REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1565 OF 2015

KENYA NATIONAL PRIVATE SERVICE WORKERS UNION.....CLAIMANT

VERSUS

SECURITY GUARDS SERVICES LIMITED.....RESPONDENT

RULING

1. This suit came up for hearing on 3rd April 2019, when the respondent attended court with her counsel but the claimant did not. As a result of the absence of the claimant and her counsel, the defence counsel applied for and the court dismissed the suit for want of prosecution. The Claimant was aggrieved by the dismissal of her suit and brought the instant Application 5.4.2019 seeking the following-

a. The Honourable Court be pleased to set aside the orders made on 3rd April 2019 dismissing the suit for non-attendance and reinstate the same for hearing.

b. Costs of this application be in the cause.

2. The Application is based on the grounds as set out in the motion and the Supporting Affidavit of Cynthia Onyancha. In brief the claimant's case is that on 14 March 2019, the deputy registrar (DR) fixed the suit for hearing on 5th April 2019 and directed the claimant's counsel, who attended court alone to serve the respondent. Later on the same day the respondent's counsel appeared before the DR, who again fixed the suit for hearing on 3rd April 2019 and directed that notice be served upon the claimant.

3. The Claimant further contended that on 16.3.2019, she was surprised to be served with a hearing notice for 3.4.2019 by the respondent. She further contended that her legal officer attended court on 3.4.2019 but on arrival she found that the suit had already been called out and dismissed. She averred that, there was confusion regarding the hearing date between 3rd April 2019 and 5th April 2019 and the Respondent did not communicate the same to the Court before the suit was dismissed.

4. She also avers that her non-attendance was an inadvertent mistake. It is her case that this Application was filed timeously hence it is in the interest of justice that the same be allowed.

5. The Respondent opposes the Application vide the Replying Affidavit of Job Nyasimi Momanyi filed on 17th May 2019. The Respondent contends that on 14th March 2019, the Cause was listed for mention before the DR who directed that the matter be heard on 3rd April 2019 and that a hearing notice be served upon the Applicant. That her advocate called the Claimant's legal officer to inform her of the directions and thereafter the Claimant was served with a hearing notice which clearly indicated that the hearing would be on 3rd April 2019.

6. The Respondent further contended that when the matter came up for hearing on 3rd April 2019, there was no appearance from the Claimant and as such her counsel applied for the suit to be dismissed for want of prosecution and his Application was allowed. She contended that the Applicant failed to attend Court to prosecute her case and as such the court should not exercise its discretion in her favour because that will be delaying the Respondent from enjoying the fruits of her judgment.

7. The Application was disposed of by way of written submissions where the Applicant filed her submissions on 18th June 2019 and the Respondent filed hers on 3rd June 2019.

8. The Applicant submitted that the Respondent has not proved that she was in the habit of absconding Court and maintained that her non-attendance to court on 3.4.2109 was due to the confusion and mistake. It was her position that she should be excused from that mistake and given an opportunity to be heard as the Application for reinstatement was made timeously.

9. The Applicant contended that the discretion to dismiss a suit should be exercised sparingly and the courts must always ensure expeditious, fair, just and economic disposal of cases in dispensing with justice. She relies on the case of ***D.T. Dobie & Co (K) vs. Joseph Mbaria***

Muchina CA 37 of 1978.

10. The Respondent submitted that the Application has no merit because the Applicant has never shown interest in pursuing this matter and the Application also goes against the principle objective of the Employment Act as stipulated in section 3. She relied on the case of ***Republic vs. National Government Constituency Development Fund Board & Another*** **[2017] eKLR.**

11. The Respondent further submits that the hearing notice for 3rd April 2019 was served upon the Claimant hence there was no reason why the Applicant did not attend Court. Further, the Applicant has not demonstrated the steps she took to inform the Court of the confusion.

12. It is the Respondent's submissions that the Applicant has not established the cause of delay in prosecuting the matter since 2015 to warrant resuscitation. The Respondent avers that the Applicant ought to be condemned to bear costs having being the author of her own misfortune.

Analysis and determination

13. After considering the application, affidavits and the submissions presented by both sides, the issue for determination is whether the Applicant has made a proper case to warrant this court's discretion to set aside the order issued on 3rd April 2019.

