



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 658 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**IMMACULATE INGADO ONDONI.....CLAIMANT**

**VERSUS**

**HITEN SOMAIYA.....RESPONDENT**

**RULING**

The Respondent/Applicant, Hiten Somaiya filed a Notice of Motion Application dated 23<sup>rd</sup> April 2019 brought under Rules 27 of the Employment and Labour Relations Court (Procedure) Rules 2016 and Article 159(d) of the Constitution against the Claimant/Respondent, Immaculate Ingado Indony, the decree holder herein. He seeks for Orders that the ex-parte judgment entered against him herein on 13<sup>th</sup> July 2018 be set aside and for the costs of the application to be provided for. The grounds in support of the application are that a court clerk in the Respondent's advocates firm had absconded duty with the client's file since 2017 until recently when he handed the file to a secretary in the office. Further, that the failure by the Respondent's advocates to attend court was on account of the missing court file and the fact that the dates were never put in the firm's diary.

The Application is supported by the Affidavit sworn on 23<sup>rd</sup> August 2019

by the Applicant's advocate, Vincent Chokaa who deposes that in 2014, the Respondent/Applicant instructed his firm to act for him in this cause and that the firm accordingly filed the Response and List of Documents on 8<sup>th</sup> May 2014. That he cannot personally remember any other court action in respect of this matter. That he employed a court clerk named Kyalo in 2017 and sent him to Mavoko Law Courts at one time to file pleadings for a client but the said clerk absconded and disappeared with the court papers and filing fees. That he sacked the clerk on phone and told him not to be seen at the office again. That one of the files that disappeared from his office at that time was the Respondent's file.

Counsel deposes that between November 2018 and July 2019 his firm was served with notices from the firm of M/s. Khalwale and Company Advocates but the relevant file could not be traced for the documents to be placed in the file. That sometime in July 2019, he came back to the office after a court attendance at Kisii Law Courts only to find the Respondent's file with his secretary and upon inquiring where it was from, the Secretary told him it had been brought by Kyalo. That he has come to learn that the hearing of this case took place sometime last year but he cannot trace any hearing notice having been served on his firm for the date the case was heard. That on 8<sup>th</sup> August 2019, the Respondent delivered to his office a Notice of Entry of Judgment served upon him by the Claimant's advocates. That unless the said judgment is set aside, the Respondent is likely to suffer irreparable damages as the Claimant is in the process of execution.

**Claimant's Case**

The Respondent filed a Replying Affidavit sworn on 9<sup>th</sup> September 2019 in which she deposes that the Applicant has failed to adduce any good reasons why he is deserving of the prayers sought in his application. That the discretion of this court should not be exercised to assist a party who seeks to frustrate her quest to accessing justice. That the Applicant has not been truthful in his application with most of his allegations remaining unsubstantiated. That the Respondent's counsel was duly served with the hearing notice but there was no representation in court and no reasons have been given for failing to attend court on that day. That the judgment entered by this Court is proper and should not be set aside as the court considered the defense in the court file. That the application is an afterthought as the Applicant is has moved the court more than one year after being served with the warrants of attachment.

She deposes that the Respondent/Applicant is capable of paying the decretal amount within a short time and that this is a tactic aimed at denying her the fruits of her judgment. That this Court ought not to allow the Applicant's application but should instead allow execution to proceed against the Judgment-Debtor's property for recovery of the balance of the decretal sum. That it is in the interest of justice that the

application herein is dismissed with costs.

## **Proceedings**

The matter came up for hearing on 18<sup>th</sup> September 2019 when the Applicant's advocate submitted that the main reason to set aside the judgment is because the file had disappeared following a difference between Mr. Chokaa and a former clerk known as Kyalo who disappeared with a number of Mr. Chokaa's files. Further, that the Respondent will adduce oral evidence to prove that the Claimant had indeed absconded duty. He prayed that the suit be reinstated and judgment set aside.

The Claimant's advocate strongly opposed the application and submitted that judgment was delivered on 18<sup>th</sup> December 2017 and the reasons given to set aside are not valid. That the Applicant's advocate at paragraph 7 of the affidavit by Chokaa admitted that he received all notices. That if indeed the file had disappeared, he would have informed the court that he was unable to proceed for lack of the file and could also have reconstructed the file. That the Bill of Costs was filed and served upon the advocates but they never appeared in court. That the same has been taxed. He urged the Court to dismiss the application with costs.

The Applicant's advocate then responded stating that any notice being between the time he filed the claim and bundle of documents was not in his possession and that what he has is what he received between November 2018 and July 2019. That this is what prompted him to file the application herein

## **Analysis and Determination**

The only issue for determination is whether the applicant meets the threshold for setting aside the *ex parte* judgment entered in this cause on 20<sup>th</sup> July 2018.

Judgment herein was delivered on 20<sup>th</sup> July 2018 and the application for setting aside thereof filed on 23<sup>rd</sup> April 2019, more than a month's later. The respondent does not deny having been served with hearing notice. Indeed Counsel for the respondent has deposed in the affidavit in support of the application at paragraph 7 that –

“That between November 2018 and July 2019 my firm has been served with notices from the firm of M/s Khalwale and Company Advocates but the relevant file could not be traced and the documents placed on it.”

As rightfully pointed out by the claimant, the respondent did not bother to reconstruct his file from documents from the claimant's advocates or from the court record. The respondent further did not bother to attend court on the hearing date to explain his predicament or to inform the claimant's Counsel about the same.

It is further not explained why the respondent did not follow up his case with his advocate for all this period. The respondent has not even filed an affidavit to demonstrate that he is interested in pending the case.

As was stated in the case of *Shah and Mbogo*, for a court to set aside an *ex parte* judgment the court must be satisfied either that the defendant was not properly served with summons or hearing notice, or that the defendant failed to appear in court at the hearing due to sufficient cause.

Sufficient cause was defined by the Court of Appeal of Tanzania in the case of *The Registered Trustees of Archdiocese of Dar es Salaam -V- The Chairman Bunju Village Government & Others* thus:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant.”

Further, in the case of *Patel -V- East Africa Cargo Handling Service, Duffus V. P.* stated –

"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. I agree that 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. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

The respondent herein has not proved to the court that there is sufficient cause to justify the setting aside of the *ex parte* judgment which was regular, having admitted to being served and done nothing after the alleged loss of file, which has not even been proved.

The respondent has further not personally demonstrated diligent or interest in the prosecution of the defence in this case.

From the foregoing I find no valid reason to set aside the judgment in this suit with the result that the application dated 23<sup>rd</sup> April 2019 is dismissed with costs to the claimant.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**