



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 544 OF 2017**

**JAMES OMOKE ONSOTI & 16 OTHERS.....CLAIMANTS**

**VERSUS**

**DANREE MULTI HANDLING SERVICE LTD.....1<sup>ST</sup> RESPONDENT**

**A – ONE PLASTIC LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before me is the Claimants'/Applicants' notice of motion application dated 19<sup>th</sup> February 2019 seeking to set aside the dismissal of the suit for non-attendance. The application is brought under Section 1A, 1B and 3A of Civil Procedure Act, Order 12 Rule 7 of the Civil Rules & Section 7 of Labour Relations Court Act as well as Article 50 of Constitution. It prays that the dismissal orders issued in this case on 18<sup>th</sup> February 2019 be set aside, that the suit be reinstated for hearing and disposal and that the costs of the motion be in the cause. The application is supported by the affidavit of Njoroge Mungai, Advocate and on the grounds that the Claimants' representatives were present in court when the matter was called out and that the Claimants' advocate walked in just in time when the court was about to make its dismissal orders. The other grounds on the face of the motion were that the Claimants/Applicants have all along diligently pursued and prosecuted the case and that the dismissal order was issued in error as the file has all along been active and the Claimants ready to pursue their case. In the affidavit in support, counsel for the Claimants deposes that he was on his way to court when the vehicle he was travelling in developed mechanical problems and upon realising he would not make it to court on time called an advocate to hold his brief and seek time allocation for 11.30am which request was granted by court and the matter set for hearing at 11.00am. He deposed that he attended court at 11.00am just in time when the court was calling out the matter and that even after a humble request to address the court the court proceeded to pronounce its order that the matter was dismissed for non-attendance. He further deposes that one Bonventure Arema Ahingana was to represent the Claimants as witness and he was in court and was waiting for his name to be called out. He further deposes that the matter has been adjourned on instance of the Respondents yet he has always been ready to proceed to hearing.

2. The Respondents are opposed to the motion and filed a replying affidavit sworn by Eric Macharia, Advocate. He deposed that the suit came up for hearing on 18<sup>th</sup> February 2019 and both parties were ready to proceed and the advocate the Claimants counsel sent to hold his brief sought for time allocation for 11.30am and the matter was scheduled for hearing at 11.00am and that the Claimants advocate came to court way past 11.00am after the matter had been called out numerous times with no one coming forth to respond and subsequently the court dismissed the matter for non-attendance. He deposed that he and his colleague Ms. Koranje beckoned the 18<sup>th</sup> Claimant in the claim Bonventure Arema Ahingana to stand and respond and he did not. He deposed that the counsel for the Claimants was misleading the court as the date was the first time the case had come up for hearing and the Respondents had never occasioned an adjournment of any hearing as asserted by counsel for the Claimants. He deposes further that though mistake of counsel should not be visited on litigants, there is an exception where the litigant is privy to the default and that in this case, the litigant (18<sup>th</sup> Claimant) and two other Claimants were present in court and did not respond when the matter was called out. He stated that it was in the interests of justice that the application be dismissed with costs as the litigants did not act diligently when they failed to respond when the matter was called out.

3. In oral arguments by counsel for the Claimants, it was stated that the claim came up for hearing and that the Claimants were in Court and that the representative of the Claimants was in Court as well. The advocate for the Claimants states that he was on his way to court and had prepared the witnesses but unfortunately the vehicle he was travelling in had developed a mechanical hitch. He then requested an Advocate to request for hearing at 11.30am and the Court set 11.00am for hearing. He submitted that when he entered Court he found the matter having been called out and that the Court had called the 1<sup>st</sup> and 2<sup>nd</sup> Claimants but the Claimants' representative did not respond. He says he shot to his feet but was late as the matter had been dismissed for non-attendance. He admitted that the mistake was his and that the mistake of an advocate should not be visited on his clients, the Claimants. He argued that the mistake was inadvertent and unfortunate and that the court record would bear witness that he has always been keen to prosecute the case and always attended court and the unforeseen misfortune should not punish the Claimants and deny them an opportunity at the seat of justice. He submitted that the Claimants were waiting to hear their names called out and at their turn respond.

4. The Claimants position was opposed by the Respondents who submitted that the advocate walked into court way past 11.00am and that despite the matter being called out repeatedly, the Claimants who were present did not respond when the case was called out. The Respondents' counsel argued that the reasons furnished for their failure were not sufficient for the grant of the discretionary power to set aside. The Respondents thus urged the dismissal of the motion with costs to the Respondents.

5. In the cases 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 stated to be:

a. 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.

b. 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.

c. Additionally, a discretionary power should be exercised judicially and not arbitrarily or idiosyncratically

6. The Claimants herein were represented by 3 of their own when the case was called out. The court assistant and the court called out the matter a few times with no response. Counsel for the Respondents asserts that he beckoned the Claimants to stand up and they did not respond. In addition, counsel for the Claimants was less than candid that he came to court when the matter was being called out and was not able to stall the dismissal order. That is far from the truth as when he walked in the matter had been dismissed and the court was rising. The Claimants have no one but themselves to blame for the misfortune that befell them. They were in court, apparently, but declined to stand or even raise their hands. If indeed they were desirous of being heard they would have made some effort. It is disingenuous to suggest that the 18<sup>th</sup> Claimant was waiting to hear his name called out. The matter has 107 Claimants and it is inconceivable that the court would call all 107 Claimants to establish who is present. Those who are stated to have been in court were obligated to make their presence known and they failed to do so in effect showing there was no attendance on their part. The discretion to set 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. This motion is devoid of merit and is accordingly dismissed with costs.

It is so ordered.

**Dated and delivered at Nyeri this 24<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**