



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 575 OF 2015

CHRISTOPHER GARO NYAWADE.....CLAIMANT

VERSUS

H. YOUNG & COMPANY (E.A.) LIMITED.....RESPONDENT

RULING

1. The application before this Court is the Respondent's Notice of Motion dated 22.7.2020 seeking the following orders–

- a. THAT this matter be certified as urgent and be heard ex parte in the first instance as the object of the application will otherwise be defeated by delay.*
- b. THAT pending inter partes hearing of this Application this Honourable Court be pleased to grant a stay of execution of judgment.*
- c. THAT the Court be pleased to set aside the judgment of 29.4.2020 and re-open the proceedings.*
- d. THAT leave be granted to the Applicant to cross examine the Claimant.*
- e. THAT leave be granted to the Applicant to call its witnesses.*
- f. THAT leave be granted to the Applicant to file substituted witness statements.*
- g. THAT the costs of this Application be in the cause.*

2. The Application is premised on the grounds set out on the body of the motion and the Supporting Affidavit of Charles Adede Owinyo sworn on 22.7.2020. The Claimant has however, opposed the Application vide his Replying Affidavit sworn on 24.7.2020.

3. The Applicant averred that there were good reasons for her non-attendance during the hearing; that although she admitted her advocate's secretary received the hearing notice from the claimant's advocate and duly signed, she failed to diarize the same as required; that as a consequence of the secretary's default, the hearing date was never brought to his attention of the counsel resulting in his non-attendance and that of the defence witnesses; and that it was not until the Applicant was served with a Notice of Entry of Judgment, when he realized that the matter had been heard.

4. The applicant urged that a counsel's mistake should not be visited upon the litigant, and prayed for the suit to be reopened for hearing since she has an arguable defence on record. She further urged the court to set aside the exparte judgment and give her a chance to prosecute her defence so that the suit can be determined after being heard on merit. She contended that any prejudice occasioned on the claimant by allowing the application can be compensated by way of costs.

5. The Claimant has, on the other hand, contended that the application is an afterthought, devoid merit and should be dismissed with costs as it was an exercise in futility. In his view, the Application is an attempt to delay the enjoyment of the fruits of his judgment without a reasonable excuse and on account of the Applicant's Advocates' negligence.

6. The Claimant further averred that he had complied with all the necessary procedures required in setting down the suit for hearing and thereafter served a hearing Notice upon the Applicant's advocate who ignored the same and failed to attend Court.

7. The Claimant further argued that, since the Applicant's Advocate admitted service of the hearing notice, the impugned judgment was obtained fairly and procedurally. He also contended that this Court issued a balanced judgment since the information contained in the defence was considered before the same was dismissed for want of prosecution. In the Claimant's view, there is no defence on record and as

such setting aside the judgment would be inconsequential as the Applicant had not sought orders to have the dismissed defence reinstated.

8. He contended that, the Applicant will suffer no prejudice or injustice if the judgment is executed, but setting aside the judgment would prejudice him because he has waited for over years since filing of the suit in addition to the suffering occasioned by the termination of employment.

9. The Application was disposed of by way of written submissions with both parties filing their written submissions.

Submissions by the Parties

10. The Applicant submitted that this Court had the duty and power to entertain and grant the orders sought as envisioned in articles 48, 50 and 159 of the Constitution and sections 3 and 16 of the Employment and Labour Relations Court Act. She relied on the case of **Martha Wangari Karua vs. Independent Electoral Boundaries Commissions [2018] eKLR** where it was held that the rules of natural justice require the Court to grant a litigant an opportunity to be heard regardless of how weak his/her case is.

11. The Applicant submitted that her defence raised triable issues and no prejudice would be suffered by the Claimant if the judgment is set aside since his rights as a litigant will remain intact. However, she contended that she stood to be prejudiced if the orders sought were not granted. She relied on the case of **James Wanyoike & 2 Others vs. CMC Motors Group Limited & 4 Others [2015] eKLR** which outlined the test to be met before an order could be set aside as follows–

- a. *Whether there is a defence on the merits.*
- b. *Whether there would be any prejudice to the plaintiff.*
- c. *What is the explanation for any delay?*

12. Finally, the Applicant submitted that the non-attendance arose from an inadvertent mistake, to which various mechanisms had been put in place to remedy the honest mistakes. She relied on the case of **James Wanyoike & 2 Others vs. CMC Motors Group Limited & 4 Others [2015] eKLR** to fortify her position.

13. On the other hand, the Claimant's submissions were a reiteration of the averments made in his replying affidavit. He contended that equity and fairness demanded that parties serve their opponents with the documents to be relied on for their knowledge of what is coming up before Court. He therefore submitted that articles 48, 50 and 159 were followed to the letter before the impugned judgment since the Applicant was served with the hearing notice.

14. He contended that the Applicant had not explained why there was no appearance during the mentions for directions between 2015 and 2018 yet notices were served upon them. According to the Claimant, the Applicant was being insincere since they did not attend Court every time they were served with mention and hearing notice for more than five years when she filed the instant application. In conclusion, the Claimant submitted that should the Court decide to award the orders sought, the Applicant should be directed to deposit security.

Issues for determination and analysis

15. I have carefully considered the application, affidavits filed in support and opposition thereof, the annexures and written submissions filed. It is not in contention that there was non-attendance by the Applicant and her advocates despite being served with the hearing notice. It is also a fact that the matter proceeded and a judgment was entered in favour of the Claimant. The issues for determination before this Court therefore are–

- a. Whether the Applicant has met the threshold for setting aside a regular judgment.
- b. Whether the judgment delivered on 29.4.2020 should be set aside and hearing re-opened for the Applicant to cross examine the Claimant and call her witnesses.

Legal threshold for setting aside a regular Judgment

16. In **Captain Philip Ongom vs. Catherine Nyero Owota SCCA 14/2/2001 [2003] KLR** held *inter alia* that the Court must be satisfied with one of these two things–

- (a) *The defendant was not properly served with summons; or*
- (b) *The defendant failed to appear in court at the hearing due to sufficient cause.*

17. 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...”

18. 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 ...’

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

“This discretion (to set aside a regular judgment) 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)

20. The principles for setting aside a judgment were set out in the case of *Patel vs. East Africa Cargo Handling Services [1974] EA 75* as follows–

“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.”

21. Flowing from the foregoing precedents, it appears clear that for the Court to exercise discretion to set aside a regular judgment entered for non-attendance, the applicant 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 applicant has an arguable defence that raises triable issues;
- 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.

22. In this case the reason given for the applicant’s failure to attend court for the hearing is that the advocates secretary failed to diarize matter and as a result the counsel was never informed about the hearing date and he never attended the hearing with the defence witness. The said secretary never swore any affidavit to confirm the alleged default and a copy of the diary for the material date was not annexed to the supporting affidavit to confirm that the secretary never recorded the matter after service.

23. The question that arises is whether the applicant failed to attend the hearing on 18.11.2019 due to willful 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 although there was negligence on the part of the counsel’s office, the failure to attend the hearing by the applicant was not due to negligence on her part. Whereas the applicant should ordinarily have a recourse against her counsel for professional negligence, the aforesaid precedents have demonstrated that even a regular judgment can be set aside, upon terms, to allow a part his day in court if the applicant has an arguable defence.

24. I have examined the applicant’s defence and found that, indeed it raises triable issues as it does not consist of mere denials. It is clear that by the said defence, the applicant denies the claim for unfair termination and contends that the reason for the termination was valid and a fair procedure was followed. The said defence is still on record as all what the court did was to disregard it since it was not prosecuted during the hearing due to non-attendance.

25. In addition, I am satisfied that the application has been made without unreasonable delay. The claimant’s counsel notified the applicant’s counsel of the judgment by the letter dated 20.7.2020 and the application was filed on 22.7.2020.

26. Finally, although the claimant will be prejudiced by the setting aside a regular judgment in his 5 years’ suit, it is my considered view that denying the respondent a chance to prosecute her defence in the circumstances herein would be more prejudicial and indeed irreparable. As regards the claimant I am satisfied that an award of cost will adequately remedy the prejudice caused by the setting aside of the impugned judgment.

27. In conclusion, I proceed to allow the application dated 2.7.2019 in the following terms:

- a. ***THAT the judgment delivered herein on 29.4.2020 is hereby set aside and the hearing is re-opened.***
- b. ***THAT leave is granted to the Applicant to cross examine the Claimant and to call her witnesses.***
- c. ***THAT leave is granted to the Applicant to file substituted witness statements.***
- d. ***THAT the Applicant is condemned to pay kshs. 15000 as throw away costs to the claimant.***

Dated and delivered at Nairobi this 17th December, 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 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