case of **Bilha Ngonyo Isaac *v* Kembu Farm & Another [2018] eKLR** where it was held

16. As a whole, I am not satisfied that the trial court misdirected itself in the exercise of its discretion. To the contrary, I find that the decision to disallow the application for reinstatement of the suit was well thought out and reasons for the decision stated therein, those that were placed before the court on the material date. There would be no misjustice to a party who for three consecutive times would fail to attend court for hearing of her case, and no satisfactory reasons are given when the court fails to hear him out, then states that she is prejudiced by an order of dismissal. In the circumstances, it is the respondents who were prejudiced by the appellant's failures to prosecute the case without unreasonable delay.

17. Pendency of a case in court when it is obvious that the plaintiff is not interested to prosecute it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. In the process, the court becomes the punching bag, leading to lose of confidence with the judicial system due to delays in fanalising cases, when in effect and in most of the cases, it is the parties, mostly the plaintiffs, who would take the earliest opportunity to delay finalization by requesting for unnecessary adjournments without clear and convincing reasons. A court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts.

18. I am minded that dismissal of cases upon summary procedure may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures - Kenya Power & Lightning Co. Ltd -vs- Alliance Media Kenya Ltd (2014) e KLR.

The Respondent submitted that the Court should not exercise its discretion in favour of an applicant who failed to attend court for the hearing of his case and gives no satisfactory reasons for the non-attendance then states that he is prejudiced by the dismissal order. The Respondent asserts that the Claimant did not comply with Order 9 Rule 6 of the Civil Procedure Rules 2010 as there was no application or consent was entered into between the former and current advocates. The Respondent cited the cases of **Njue Njagi *v* Ephantus Njiru & Anor. [2016] eKLR** and **Stephen Mwangi Kimote *v* Murata Sacco Society [2018] eKLR** and argued that the dismissal of a suit for non-attendance amounts to a judgment in that suit. It cited the decision in the Court of Appeal in **Njue Njagi *v* Ephantus Njiru & Anor.** (*supra*) thus

Another issue may arise as to whether a dismissal of a suit for non attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR. stating:

"Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The Civil Procedure Act does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:

"Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."

Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8." [Emphasis added]

The Respondent submitted that the suit is not meritorious and ought not be reinstated as the Respondent is prejudiced by the continued pendency of the suit which the Claimant had refused to prosecute since she filed it. The Respondent submitted that the application was a contravention of the Respondent's rights under Article 50 to a fair trial. It submitted that justice cuts both ways and the Respondent should also have a right to speedy resolution of the dispute pending before the court and there should be an end to litigation.

5. In brief counsel for the Claimant/Applicant and the Claimant herself assert that there was no notification of the date change made by the court to the hearing on 2nd October 2019 for hearing on 4th October 2019 as the court was not sitting on the scheduled hearing date. The Respondents contest the motion and asserts there was no basis for the same as the Respondents were duly notified of the change in dates. The Claimant failed to show what she did on 2nd October 2019 when the case was scheduled for hearing. When she came to court what did she do? Did she go to the Registry to enquire as to why the Court was not sitting? Did she seek to ascertain whether the matter had another date? All these questions remain unanswered and lead to the inevitable conclusion that the Claimant is being economical with the truth. If there was a falling out with her advocate, where is proof? What is there to show she made efforts to ascertain the status of her case? None is availed and it is clear the blame she is trying to place on her former advocates is meant to hoodwink the court that she was a diligent litigant keen to have her matter heard and determined while in fact she is the epitome of indolence. In the circumstances of this case, it is the Respondents who were prejudiced by the Applicant's failure to prosecute the case without unreasonable delay. Pendency of a case in court when it is obvious that the Claimant is not interested to prosecute it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. I am mindful of the fact that dismissal of cases in summary procedure such as done here may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures. The motion before me is devoid of merit and is accordingly dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered at Meru this 29th day of January 2020

Nzioki wa Makau

JUDGE