REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 626 OF 2019

SAMUEL GACHEHA CHEGE.....CLAIMANT

-VERSUS-

KENYA WOMEN MICROFINANCE BANK PLC.....RESPONDENT

RULING

Introduction

1. The application before me is the Respondent's Notice of Motion dated 22.10.2019. It is brought under section 17 of the ELRC Procedure Rules, Judicature Act and Article 159(2) (d) of the Constitution and it seeks the following orders: -

(a) **THAT** this Honourable Court be pleased to certify the application as urgent.

(b) **THAT** this Honourable Court be pleased to grant a stay of the execution of the orders of 15.10.2019 pending inter-partes hearing in the application dated 19.9.2019.

(c) **THAT** this Honourable Court be pleased to set aside the orders made on the 15.10.2019 and allow the respondent to participate in the inter-partes hearing of the application dated 19.9.2019 and the main suit.

(d) **THAT** this Honourable Court be pleased to deem the documents filed by the respondent on 18.10.2019 as properly on record.

(e) **THAT** the costs of this Application be provided for.

2. The application is supported by the Affidavit sworn by the respondent's General Manager, Ms Carolyne Wanjiku Mwangi on 22.10.2019. In brief, she deposed that the reason for not attending court for hearing on 15.10.2019 was not wilful neglect but due to inadvertent mistake on the part of the respondent's counsel when he diarised the hearing date as 25.10.2019. He further contended that an error on the part of the counsel should not be visited on the innocent litigant.

3. She further contended that unless the orders sought are granted, the respondent will be greatly prejudiced because the impugned orders are final in nature, and as such she will have been condemned unheard. She further contended that the failure to file the said documents in time was also not deliberate but due to reasons beyond the instructing officers.

4. Finally, she contended that the memorandum of response and the replying affidavit discloses reasonable and arguable defence which brings out certain facts which have not been disclosed in the claimant's pleadings. She therefore prayed that the application be allowed in the interest of justice.

5. The application is opposed by the claimant on grounds that the respondent's counsel did not reach out to him to seek indulgence for filing of pleadings; that no extract from the respondent diary was annexed to the application as an exhibited to prove the alleged wrong diarizing; that the he is entitled to the repayment of the mortgage at the preferential rates; that the impugned orders were not final in nature; that the respondent has not rebutted that he has the right to service his mortgage at the preferential rates; and finally, the release of the kshs.1,032,626.84 pending trial will not prejudice the respondent.

6. In her submissions, the applicant reiterated that the failure to attend and file the necessary responses to the suit and the application dated 19.9.2019 was not deliberate but a genuine mistake of counsel which should not be visited on her. She relied on **Bank of Africa Limited v Put Sarajevo General Engineering Co. ltd & 2 others [2018] e KLR** where the court held that the reason for non- attendance was genuine and not due to indolence.

7. On the other hand, the claimant submitted that the applicant has not demonstrated any excusable mistake or compelling reason to warrant the court to exercise the discretion sought in the instant application. He urged that the discretion of the court to review and set aside its orders is wide and unfettered but contended that it should not be exercised to assist anyone to delay the course of justice. In his view, delay defaults equity because equity aid the vigilant and not the indolent. To emphasize the forgoing submission, he relied **Joseph Nguje Waweru v Joel Wilfred Ndiga [1983] e KLR**

Analysis and determination

8. 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.

9. It is trite that 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 principle 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 exparte. 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 erosion or otherwise to obstruct or delay the course of justice."***

10. I **Joseph Nguje Waweru v Joel Wilfred Ndiga [1983] e KLR** the Court of Appeal held that: -

> ***"1. The court has an unfettered discretion to do justice between the parties.***
>
> ***2. … to avoid hardship or injustice arising from inadventure or mistake even though negligent, but the discretion should not be exercised to assist anyone to delay the course of justice."***

11. Applying the principles set out in the foregoing precedents to the facts of this case, I find that the failure by the respondent to attend court was not deliberate but a genuine mistake on the part of the counsel when he wrongfully diarized the hearing date as 25.10.2019 as oppose to 15.10.2019. It has not been shown that the applicant and her counsel knew of the date and deliberately failed to attend the hearing in order to delay the course of justice.

12. On the other hand, I have perused the responses to the motion dated 19.9.2019 and the main Claim and found that they disclose a reasonable defence that raises triable issues. It is trite that where there is a draft defence on record, the court ought to consider it alongside the issue of inadventure or mistake by counsel. Consequently, I find that this this a good case to exercise discretion in favour of the applicant in order to accord the parties a fair trial.

13. The court has been showed that granting the orders sought will occasion prejudice to the claimant which cannot be compensated by way of costs. I therefore agree with the claimant that he should be paid throwaway costs for the inconveniences caused by the respondent's application.

Conclusion

14. I have found that the applicant has demonstrated that the failure to attend the hearing on 15.10.2019 was not deliberate but due to a genuine mistake. Consequently, I allow the application in the following terms:-

(a) **THAT** the orders made on the 15.10.2019 be and are hereby set aside and the respondent allowed to participate inthe inter-partes hearing of the application dated 19.9.2019 and the main suit.

(b) **THAT** the documents filed by the respondent on 18.10.2019 be and are hereby deemed as properly on record.

(c) **THAT** the Applicant is condemned to pay the claimant throw away costs of Kshs. 15,000 within 14 days from.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N MAKAU

JUDGE