



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1485 OF 2016**

**JOSWA KENYATTA.....CLAIMANT/RESPONDENT**

**VERSUS**

**CIVICON LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant herein is the Respondent's Notice of Motion dated 2/7/2019 seeking the following orders: -

- a. Stay of proceedings in this matter pending hearing and determination of this application.
- b. Setting aside the ex parte proceedings of 18/06/2019.
- c. Direction that the hearing of the main suit be heard afresh and the applicant be allowed to defend the suit unconditionally.

2. The Application is premised on the grounds set out on the body of the motion and the supporting Affidavit sworn by Mr. Boniface Munyao Muumbi, Applicant's Advocate on 2.7.2019. In brief, the Applicant's case is that, it entered appearance on 13/03/2017 and subsequently filed a Memorandum of Response on 22/06/2017; that when the matter was fixed for hearing on 18/06/2019, the advocate assigned to handle the matter and who has since left the firm, inadvertently failed to update the diary to indicate the said date and also failed to inform the firm; that as a result, the Claimant proceeded with the hearing of the matter ex parte on 18/06/2019 and the Applicant only learnt of the same when it was served with a mention notice for 02/07/2019 to confirm filing writing submissions.

3. The applicant further contended that, it has not been able to cross-examine the Claimant as well as present its witnesses tender evidence and be cross-examination; that it stands to suffer great prejudice if the Honourable Court proceeds to deliver judgment without hearing its witnesses; that the mistake of counsel should 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 Claimant filed his Replying Affidavit sworn 18<sup>th</sup> July, 2018 to oppose the application. He contended that while the matter was commenced in 2016, the Applicant only entered appearance on 13.3.2017 and its defence on 21.6.2017 but failed to file its witness statement to date; that his advocates diligently served the applicant's counsel with hearing notice within sufficient time and as such applicant was thus well aware of the matter coming up for hearing on 18/06/2019. He believes that a party seeking to stay and/or set aside proceedings has to satisfy the following ingredients:

- a. Whether the applicant has established that he/she has a prima facie arguable case;
- b. Whether the application was filed expeditiously; and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

5. He further contended that the application herein was filed after inordinate delay; that the Applicant has also failed to mention the previous advocate who was handling its matter, and to have the advocate swear an affidavit to confirm that he forgot to update the diary; that the allegations by the Mr. Muumbi is hearsay; and that applicant has caused delay in this matter by late filing of its pleadings.

6. The claimant further argued that the applicant has not established a prima facie case in support of its prayer for setting aside of the court proceedings; and that whereas an innocent party should not suffer for the mistake by counsel, it is also the primary duty of a party to follow up the progress of its case. Finally, he urged that should the court be satisfied that the application has merits, then costs should be paid to him

before the next hearing date.

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

### **Applicant's Submissions**

8. The Applicant submitted that this court has a wide discretion to set aside its orders and or proceedings as long as the same is done on such terms as may be just. It contended that Courts exercise discretion in favour of the Applicant to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error as was held in the case of **Mbogo and another -vs- Shah [1968] 1 EA 93**. It further submitted that by exhibit BMM 1 annexed to the supporting affidavit it has demonstrated the evidence of the mistake of the previous advocate.

9. The applicant further submitted that this Court's discretion to set aside *ex parte* interlocutory judgment is provided for under **Order 10 Rule 11 of the Civil Procedure Rules 2010** which provides that where judgment has been entered under the said order, the Court may set aside or vary such judgment and any consequential decree of order upon such terms as are just. It urged that this Honourable Court should thus exercise its discretion and set aside the *ex-parte* proceedings.

10. It further submitted that it is trite law that a suit should be heard on merits and parties be allowed to canvass their case fully and the real issues in controversy be set out and rights of parties be determined as opposed to applying for judgment in default without affording the other party a chance to defend or show cause. In its view, the Claimant has not been candid with his facts and this Court should therefore be inclined towards hearing the memorandum of response on merit as it raises triable issues with high chances of success.

11. For Emphasis, the applicant relied on the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** where the Learned Duffus P. held that the discretion of the court to set aside its decision is wide but it must be satisfied that there is a defence on the merits. It further relied on the case of **CMC Holdings Limited -vs- James Mumo Nzioki [2004] eKLR**, the Court observed that the court must not only consider why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which raises triable issues.

