



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 272 OF 2017

MARY NJERI GIKONYO.....CLAIMANT/ RESPONDENT

VERSUS

ORIENT SACCO SOCIETY LIMITED.....RESPONDENT/APPLICANT

CONSOLIDATED WITH

CAUSE NO. 273 OF 2017

MARY WANJIRU WANYORO.....CLAIMANT/ RESPONDENT

VERSUS

ORIENT SACCO SOCIETY LIMITED.....RESPONDENT/APPLICANT

AND

CAUSE NO. 414 OF 2017

JANE WANGARI WANJERU.....CLAIMANT/ RESPONDENT

VERSUS

ORIENT SACCO SOCIETY LIMITED.....RESPONDENT/APPLICANT

**RULING**

1. The Respondent/Applicant has filed 3 different applications all seeking the setting aside of the orders and proceedings emanating herein as the cases were heard in the absence of the Respondent/Applicant. The Respondent/Applicant asserts that it was not notified of the hearing of the cases by its advocates. The applications dated 23<sup>rd</sup> April 2019 (Cause No. 272 and 273 of 2017) and 15<sup>th</sup> May 2019 were supported by the affidavits of Samson Maina Nkonyoro which were to the effect that the court should allow the hearing of the suits on the merits. The Respondent/Applicant thus seeks the setting aside the Judgments delivered by the court in the 3 cases.

2. The Claimants were all opposed to the applications seeking to set aside the judgments that were delivered by the Court. The Claimants assert that the Respondent has not come to court with clean hands as no tangible efforts have been shown to suggest that the Respondent was ready for the hearing. The Respondent/Applicant was accused of indolence and this is stated to be demonstrated by the Respondent/Applicant's receipt of letters in respect of the claims and taking no action.

3. The parties filed submissions in support and opposition of the claims. The Respondent submitted that the matter was handled previously by a firm of advocates that was notified of the hearing and the firm of advocates failed to notify the Respondent of the hearing and therefore the Claimants' cases were heard in the absence of the Respondent. The Respondent/Applicant submits that it was being condemned unheard and the execution of the judgment would be extremely prejudicial to the Respondent/Applicant. The Respondent/Applicant submitted that it had a valid and fair reason to warrant an order of stay. The Respondent/Applicant submitted that the matters proceeded *ex parte* meaning that the Respondent/Applicant was not given a chance to be heard and to defend itself. The Respondent/Applicant submitted that this was against the provisions of Articles 25 and 50 of the Constitution and Sections 1(A)(1) and 1B (1)(a) of the Civil Procedure Act. the Respondent/Applicant submitted that relying on the decision in **Republic v National Land Commission & 2 others Ex Parte Archdiocese**

of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR where the Court held citing the case of **Msagha v Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** held as follows:-

*“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...*

The Respondent/Applicant submitted that this position was reiterated in several other cases cited in support of the submissions that courts must always bear in mind that the laws of procedure are grounded on principles of natural justice which requires that men should not be condemned unheard and proceedings affecting their lives and property should not continue in their absence nor should they be precluded from participating in them. The Respondent/Applicant cited Order 22 Rule 25 of the Civil Procedure Rules 2010 which provide for stay of execution pending suit between decree-holder and judgment debtor. The case of **Wachira Karani v Bildad Wachira [2016] eKLR** where the Court held that

*'the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.[4]) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see Shah vs. Mbogo[5]). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali.[6])It also goes without saying that the reason for failure to attend should be considered.'*

The Respondent/Applicant submits that it raises serious and triable issues the Court ought to consider and determine and that the Court should look at the nature of the action and the defence if any raised. The case of **Esther Wamaitha Njihia & 2 Others v Safaricom Limited [2014] eKLR** was cited for the proposition on setting aside and stay arguing that the plaintiff can be reasonably compensated by costs for any delay in hearing bearing in mind that to deny a litigant a hearing should be last resort of any court.

4. The Claimants submitted that the Respondent/Applicant had come to court with unclean hands. It was submitted that he who comes to equity must do so with clean hands. The cases of **Esther Nungari Gachomo v Equity Bank Limited [2019] eKLR** and **Caliph Properties Limited v Barbel Sharma & Another [205] eKLR** were cited in support of the submission that the Respondent/Applicant was aware of the suit all along and failed to act and its hands were tainted. The Claimants submitted that the Respondent had a duty to pursue its case and it could not blame the lawyers. The Claimants submitted that the Respondent had not attached any emails or letters enquiring about the case to its advocate nor did it provide call records to show the same. The case of **Neeta Gohil v Fidelity Commercial Bank Limited [2019] eKLR** was cited for the proposition that the case belongs to the litigant and not the advocate. The Claimants submitted that the provisions of Sections 1A(1) and 1B(1)(b) and (d) of the Civil Procedure Rules relate to the timely disposal of the suits before the courts.

5. The Respondent/Applicant came to court seeking the vacation of proceedings ostensibly because the Respondent/Applicant was not heard. The Respondent/Applicant argues that it was condemned unheard contrary to the cardinal principles of natural justice – *audi alteram partem*. The Claimant is opposed to the grant of the orders sought by the Respondent/Applicant. The matters were not undefended but were heard in the absence of the Respondent/Applicant whose advocate and witnesses were absent at the date set for the hearing. The principles for setting aside the judgment of a court is well settled. In the case of **Mbogo v Shah [1968] EA 93** the principles were set out as:-

*a) Firstly, there are no limits or restrictions on the judge’s discretion 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.*

*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) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.*

6. The complaint by the Respondent/Applicant is that it was not informed of the matter coming up for hearing by its advocate. No evidence of the absence of communication is availed. There is no letter annexed showing the Respondent/Applicant’s efforts to reach its advocate after the matter came to the Respondent’s attention. There is nothing that suggests even remotely that the Respondent/Applicant made enquiries about the suit during its pendency. The discretion to set aside is meant to aid in the just disposal of cases and the principles of natural justice though laudatory and aspirational just as Article 25 and 50 of the Constitution are, are no panacea for indolence or a party who does not attend a hearing. If it was the case that a case cannot be determined on merits because one party is absent then in that case suits would never be concluded as parties often fail to attend court deliberately or mistaken in the belief that all they need to urge the court is to apply these laudatory principles of natural justice and set aside the judgment procedurally obtained after a default in appearance. No grounds exist for the grant of the relief sought. The upshot of the foregoing is that the motions before me are entirely devoid of merit and are thus dismissed with costs to the Claimants.

It is so ordered.

**Dated and delivered at Nyeri this 15<sup>th</sup> day of October 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**