



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

INDUSTRIAL CASE NO. 262 OF 2018

(Before Hon. Justice Mathews N. Nduma)

SAMUEL OTIENO ONDOLA.....CLAIMANT/RESPONDENT

VERSUS

KISUMU COUNTY PUBLIC SERVICE BOARD....1ST RESPONDENT/APPLICANT

THE GOVERNOR KISUMU COUNTY

H.E. PROF. PETER ANYANG' NYONGO.....2ND RESPONDENT/APPLICANT

RULING

1. Application dated 9th October 2018 seeks to set aside orders issued on the 2nd October 2018, the proceedings preceding the same and other consequential proceedings *ex debito justitiae* on the grounds that the order was granted *ex parte* after the advocate on record for the applicant failed to file a response to the claimant's application before the hearing date and the advocate on record misdiarised the hearing of the claimant's application to the 2nd November 2018 instead of the 2nd October 2018.
2. That the interest of justice demands that the applicant be heard. That the respondent shall suffer no prejudice and if same is suffered it can be remedied by way of costs.
3. The application is opposed vide grounds of opposition dated 26th October 2018 and filed on the even date to the effect that there are no compelling reasons to warrant setting aside of the orders of the court. That the respondents were aware of clear orders by the court to respond to the application within 14 days from July 2018 when they were served with the application and *ex parte* order.
4. That the application is unmeritorious, misconceived and it be dismissed with costs.
5. In *Patel vs E. A. Cargo Handling Services Ltd (1974) EA75* 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 and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”
6. The court was referring to order 10 Rule 11 of the Civil Procedure Rules which give the court discretion to set aside or vary a default judgment upon such terms as may be just.
7. In the present case, the court granted the orders sought to be set aside on 2nd October 2018 upon hearing Advocate Nyamwea for the claimant/applicant in the presence of M/S Kwamboka for the respondent, the applicant in the present application.
8. M/S Kwamboka told the court on the 2nd October 2018 that she had not filed a replying affidavit to the application and was not ready to proceed with the interpartes hearing of the application.
9. Mr. Okello who at the time held brief for Mr. Nyamwea opposed the application for adjournment.
10. The application was stood down for arguments at 12.15 p.m when Mr. Nyamwea told the court that the application was not opposed and

that it be granted as prayed. M/S Kwamboka on her part admitted that they had been served with the application on 30th July 2018 and had not filed any replying affidavit. No justification for the default was placed before court on the day by counsel for the respondents.

11. The court notes that over two months had lapsed from 30th July 2018 when the respondents were served and no sound explanation was given for the default.

12. There is no explanation at all in the supporting affidavit of Mr. Lugano, counsel for the applicant and in the grounds supporting the application why the applicants did not file a replying affidavit to the application dated 12th July 2018. No such explanation was given on the date of the hearing by M/S Kwamboka who held brief for Mr. Lugano. The issue of misdiarising the hearing date was not raised by M/S Kwamboka in court when the application was deemed unopposed and orders of the court granted.

13. It is the court's finding that the applicant have not been candid with the court and lack clean hands to deserve exercise of the discretion of the court to set aside the order granted on 2nd October 2018.

14. The justice of the case, on the facts before it dictates that this application be dismissed for lack of merit. The main suit after all is pending determination on the merits. Accordingly, the application to set aside orders of the court granted on 2nd October 2018 is dismissed with costs.

Ruling Dated, Signed and delivered this 23rd day of May, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Lugano for Applicants/respondents.

Mr. Nyamwea for claimant. /applicant

Chrispo – Court Clerk