



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 39 OF 2018

CONSTANTINE KANEKE CHERONYE.....CLAIMANT

VERSUS

H. YOUNG COMPANY (EA) LIMITED.....RESPONDENT

RULING

1. The Claimant's notice of motion application dated 26<sup>th</sup> September 2019 seeks to set aside the court orders of 27<sup>th</sup> June 2019 when the suit was dismissed for non-attendance. The Claimant asserts that the advocate appeared and that there was court adjournment fees to be paid. It is argued by the Claimant's advocate Mr. Ngugi that he requested for the file and found it could not be traced. The Claimant's prayer in the motion was that the mistake of counsel should not be visited on the client. It was asserted that the Claimant himself attended the court and that it showed he was willing and is interested in pursuing the matter. The Claimant's counsel argues that the claim has a high chance of success and there is likelihood of suffering irreparable harm if the motion is not granted and suit reinstated. The Claimant argued that the Respondent would not suffer any prejudice if the motion is allowed.

2. The Respondent was opposed and filed a replying affidavit sworn by Veronica Njoki a legal officer in the Respondent. It was the Respondent's position that the case was cause listed for hearing on 27<sup>th</sup> June 2019 and the Claimant and his advocate were present at call over and confirmed they were ready to proceed. The case was slotted for hearing but the Claimant and his advocate were not present at the time allocated for the hearing. It was argued at the hearing of the application by counsel for the Respondent Mr. Onsare that the case was allocated a hearing time of 11.00am and at the time it was scheduled for hearing the Claimant who was present in the morning was absent as was his lawyer. He stated that he is the one who applied for the dismissal of the suit for non-attendance and that the court proceeded to dismiss the suit. He prayed that the motion to reinstate the suit be dismissed with costs.

3. It is not disputed that the case was cause listed for hearing on 27<sup>th</sup> June 2019 and the Claimant and his advocate were absent at call over. The Respondent through its advocate indicated readiness to proceed with the hearing and in the absence of the Claimant sought the dismissal of the suit. The case was therefore dismissed for non-attendance. The power to set aside is discretionary. As held in the case of **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**

“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

Similarly the case of **Shah v Mbogo [1967] EA 166**, held that

“this discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

4. The setting aside that is sought is on the same footing as that considered in the two cases cited as the orders that issued. The last time the matter was scheduled for hearing the Claimant sought and obtained an adjournment to ostensibly file documents. The Claimant was ordered to pay costs of Kshs. 1,000/- for the adjournment occasioned by his application to defer the hearing. The court order was that there would be no further adjournment. Curiously, to date, the adjournment fees ordered to be paid have not been paid. Come June 2019 on the date the case was scheduled for hearing, the Claimant was absent and so was his lawyer. The case was scheduled for hearing on the material date and it is not feasible to have the file at the Registry on the date of hearing. It is disingenuous for counsel for Claimant to assert that he was looking for the file at the Registry and the file could not be traced. When matters are listed the logical place to look for a file during the date in question is the court where the matter is listed. It is only in those rare occasions that a file is missing that parties may be referred to the Registry to trace it. As this was not the case, the Claimant's motion is hopelessly devoid of merit and is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Meru this 5<sup>th</sup> day of March 2020**

**Nzioki wa Makau**

JUDGE