REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1178 OF 2015

BENJAMIN MWEA MWANTHI.....CLAIMANT

-VERSUS-

EAST AFRICA SPECTRE LIMITED.....RESPONDENT

RULING

Introduction

1. The application before me is the Claimant's Notice of Motion dated 2.7.2019 brought under section 1A, 1B and 3A of the Civil Procedure Act, Rule 26(2) of the Employment and Labour Relation Court (Procedure) Rules Article 159 of the Constitution. It seeks the following orders: -

(a) **THAT** the respondent's case be reopened and the respondent's witness recalled for cross-examination on the evidence on record.

(b) **THAT** the costs of this Application be in the cause.

2. The application is supported by the Affidavit sworn by the claimant's counsel Mr. Daniel Mukeli on 2.7.2019 and is premised on the grounds set out on the body of the motion. In brief, the claimant appreciated that the suit was fixed for defence hearing on 2.7.2019 by consent but his counsel failed to diarise the date through inadvertent mistake. He further contended that he failed to attend court on the said date because his counsel advised him not to attend for reason that he had testified and closed his case. He further contended that the failure to attend the hearing of the defence case was not intentional but due to his counsel's inadvertent mistake which should not be visited on him. He contended that the application herein was brought without any delay and that no prejudice will be occasioned to the respondent if the application is allowed. He prayed for the orders sought because it is in the interest of justice that the application be allowed.

3. The respondent opposed the application by the Replying affidavit sworn by her General Manager Mr. Hudson Chitala on 15.10.2019. In summary the respondent contended that the application lacks merits because the claimant's counsel admitted that the hearing date was fixed by the court in his presence. She further contended that the claimant has not given reasonable explanation why he and his counsel failed to attend the hearing on 2.7.2019. She further contended that the claimant's counsel acted in breach of the court's overriding objective of expeditious disposal of suits as envisaged under section 3 of the Employment and Labour Relations Court Act and Article 159 of the Constitution. She also contended that the claimant was accorded the right to cross examine her witnesses but he failed to attend court. He therefore prayed for the application to be dismissed with costs.

4. On 17.10.2019, the court directed the parties to dispose of the application by written submissions but only the applicant filed his submissions while the respondent opted to rely on her Replying Affidavit and the filed list of Authorities filed.

5. The applicant submitted that it is necessary for him to cross examine the respondent's witness in order to bring out all the relevant issues to help the court reach a just decision. He further argued that the respondent will not suffer any prejudice if the hearing is reopened. He argued that the court has unfettered discretion to reopen the defence case and recall the respondent's witness for cross examination provided the discretion is exercised judiciously and without exposing the opposite party to prejudice.

6. He argued that his right to cross examine the respondent's witness should not be denied due to his Advocates mistake/error. He relied on Article 159(2) (d) of the constitution to urge that justice should be administered without undue regard to procedural technicalities. He further relied on section 26(2) of the ELEC Act which allows the court to reopen a hearing for sufficient reason if it considers it fit to do so. He also relied on section 146(4) of the Evidence Act and Order 18 Rule 10 of the Civil Procedure Rules which allow the court to recall any witness who has been examined for further examination or cross examination. Finally he referred to several authorities to fortify his submissions which support the view that the court has wide discretion to reopen hearing in accordance with sound and reasonable judicial principles.

7. The issue for determination herein is whether the applicant has met the legal threshold for the court to exercise discretion in granting the

orders sought.

Analysis and determination

8. The discretion of the court to review and set aside its own exparte orders is wide and unfettered provided that the aim is to do justice. The guiding principles for setting aside *ex parte* judgment (read orders) were set out in ***Shah vs Mbogo and Another [1966] EA 166*** where the court held that: -

> ***"I have carefully considered the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."***

9. In this case the failure to attend court was due to the failure by the claimant's counsel to note the hearing date in his diary. It has not been shown that the said failure to diarize the hearing date was deliberate and intended to obstruct or delay the course of justice. Applying the principles set out in the above precedent, I find that the failure by the applicant to attend court was not deliberate but due to a genuine mistake on the part of the counsel.

10. In addition, the respondent has not demonstrated that she will suffer prejudice which cannot be remedied by an award of costs. The application was brought on 9.7.2019, one week after the impugned orders which was not after unreasonable delay. In my view, the court should as a matter of course be inclined to excuse a genuine mistake by counsel for the ends of justice, if the application is made without unreasonable delay and that costs can remedy any prejudice occasioned to the opposite party by allowing the application.

11. In **Philp Chemwolo & Another v Augustine Kubede [1986] e KLR** the Court of Appeal held that: -

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for purpose of deciding the rights of the parties and not the purpose of imposing discipline."***

12. Having put into consideration the facts of this case, the provisions of the law cited and the said precedents, I find and hold that the applicant has demonstrated a good cause warranting the exercise the court's discretion in his favour in order to accord the parties a fair trial.

Conclusion

13. I have found that the applicant has demonstrated that the failure to attend the hearing on 2.7.2019 was not deliberate but due to a genuine mistake of his counsel. I have also found that the filing of the application was made without inordinate delay and the respondent will not suffer prejudice that cannot be compensated by cost. Consequently, I allow the application in the following terms: -

(a) The defence case is reopened and the respondent's witness recalled for cross examination.

(b) Applicant shall pay the respondent throw away costs of Kshs. 5,000 before cross examining the respondent's witness.

Dated, Signed and Delivered in Open Court at Nairobi this 6th day of March, 2020.

ONESMUS N. MAKAU

JUDGE