



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 103 OF 2017

ABRAHAM KARUMI GICHUKI.....CLAIMANT

VERSUS

MASTERMIND TOBACCO (K) LIMITED.....RESPONDENT

RULING

1. Before me is the Respondent's notice of motion dated 17th September 2020. In it, the Respondent seeks to arrest the judgment in the current suit slated for 24th September 2020 pending the hearing and determination of the suit herein. It also seeks that the Court recalls the Claimant's witness(es) for cross-examination by the Respondent/Applicant with corresponding leave to the Claimant to reexamine the recalled witnesses. The Respondent/Applicant urged the Court to allow it to call its witnesses, to wit, Mr. Kenneth Kinoti Magiri and Mr. Daniel Mutua Mutisia for examination by the parties herein. The grounds for the motion are:-

1. That on the 28th day of July 2020 Mr. Mathews Okoth the Respondent's/Applicant's advocate who has always had a personal conduct of this matter started experiencing fever, dry cough, general fatigue, chest pain and shortness of breath and the said advocate immediately sought medication at the Mater Misericordiae Hospital South B branch.
2. That due to the ongoing pandemic, the Hospital conducted tests on the said advocate and 24 hours later returned that the advocate tested positive for Covid-19.
3. That in line with the Ministry of Health Guidelines the Advocate was placed on mandatory quarantine under home based care initially for a period of 14 days from 29th July 2020 to 12th August 2020.
4. That a repeat test **was done** on 12th August 2020 and the advocate directed to undergo mandatory quarantine for a further 14 days to 26th August 2020 when he tested negative.
5. That out of abundant caution the advocate did not resume work for a further 14 days to avoid placing the clients and other office staff on harm's way.
6. That it was not until 14th September 2020 when the advocate resumed work and two days later on the 16th September 2020 was confronted with a judgement notice in this suit slated for 24th September 2020.
7. That the circumstances under which the Applicant's advocates failed to attend Court for the hearing on 30th July 2020 were beyond his control and in compliance with government directive on mandatory quarantine for those who test positive for Covid-19.
8. That the Applicant risks being condemned unheard in this suit despite having fully complied with Order 11 requirements and pre-trial directions.

The Respondent/Applicant thus sought the orders as prayed. Mr. Migele who urged the motion on behalf of the counsel on record argued that the Respondent/Applicant has always been ready to proceed and had filed statements of witnesses whom it intended to call. He submitted that they would wish to have the substantive hearing in the matter for the evidence of the Respondent's witnesses to be taken. He cited the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** where the Court of Appeal held that

We agree with those noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or

error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.

He further submitted that the Court should swing the pendulum towards addressing substantive justice. He cited the case of **M Merama Nyangombe v Chacha Mwita, Court of Appeal, Civil Appeal No 79 of 1983 Kisumu** (unreported) and stated that the point is that the Court should consider if there is a defence on the merits and secondly if there is prejudice to be suffered by the other party. He respectively submitted that the circumstances were beyond the control of counsel for the Respondent/Applicant as they touch on his health. He thus prayed that the Court grants the prayers sought.

2. The Claimant was opposed and filed grounds in which he stated that the Application is premature as Judgement is yet to be delivered; the Application is not founded in law and thus cannot hold water; the Application is brought partially under the Civil Procedure Act and Civil Procedure Rules which have no status in this Honourable Court; the Applicant was duly served with all notices pertaining the disposition of this matter; the Application lacks merit; and that it is therefore in the interest of justice that this Application be dismissed. The Claimant reiterated these points in the submissions made orally on 23rd September 2020 when the motion was urged adding that the Counsel for the Respondent/Applicant had not demonstrated by way of attaching any medical notes, hospital receipts or medical report to prove sickness. In support of the contention that the motion was premature the Claimant cited the case of **Mary Igoki Muruaruchiu v Johnson Rwiggi [2019] eKLR** where Kemei J. stated that

It is to be noted that the Court has not delivered any judgement in this case and therefore there is no judgment to be arrested. In the end this application is not merited and the same is dismissed.

3. The Respondent/Applicant's advocate in a brief reprise submitted that the issue raised on the conduct of the Respondent was inapt as the conduct of the Claimant was the one who had sought at one time to reinstate the suit that had been dismissed for failure to prosecute the same.

4. The motion is one whose provenance is tenuous at best. Counsel for the Respondent/Applicant is stated to have suffered a bout of Covid and was as a result quarantined in line with the Ministry of Health (MOH) guidelines on Covid-19. He is stated to have tested positive for the novel coronavirus on or around 28th July 2020. The case as record bears out was scheduled for 30th July 2020. Whereas that is the assertion on his affidavit and the grounds advanced in support of the motion, there is no treatment record or other evidence attached from Mater Misericordiae Hospital South B branch to show indeed he suffered from Covid at the time the matter was scheduled for hearing. The application was not made in July or even August 2020 but was made on 10th September 2020. This is despite the fact that the case was being handled by an advocate who practices not solo but in partnership. It is not lost on the Court that in setting aside its orders, a court has to consider whether the mistake or error giving rise to the prayers for relief are inadvertent or excusable. In this case it seems the advocate deliberately failed to take proactive steps as he has not indicated that he was even hospitalized but instead was placed in quarantine meaning he could have been asymptomatic thus capable of at least making or receiving phone calls. It would be expected that a diligent advocate would seek the indulgence of colleagues or even advocates of the opposite party in such circumstances by having them contacted to communicate the predicament. No effort was made in August to check what had transpired on 30th July 2020 and no effort was made to contact the advocates for the Claimant. In my view, there is no ground for the re-opening of the case. To boot, there is no judgment to arrest as the judgment herein is yet to be delivered. A date for delivery of judgment will be set shortly after this Ruling as the date due for delivery was interrupted by this motion, which I find to lack merit, and accordingly dismiss it albeit with not order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of September 2020

Nzioki wa Makau

JUDGE