12. The Applicant also relied on the case of **Crystal Motors (K) Ltd vs. Occidental Insurance Company Limited (2007) eKLR** where the court observed that all the facts and circumstances both prior and subsequent and of the respective merits of the case of the parties are matters which should guide the Court as to whether to exercise its discretion or not.

13. It submitted that the Claimant's Replying Affidavit does not indicate what prejudice, if any, will be occasioned to him if the Application is allowed and urged that it is only fair and just that the *ex-parte* Proceedings of 18/06/2019 are set aside since it has sufficiently explained its failure to attend the hearing, and the fact that it has a defence on record which should be given a chance to go for trial.

### **Claimant's Submissions**

14. The Claimant submitted that the Applicant has not shown sufficient cause as to why he failed to attend court on the hearing date and contended that Equity aids the vigilant as opposed to those who slumber on their rights. He cites the case of **Wachira Karani v Bildad Wachira [2016] eKLR** where Mativo J held that sufficient cause is the cause for which the defendant could not be blamed for his absence and went on to opine that sufficient cause is a question of fact and it depends on the special circumstances in the case at hand. The claimant further relied on **Nathan Ogada Atiagaga v David Engineering Limited [2016] eKLR** to support his case.

15. Finally, Claimant urged the court to dismiss the Respondent's application with costs but that if the court is inclined to grant the same, he prayed for throw away costs pegged at Kshs. 30,000/=.

### **Issues for determination and analysis**

16. There is no dispute that the applicant's counsel was served with a hearing notice but failed to attend court with his client for hearing on 18.6.2019. The main issue for determination is whether the applicant has established sufficient cause to warrant a grant of the orders sought.

17. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. 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* proceedings or decision) is intended so 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*)

18. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the *ex-parte* decision or proceedings. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that:

**“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”**

19. The Supreme Court of India in **Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011)** observed that:

**“Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...’”**

20. In this case the reason given for the respondent’s failure to attend court is that the counsel who had the conduct of the matter did not update his diary to indicate the hearing date in the diary and left the law firm. A copy of the diary annexed to the supporting affidavit indicates that only two cases were scheduled for hearing on 18.6.2019 excluding the instant case. The question that arises is whether the applicant failed to attend the hearing on the said date due to wilful neglect or deliberately to delay the course justice. Having carefully considered the explanation given by the applicant 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 his lawyer. Consequently, I hold that the applicant has demonstrated a sufficient cause upon the court can exercise its discretion.

21. However, before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider whether the applicant has any defence which raises triable issues. In Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 Duffus P. held that:

**“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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”**

22. Again in the case of CMC Holdings Limited -vs- James Mumo Nzioki [2004] eKLR, the Court stated:

**“The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.” (Emphasis theirs)**

23. I have considered the defence filed by the applicant and noted that it denies the allegation that the claimant was dismissed and averred that the contract lapsed automatically due to effluxion of time. I have also considered the documentary evidence filed together with pleadings by both parties and formed the opinion that the defence by the applicant is not frivolous but one that raises triable issues.

24. Finally, the discretion to set aside ex-parte proceedings must be done upon terms which are fair to both parties. In this case, the claimant has closed his case and filed written submissions but the court has not yet rendered any judgment. Setting aside the ex-parte proceedings and reopening the case for hearing will definitely prejudice the claimant. However, the claimant has not shown that the prejudice he stands to suffer cannot be remedied by costs. Indeed, he proposed in his written submissions that an award of kshs. 30000 would appease him if the proceedings are set aside.

25. Having found that the applicant has demonstrated sufficient cause warranting setting aside of the impugned proceedings; that its defence raises triable issues; and that the claimant will not suffer damage which cannot be remedied by costs, I proceed to allow the application dated 2.7.2019 in the following terms:

- a. The ex-parte proceedings of 18.6.2019 are set aside to the extent that the hearing is reopened and the applicant is allowed to cross examine the claimant and prosecute its defence.
- b. The applicant is condemned to pay the claimant thrown-away costs of Kshs. 15,000 before the hearing date.

**Dated and delivered at Nairobi this 8<sup>th</sup> 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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(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**