REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1521 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

WAMBUA MUTUA.....CLAIMANT

VERSUS

SOFTWARE TECHNOLOGIES LIMITED.....RESPONDENT

RULING

By Notice of Motion filed under Certificate of Urgency dated 18th May, 2018 the applicant, Software Technologies Limited who is the Respondent in the main suit seeks the following orders;-

1. That the Notice of Motion Application herein be certified urgent and heard ex-parte at the first instance. (spent)

2. That pending the inter-parties hearing of this Application, the Court does issue a stay of execution of the parts relating to salary arrears of Kshs.314.208/- and Leave days calculated at 63 days which translate to Kshs.388,500/- as contained in the Judgment of 20th April 2018.

3. That pending the hearing and determination if this Application, the court issue a Stay of Execution of the parts relating to salary arrears of Kshs.314.208/- and Leave days calculated at 63 days which translate to Kshs.388,500/- as contained in the Judgment of 20th April 2018.

4. That the Court do set aside parts of the Judgment relating to Salary arrears of Kshs.314,208/- and Leave days calculated at 63 days which translate to Kshs.388,500/- as delivered on the 20th of April 2018.

5. That the do grant leave to the Defendant/Applicant to file a Defence out of time and all other relevant documents necessary for the hearing and determination of the issues relating to Salary arrears of Kshs.314.208/- and Leave days calculated at 63 days which translate to Kshs.388,500/- within 14 days.

6. That the Costs of this Application be in the cause.

This Application is premised on the grounds that:-

i. The Defendant/Applicant's Counsel inadvertently failed to prepare and file a suitable Defence within the prescribed time in law.

ii. The Defendant/Applicant herein has a prima facie case against the Plaintiff/Respondent and therefore in the interest of justice, the Judgment passed relating to Salary arrears of Kshs.314.208/- and Leave days calculated at 63 days which translate to Kshs.388,500/- should be heard on merit.

iii. The Plaintiff/Respondent in its evidence in chief and supporting documents therein failed to present the correct factual position of the matters relating to salary arrears and leave days, thereby making the court arrive at a wrong decision relating on the same.

iv. The Defendant/Applicant be granted leave to file an appropriate Defence in relation to the aspect of the Salary Arrears and Leave days to enable the court hear the matter on merit and arrive on the correct Judgment on the same.

v. The Plaintiff/Respondent shall not suffer any prejudice if this court do set aside Parts of the judgment relating to Salary arrears of

Kshs.314.208/- and leave days calculated at 63 days which translate to Kshs.388,500/-.

vi. The mistake of the advocate in failing to file an appropriate defence should not be visited on the Defendant/Applicant and as the rules of justice require, the Defendant/Applicant ought to be given an opportunity on the issues relating to Salary arrears of Kshs.314.208/- and leave days calculated at 63 days which translate to Kshs.388,500/-.

The Application is supported by the affidavit of **STEPHEN OMWENGA** sworn on 18th May, 2018 and on the grounds on the face of the motion.

The Application is filed under Article 50 of the Constitution of Kenya, Order 10 Rule 11, Order 22 Rule 22, 51, 52, 53, and 54 and Order 45 Rule 1 &2, Order 51 Rule 1 of the Civil Procedure Rules, 2010.

The Claimant/Respondent opposed this Application and filed Grounds of Opposition dated and filed in Court on 29th May, 2018. The Claimant/Respondent raises the following grounds of opposition:

1. That the Applicant is not entitled to the Orders sought therein as the same are merely an afterthought, made in bad faith and aimed at delaying the cause of justice.

2. That the Applicant was duly served with all the processes of this court and even entered appearance through their advocates on record messers E. M Washe and Associates Advocates on 30th November 2016. The Applicant was fully aware of the existence of this Cause.

3. That the Applicant purposefully and/or negligently failed to file a response prompting the Respondent/Claimant to fix the matter for a mention for directions before Nderi J. on 19th July 2017.

4. That the Applicant admits to negligently failing to file a response before

this court with a flimsy excuse that the Associate Advocate handling the matter at E. M Washe and Associates Advocates left employment rendering the file dormant.

5. That the court then set down the matter to proceed undefended on 23rd January 2018, on which date the Claimant/Respondent gave his evidence before the court for determination.

6. That the court proceeded to pronounce Judgement against the Applicant on 20th April 2018.

7. That an order for Stay of execution is subject to judicial discretion, which discretion is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

8. That the conduct of the Applicant is that of a person who has deliberately sought to delay the cause of justice and is now attempting to use this court as an avenue to sanitize and/or mask incompetence and outright negligence.

9. That the Notice of Motion Application dated 18th May 2018 falls short of meeting the conditions for the grant of Orders for Stay of execution.

10. That by law, the Applicant must in their Application satisfactorily demonstrate that:

a) They stand to suffer substantial loss unless the Orders sought are granted.

b) They have given such security as the court orders for the due performance of such decree/ judgement sum as may ultimately be binding on them.

11. That having failed to meet this criteria, the Application stands misconceived, mischievous and an outright abuse of court process.

12. That the Applicant has also not met the conditions required in law for the Judgement of 20th April 2018 to be set aside. No defence to show that the Applicant/Respondent raises triable issues has been exhibited before this court.

13. That it is the Claimant's submission that the Notice of Motion Application dated 18th May 2018 be dismissed with costs as it lacks merit.

In disposing of the instant Application, the parties agreed to file written submissions.

Defendant/Applicant's Submissions

It is submitted on behalf of the Respondent/Applicant that the instant application is pegged on the provision of Order 10 Rule 11 of the Civil Procedure Rules, 2010 which provides:

> *"…where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree upon such terms as are just."*

The Respondent/Applicant further submitted that an Application to set aside does not accrue as of a right but is discretionary upon the Court where it is found that such application is in the interest of justice. This principle was espoused in the case of ***Patel Vs E.A Carge Handling Services Limited (1974) EA 75*** where the Court held that:

> *"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules."*

The Applicant further relied on the case of ***Shah Vs Mbogo (1967) E.A 166 at page 128B*** where the Court states:

> *"This discretion to set aside an ex-parte judgement 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."*

The Respondent/Applicant further submits that the failure to file Defence was a mistake of the Advocates on record and not of the Respondent herein and urged the Court to allow the Application in the interests of justice. The Applicant relied on the Authority of ***Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103 at 1040*** where it was held:

> *"Blunders will continue to be made from time to time and it does not follow that because of a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot bed put right by payment of costs. The Court is often said exists for purposes of deciding the rights of the parties and not the purpose of imposing discipline."*

It is further submitted that the overriding objective of the Courts in dispensing justice is to ensure expeditious, fair, just, proportionate and economical disposal of cases. Further, that the right to fair trial ought to be protected as it is a right in the Constitution of Kenya, 2010. The Respondent relied on the case of ***Mbaki & Others Vs Macharia & Another (2005) 2 E.A 206*** as cited in ***JMK vs MWM and Another (2015) eKLR*** where it was held that:

> *"…The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were prejudiced without the party being afforded an opportunity to be heard…"*

The Applicant submitted that denying it a chance to be heard is a violation of its constitutional right and a defeat to justice to both parties.

The Applicant further submitted that it has a Defence that raises triable issues and substantial questions of law with a high probability of success which ought to be heard on merit. Further, the Applicant submits that it would be unjust, unfair and prejudicial to condemn the Respondent/Applicant unheard.

In conclusion the Defendant/Applicant urged the Court to allow the instant Application as the Plaintiff/Respondent shall not suffer any prejudice if the ex-parte judgment is set aside. The Court is urged to allow the instant Application as prayed.

The Claimant urged the court to dismiss the instant application as it is meant to delay him from realizing the fruits of his judgment.

Determination

The issues for determination is whether the application dated 18th May, 2018 is merited. The Applicant seeks to set aside the Court's judgment delivered on 20th April 2018 and to be allowed to file its defence out of time.

Order 10 Rule 11 of the Civil Procedure Rules provides that:

> **Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."**

Thus, the provision aforestated does bestow on the Court unfettered discretion to set aside or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations. In the authority of ***Patel vs. East Africa Cargo Services Ltd (1974) EA 75*** this principle was expressed thus:

> *"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 ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."*

The Applicant in the instant Application attributes the failure to file Defence to an Advocate on record who failed to put in the relevant Defence. It submits that mistakes of the Advocate should not be visited upon the client.

In ***Shanzu Investment Ltd vs. the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR,*** the court held that

> ***"The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgement is varied, it must be done on terms that are just''.***

Similarly, the Court held as follows in the case of ***Shah Vs Mbogo (1967) E.A 166 at page 128B***:

> *"This discretion to set aside an ex-parte judgement 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."*

The applicant has submitted that it has a defence that raises triable issues and prays that it be allowed to proceed with the matter on merit.

It is not denied that the respondent was properly served but failed to file defence. I further note from the record that the case was fixed for hearing on 19th July 2017 in the presence of the respondent when the court noted that there was no defence on record and the case was certified to proceed to formal proof on 23rd January 2018.

Should the respondent have wished to file defence, it would have filed an application soon after 19th July 2017 for setting aside of the orders made on that day to the effect that the suit proceeds to formal proof as there was no defence on record.

I find no sufficient reason for failure to file defence from the date the memorandum of appearance was filed on 30th November 2016 to the date of mention on 19th July 2017.

The file having been certified to proceed to formal proof, the respondent would in any event not have presented any evidence on the hearing date. There is no prayer in the application for setting aside the orders of 17th July 2018 to the effect that the file proceeds to formal proof such that even if I set aside the judgment the respondent would still not be able to file a defence.

I have further considered the documents filed with the application and note that the respondent was in arrears of payment of salary in the sum of Kshs.748,941 by the time the claimant resigned and all payments made to the claimant thereafter were acknowledged and factored in the claimant's tabulation at Appendix WM4 of the claim. The only reason there is a difference between the claimant's and applicant's tabulation is that the respondent made a recovery of three months' salary in lieu of notice.

No draft defence has been filed that contains a counter-claim for the said three months' salary in lieu of notice neither has the respondent attached any demand notice for the same.

There is therefore no indication that the respondent intended to make a claim for the said payment in lieu of notice.

From the foregoing I find that the grant of the orders sought would be a mere academic exercise as respondent has not demonstrated that it has a valid defence to the claim. I thus find no justification to exercise my discretion in favour of the respondent with the result that the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE