



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1001 OF 2013

DAVINDER UBHI.....CLAIMANT

VERSUS

ATHI STORES.....RESPONDENT

RULING

1. The application before me is the claimant's Notice of Motion dated 18.10.2018 brought under Order 51 Rule 1, Order 12 Rule 7, section 1A,1B and 3A of the Civil Procedure Act. It seeks the following orders.

- a. That the dismissal of the case and orders dated 18th October 2018 be set aside.
- b. That the claimant's/applicant's suit be reinstated and the claimant/applicant be allowed to take part in the proceedings.
- c. That costs of the application be provided for.

2. The application is supported by the claimant's advocate's affidavit sworn on 18.10.2018 and Mr. Ngari Nthumbi on 18.10.2018. It is premised on the grounds set out on the body of the motion.

3. The application is opposed by the respondent who has filed grounds of opposition that the application is bad in law and lacks proof of the allegations raised therein. On 1.10.2019 the parties agreed to dispose of the application by written submission. The claimant filed his submission but the respondent did not.

Applicant's case

4. The Claimant contended that on 24.7.2018 his counsel attended court and fixed the suit for hearing on 18.10.2018. Thereafter his counsel served the respondent with a hearing notice but the same was received under protest on ground that the defence counsel had other matters fixed for hearing on the same date before other courts.

5. The claimant further contended that on the 18.10.2018, she never travelled from Mombasa because she anticipated an adjournment and as such she instructed her clerk by phone to attend court and take another date. Unfortunately, the clerk arrived at the court at 9.35 and found that the suit had already been called and dismissed. The claimant prayed that the application be granted because the failure to attend court was due to his fault.

6. The issue for determination is whether the application has merits to warrant the discretion of this court in favour of the applicant.

7. It is evident from the record that the claimant attended court ready to prosecute his suit on 29.10.2014 and 9.6.2016 but the suit was adjourned at the instance of the respondent, and the court respectively. On 27.7.2017, the claimant was not ready to proceed because he failed to serve hearing notice on the defence. On 24.7.2018, the court invited the parties to fix a hearing date and although the defence counsel never attended, the court fixed the matter for hearing on 18.10.2018. The claimant served Hearing Notice on 2.10.2018 but the respondent received it under protest because the counsel had 3 other matters fixed for hearing on the same day before the High Court and Environment and Land Court. On 18.10.2018 the respondent sent a counsel, who sought adjournment on ground that his client was out of the country. However, the court observed that the matter was fairly old and dismissed it for want of prosecution.

8. The Claimant's counsel deposed that the claimant was still interested in prosecuting his case and blamed the dismissal of the suit to human error solely on her part and to the exclusion of the claimant.

9. Order 12 rule 7 donates jurisdiction to the court to set aside or vary its order made for non-attendance by a party during the hearing, upon terms that are just. The discretion to set aside or vary the order is now fettered according to **Mbogoh v Shah [1967]EA 116** where the court

held that:

“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.”

10. Considering the uncontested facts of this case as set out in the applicant’s supporting affidavits and the court record above, I find that the claimant did not fail to attend the court deliberately with the aim of obstructing or delaying the course of justice. The reason for the claimant not being able to prosecute his case on 18.10.2018 just as in the previous two occasions highlighted above was due to the defence not being ready to proceed or due to courts own motion.

11. The court exists to do justice to both parties and in this case, justice dictates that I exercise discretion in favour of the claimant. The respondent did not dispute the claimants factual account as set out in the affidavits in support of the motion and she never filed any written submission to oppose the application. I therefore deem the application as not seriously opposed and proceed to allow it as prayed. Costs in the cause.

Dated, signed and delivered in open court at Nairobi this 21st day of February, 2020.

ONESMUS N. MAKAU

JUDGE