14. The Applicant's case is that she failed to attend court because there was confusion regarding the correct hearing date between 3.4.2019 and 5.4.2019, and also due to inadvertent mistake on her part. However, she admitted that on 16.3.2019 she was served by the respondent with a hearing notice for 3rd April 2019 but failed to attend court for the hearing.

15. Although the applicant alleges that there was confusion regarding the correct hearing dates, I agree with the Respondent that the Applicant ought to have attended Court on the 3rd of April 2019 to seek directions on the confusing dates. I further agree with the respondent that the Applicant did not adduce any evidence to support the allegation that her representative arrived in court late. In the circumstances, I return that the applicant failed to attend court on 3.4.2019 for hearing despite being served with a hearing notice.

16. Rule 22 (2) of the ELRC (procedure) Rules 2016 provides that:

> ***"Subject to paragraph (1), where a party fails to attend court on the day fixed for hearing, the court may dismiss the suit except for good reason to be recorded.***

17. The foregoing provision resembles Order IXB rule 4 (1) of the Repealed Civil Procedure Rules which provided as follows-

> ***"If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."***

18. Rule 7 (2) and rule 8 of the Repealed Rules provided as follows-

> ***"7 (2) When a suit has been dismissed under rule 4 no fresh suit may be brought in respect of the same cause of action.***
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> ***8. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons may set aside or vary the judgment or order upon such term are just."***

19. From this holding therefore, it is evident that a dismissal for want of prosecution is a final judgment but the same can be set aside upon a successful application by the claimant. It is important to note that Order IXB rule 4 (1) of the Repealed Civil Procedure Rules is the equivalent of Order 12 rule 3 (1) of the Civil Procedure Rules, Order IXB rule 7 (2) is the equivalent of Order rule order 12 rule 6 (2) and Order IXB rule 8 is the equivalent of order 12 rule 7. There is however no equivalent rule under the ELRC procedure rules and as such this court should seek guidance from the Civil procedure rules for guidance by dint of rule 32 of the ELRC procedure rules which applies civil procedure rules to a matter before this court after entry of judgment.

20. I am bound by the Court of Appeal decision in ***Njue Ngai vs. Ephantus Njiru Ngai & Another [2016]eKLR*** where the Court of Appeal stated as follows in relation to dismissal of suit under order IXB rule 4 of the Civil Procedure Rules (repealed):

> ***"18. Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR stating:***
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> > ***"Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The Civil Procedure Act does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:***
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> ***"Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."***

Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8."

21. On the fateful date the respondent attended court ready for the hearing with her counsel and when the claimant failed to attend court to prosecute her case, the respondent prayed for the suit to be dismissed. After satisfying itself that service of the hearing notice had been done, the court made the following orders:

"Suit is dismissed for want of prosecution. Costs to the respondent."

22. The effect of the foregoing orders was that a final judgment was entered for the respondent against the claimant. The respondent should be allowed to enjoy the said judgment unless good cause is shown as to why the judgment should be set aside. In this case, the reasons advanced by the applicant to support the request for setting aside the judgment show that the DR of the court contributed to the confusion regarding the correct hearing date for the case between 3.4.2019 and 5.4.2019. Although hearing notice for 3.4.2019 was served on the applicant in good time, the court record retained the two hearing dates unchanged.

23. It is trite that, the court exists to do justice to all the parties and it has unfettered discretion to set aside its judgments upon terms. In ***Shah Vs. Mbogo and another [1966] EA 166, Harris J.*** set out the guiding principle on a Judge's discretion in setting aside a judgment, thus:

"I have carefully considered the principles governing the exercise of the courts' discretion to set aside a judgment obtained exparte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."

24. Having perused the court record, I am satisfied that the applicant was desirous to have his case heard and that is why on 14.3.2019, she fixed the suit for hearing on 5.4.2019 before the DR. Consequently, I return that this a proper case to warrant court's discretion to set aside the impugned judgment and reinstate the suit for determination on merits.

25. The respondent has not shown that she stands to suffer prejudice that cannot be compensated by costs if the impugned judgment is set aside. Accordingly, the application dated 4.4.2019 is allowed upon the terms that the applicant will pay throw away costs of Kshs.10,000 to the respondent before the hearing of the suit on date to be fixed at the registry on priority basis.

Dated and delivered at Nairobi this 25th day of October 2019

ONESMUS N. MAKAU

JUDGE