

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 386 OF 2017

JOHN KABIRA KIONI.....CLAIMANT/APPLICANT

VERSUS

GEORGE NAMASAKA SICHANGI t/a SICHANGI ADVOCATES.....RESPONDENT

RULING

1. The Claimant seeks to set aside the order of the court dismissing the suit for non attendance. In his motion he asserts that the failure to attend court was inadvertent and on account of factors beyond his control. In the affidavits supporting the motion, he and his advocate indicate that they had matters in other courts and that it was unfortunate that the matter was called before they could return to this court for the hearing of the suit. They urge the court to find that the failure to be present at the time the matter was called for hearing was an excusable mistake or error and that the court in keeping with the main concern to do justice to parties should allow the motion. They assert that the Respondent will not suffer any prejudice should the reinstatement be ordered.

2. The Respondent is opposed to the reinstatement of the suit and the affidavit in reply asserts that the application lacks merit and ought to be dismissed with costs.

3. The motion seeking the setting aside of the order dismissing the suit was made timeously meaning there was no delay. In the case of **Mbogo & Another v Shah [1968] EA 93** and **Pithon Waweru Maina v Thuku Mugiria [1983] KLR 78**, the law on setting aside of *ex parte* judgment or order was considered in great detail. The principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in default of either party to attend the hearing are:

i. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

ii. Secondly, this discretion 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

iii. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically

4. The Claimant/Applicant asserts accident, inadvertence and excusable mistake or error. The Claimant is an advocate of the High Court of Kenya and practices before this court. He knows that the court sets time for cases and hears them at the appointed time without deviation. His advocate also practices in this court and he too is aware of the same. They both were absent when the matter was called leading to the dismissal of the suit. Was this a mistake or error that is excusable? I think not. Discretion to be exercised in setting aside is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. The failure to attend by the 2 advocates is a deliberate delay of the course of justice. In the final result the motion is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 9th day of April 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar