



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 666 OF 2016

REUBEN KENYENYA SIMEKA.....CLAIMANT

VS

KEVIN KEPHA NYONGESA

T/A ST. KEVIN HILL SCHOOLS.....RESPONDENT

RULING

1. This ruling relates to the Respondent's application brought by way of Notice of Motion dated 9th November 2018 seeking the following orders:

- a) That the Court be pleased to stay further proceedings, including but not limited to delivery of judgment on 27th November 2018 or any other date;
- b) That the Court be pleased to set aside all proceedings taken on 9th July 2018 together with any consequential orders arising therefrom;
- c) That the cause be re-opened to allow the Respondent to cross examine the Claimant;
- d) That the Respondent be granted leave to file a supplementary list of documents;
- e) That the Respondent be granted leave to prosecute its response/defence.

2. The application, which is supported by an affidavit sworn by Peter Omwenga Mwebi, Advocate is based on the following grounds:

- a) That the Respondent instructed the firm of Mogaka Omwenga & Mabeya Advocates to act for and on its behalf in the matter and to file a supplementary list including an extract of Occurrence Book (OB) No 20/10/01/2017 from Changamwe Police Station;
- b) That the Respondent who had been served with a hearing notice to attend court on 9th July 2018, forwarded the hearing notice to his Advocates;
- c) That by mistake and/or oversight on the part of the Advocates' office, the hearing date was not diarised, which mistake and oversight led to non-attendance on the part of the Respondent;
- d) That the inadvertent mistake of the Advocate should not be visited on the Respondent who stands to bear the serious legal consequences of the non-attendance;
- e) That unless the orders sought are granted, the Respondent shall suffer great prejudice in that he will be condemned unheard and lose the opportunity to prosecute its Response and particularly the fact that the cause is founded on a forgery;
- f) That the application is made in good faith, is not a subversion of the administration of justice and is made in conformity with the overriding objective of the Court to achieve a just determination of all cases;
- g) That in the interest of justice, the Respondent deserves to be given leave to defend this cause;

h) That the orders sought, if granted shall not occasion the Claimant any prejudice because he can be compensated by thrown away costs.

3. The Claimant's response is contained in his replying affidavit sworn on 13th February 2019. He depones as follows:

a) That the cause herein was filed on 14th September 2016 and the Respondent was duly served with Summons to Enter Appearance on 28th October 2016. Subsequently, the firm of CM Advocates filed a Notice of Appearance on behalf of the Respondent on 7th October 2016;

b) That the matter was set down for formal proof on 7th December 2016 on which date the Respondent's Advocates then on record asked the Court to allow them 14 days to comply with Rule 15 of the Employment and Labour Relations Court Rules;

c) That the Court set 13th January 2017 for pre-trial on which date the matter was fixed for hearing on 13th April 2017. The Respondent was again given leave to file its documents and witness statements within 14 days;

d) That on 13th April 2017, the matter was adjourned on the ground that Counsel for the Respondent was unwell;

e) That on 12th June 2017, the parties recorded a partial consent before **Makau J** and the Respondent asked for 30 days to settle the consent amount;

f) That on 25th August 2017, the Respondent forwarded to the Claimant's Advocates the sum of Kshs. 25,000 in partial settlement on account of the consent judgment recorded on 12th June 2017;

g) That on 26th August 2017, when the matter was slated for hearing, the Respondent's Advocates informed the Court that they intended to file an application to cease acting for the Respondent. The application was allowed on 23rd October 2017 and the matter was fixed for hearing on 21st February 2018;

h) On 21st February 2018, the Claimant's Advocates were directed to serve the Respondent personally. The matter was thereafter fixed for hearing on 9th July 2018. On 14th March 2018, the Claimant's Advocates served the Respondent with a hearing notice for 9th July 2018;

i) That the matter proceeded as scheduled and judgment was delivered on 27th November 2018 and the Claimant's Advocates notified the Respondent.

4. The Claimant maintains that the Respondent's application has been brought in bad faith with the aim of denying him fruits of his judgment. The Claimant adds that the Respondent has failed to satisfy the partial consent recorded on 12th June 2017.

5. The application was urged on 11th March 2019 by which time I had already delivered judgment in the matter. What remains for determination therefore is whether the Respondent has made out a case for reopening of the case. That would necessarily involve setting aside the judgment delivered by the Court on 27th November 2018.

6. The discretionary power of the Court to set aside an *ex parte* judgement is to be exercised in cases where a party may suffer an injustice arising from an accident, inadvertence or excusable mistake (see *Edwin Oduor Chacha v Dr.Philisters Onyango & another [2013] eKLR*).

7. As held in the celebrated decision in *Shah v Mbogo & another [1968] EA 93* the discretion of the Court to set aside an *ex parte* judgment is not available to a party who sets out to subvert or delay justice. In his replying affidavit in opposition to the application, the Claimant gave a detailed account of the litigation journey travelled in this matter. The account by the Claimant, which the Respondent did not dispute, gives a clear picture of a disinterested litigant.

8. The Respondent dragged this matter in Court for close to two years, even changing Advocates in between. I must reiterate that cases in court belong to the respective parties not their Advocates. The parties therefore bear a direct responsibility to pursue their cases to conclusion. Further, the discretion of the Court is not meant to cure general carelessness or ineptitude.

9. Looking at the conduct of the Respondent in this case including his failure to fully settle the consent judgment recorded before my brother, **Makau J** on 12th June 2017, this Court finds and holds that the Respondent has not made out a case for grant of the orders sought.

10. In the result, the Respondent's application dated 9th November 2018 is disallowed with costs to the Claimant.

11. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF APRIL 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

Mr. Saringi h/b Mr. Omwenga for the Respondent