



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1707 OF 2013

(CONSOLIDATED WITH CAUSE NO. 1702, 1703, 1704, 1705 AND 1706 OF 2013)

JOHN WAWERU NJENGA..... 1ST CLAIMANT

EDWIN OPICHE AGINA..... 2ND CLAIMANT

JOHN GAKOMBO GITHAKA3RD CLAIMANT

ANTONY SHITETI KOMBO 4TH CLAIMANT

SHEM CHAHENZA AMUGOGO..... 5TH CLAIMANT

JOHN MWANGI WAGATUA6TH CLAIMANT

VERSUS

MOTOR BOTIQUE LIMITED.....RESPONDENT

RULING

1. The Application herein is the Applicant's Notice of Motion dated 29.11.2019 seeking the following orders: -

- (a) Review, vary and/or setting aside the Orders made on 18.11.2019 dismissing the suit for non- attendance.
- (b) The suit be reinstated for hearing.
- (c) Hearing date be granted on priority basis given the age of the matter.

2. The Application is premised on the grounds set out on the body of the motion and the supporting Affidavit sworn by Mr. Bernard Werre, Applicant's Advocate on 29.11.2019. In brief, the Applicant's case is that, the suit is among others consolidated and it was partly heard on 23.11.2018 but the witness was stood down for the parties to agree on the lead file and the authority for representation; that on 31.10.2019, the Deputy Registrar of this court fixed the suit for further hearing on 18.11.2019, in the presence of both parties but Applicant's Advocates Clerk inadvertently indicated the date as 18.12.2019 in the diary; that as a result, the applicants and their counsel failed to attend the hearing on 18.11.2019 and the suit was dismissed for non-attendance; that their counsel learned of the dismissal on 27.11.2019 when he sent his clerk to peruse the court file to see the status of the file and check the the documents filed by the previous counsel.

3. The applicant's further contended that, the failure to attend court was not deliberate or intentional but due to an honest mistake; that the mistake of counsel ought not to be visited upon an innocent litigant; that the application has been made without undue delay; and that it is in the interest of justice that the application herein is allowed.

4. The Respondent filed Replying Affidavit sworn on 6.2.2020 by its General Manager, Mr. Kamlesh Chitroda, to oppose the application. He contended that on 18.11.2019, he attended court with his counsel for hearing but the Applicant's and their counsel failed to attend and the suit was dismissed for want of prosecution; that no plausible explanation or sufficient reason for the non-attendance has been offered; that for the application to succeed, the applicants must establish an inadvertent excusable mistake for the non-attendance on their part and that of their counsel; that the respondent will suffer prejudice if the application is allowed; and finally, urged the court to dismiss the application with costs.

5. The application was canvassed by written submissions which I have carefully considered herein.

Applicant's Submissions

6. The Applicants filed submissions dated 10.8.2020 which basically reiterate the averments contained in the Supporting Affidavit. They urged the court to exercise its inherent jurisdiction to find that the failure to attend the hearing was not deliberate or intentional but due to an inadvertent and honest mistake that is highly regrettable; that the Applicants in the said series of matters have been waiting for justice for long and it would be unreasonable to punish them on account of a mistake by their counsel; that they are willing to prosecute the suit and prayed for an early hearing date.

7. They relied on **Master Power Systems Limited v Civicon Engineering Africa & Another [2019] eKLR** and **Mary John Kigeto v New Kenya Co-operative Creameries Limited & Attorney General [2019] eKLR**.

Respondent's Submissions

8. The respondent filed its submissions dated 18.9.2020 which also echoed the averments in its Replying Affidavit. It contended that under Order 12 Rule 3(1) of the Civil Procedure rules, the consequence of non-attendance by the plaintiff is dismissal except for a good cause to be recorded by the court; that in this case the Applicants have not shown sufficient cause or plausible reason for their failure to attend court on 18.11.2019; finally, it appreciated that the Court's discretion to set aside its decision is unrestricted but contended that it should not be exercised to cause injustice to the opposite party.

9. It relied on **Constatine Dzombo & 4 others v Lukyn Coats & another [2018] eKLR**, **The Council, Jomo Kenyatta University of Agriculture and Technology v Joseph Mutuura Mbeera & 3others [2015] eKLR**, **Shah v Mbogo & another [1967] EA 1116**, **Utalii Transport Co. Ltd & 3 others v NIC Bank & another [2014] eKLR**, and **Kamunyi v Macharia & another [1990] KLR 470** to support its submissions and prayed for the application to be dismissed with costs.

Issues for determination and analysis

10. Having carefully considered the material presented to me by both parties herein, there is no contention that both parties were represented when the suit was fixed for hearing on 18.11.2019 by the Deputy Registrar. It is also clear that the Applicants and their counsel failed to attend the hearing and the court dismissed the suit for non-attendance. The said dismissal amounted to an *ex-parte* judgment entered by the Court in favour of the respondent. The main issue for determination is whether the applicants have met the legal threshold for granting of the orders sought.

11. The legal threshold for saving a suit from dismissal for non-attendance is a demonstration of a good cause by the Applicant(s). Rule 22 (2) of the ELRC Procedure Rules provides that: -

“Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good cause to be recorded.” [emphasis add]

12. The jurisdiction of the court to review and set aside its decisions, and the legal threshold for setting aside a regular judgment or court order was discussed in **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR**, where the Court of Appeal held that: -

“...the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence on time as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among others.” [emphasis added]

13. Again in **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte Court decisions) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.” [emphasis added]

14. Flowing from the foregoing rule and the binding precedents, for the court to exercise discretion to set aside an order for dismissal of a suit for non-attendance, the Applicants must demonstrate to the court by affidavit evidence that-

- a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;
- b) The application for setting aside was made without unreasonable delay;
- c) The suit is meritorious and the applicant has not lost interest in prosecuting the same;
- d) He/she stands to suffer more prejudice compared to the opposing party if the application is declined;
- e) The interest of justice demands that the application be allowed.

15. In this case, the reason given for the Applicants failure to attend court is that the Clerk who attended court on 31.10.2019 wrongly diarized the date as 18.12.2019 instead of 18.11.2019. A copy of the diary annexed to the supporting affidavit indicates that only two cases were scheduled for hearing on 18.12.2019 including the instant case. The question that arises is whether the applicant failed to attend the hearing on 18.11.2019 due to wilful neglect or deliberately to delay the course justice.

16. Having carefully considered the explanation given by the applicants and the circumstances of this case, I am satisfied that the failure to attend the hearing by the applicant was not due to his negligence but a genuine error on the part of their lawyer. In addition, the Applicant's counsel learned of the dismissal of the suit on 27.11.2019 and filed the instant application on 3.12.2019, without any unreasonable delay. Finally, although the respondent will be prejudiced by the reinstatement of a 7 year suit, it is my considered view that denying the Applicants a chance to prosecute their case due to an honest mistake of their counsel would be more prejudicial and indeed irreparable. Consequently, I am satisfied that the applicants have demonstrated a good cause upon which the court can exercise its discretion in their favour.

17. Finally, it is trite law that the discretion to set aside ex-parte regular judgment must be done upon terms. The suit herein was filed 7 years ago and the respondent may face challenges in securing witnesses and relevant documents to mount its defence after such a long wait. However, it has not shown that the prejudice it stands to suffer cannot be remedied by costs. Consequently, I proceed to allow the application dated 29.11.2019 in the following terms:

- (a) The Order made on 18.11.2019 dismissing the suit for non-attendance is hereby set aside.
- (b) The suit is hereby reinstated for hearing and determination on merit.
- (c) A hearing date be granted on priority basis given the age of the matter.
- (d) The Applicants to pay the respondent Kshs. 10,000 being throw-away costs before the hearing date.

Dated and delivered at Nairobi this 22nd day of October, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE