



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 323 OF 2017

FRANKLIN J. B. CHABARI.....CLAIMANT/APPLICANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT

COUNTY PUBLIC SERVICE BOARD THARAKA NITHI COUNTY.....2<sup>ND</sup> RESPONDENT

RULING

1. The Claimant/Applicant herein seeks the reinstatement of the suit which was dismissed for non-attendance on 6<sup>th</sup> February 2019 when he and his Advocate were absent at the hearing. He filed the motion to reinstate the suit on the same day. In his application he asserts that his Advocate Mr. Mutuma had sent Mr. Ken Muriuki to hold his brief and get time allocation. He asserts that time allocation for hearing was set at 9.30am but the Advocate holding brief erroneously indicated that time had been fixed for 11.30am. He depones that he was present in court at 11.30am with his advocate and upon perusal of the court file realized that the matter had been allocated a hearing at 9.30am. He depones that the absence was therefore not intentional and was not intended to delay the hearing of this matter. He thus sought the grant of the motion.

2. The Respondents filed grounds in opposition. In the grounds, the Respondents assert that the Claimant and his Advocate did not explain where they were at 9.00am when the matter was called the first time and at 9.30am when the case was scheduled for hearing. The Respondents assert that Mr. Muriuki Advocate who allegedly erroneously advised the Claimant's Advocate that the case was scheduled for hearing at 11.30am and not 9.30am had not sworn an affidavit in support of the notice of motion application. The Respondents assert that courts will not exercise its judicial discretion in favour of a party who fails to attend the hearing of his case and fails to give a satisfactory explanation. The Respondents assert that reinstatement of the suit will have no effect as the Claimant's promotion to the office of Director In charge of Urban Development was revoked on 10<sup>th</sup> May 2018 and he reverted to his previous position and the suit is therefore not meritorious.

3. The parties filed submissions in support and opposition of the motion. The Claimant/Applicant submitted that the motion was grounded in Section 12(3) of the Employment and Labour Relations Court Act cap 234B of the Laws of Kenya which provides that in exercise of its jurisdiction under the Act, the Court shall have power to make any appropriate relief as the Court may deem fit to grant. He argued that this section gives the court unfettered jurisdiction to give any appropriate relief to meet the ends of justice. The Claimant further submitted that in support of his position he relied on the case of **In Re Estate of Job Ndunda Muthike (Deceased) [2018] eKLR** where the learned Judge stated that failure to annex the copy of the order that the Claimant seeks to be reviewed. He submitted that based on the case of **Grace Mwendwa Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR** which stated that

The overreaching imperative in the administration of justice that guides courts, right from the Constitution to statute law as well as the relevant Rules of Procedure that guide various types of litigation in our courts, have shifted and courts tend to disregard matters of technicalities especially where no prejudice is caused to the parties. The courts are nowadays focusing on facilitating a just expeditious, proportionate and affordable resolution of substantive disputes without undue regard to technicalities as set out under Article 159 (d) of the Constitution.

The Claimant submitted that there was no prejudice to be suffered by the Respondents if the matter is heard on the merits. The Claimant submitted that the facts contained in the grounds were on the merits of the suit and were inappropriate for inclusion as grounds of opposition. He argued that those facts ought to be contained in an affidavit. The Claimant urged the grant of orders as sought.

4. The Respondents submitted that the Claimant and his lawyer had failed to explain their absence in Court when the matter was called out when the cause list was being settled and secondly when the case was due for hearing half an hour later. The Respondents argue that as held in the Court of Appeal case of **Shah v Mbogo [1968] E.A. 93** and **Pithon Maina v Mugiria (1982-88) 1 KAR 177** the discretion to set aside is never exercised in favour of a person, like the Applicant, who has sought whether by evasion or otherwise to block the course of justice.

The Respondents also cited the cases of **John Kabira Kioni v George Namasaka Sichangi t/a Sichangi Advocates [2019] eKLR** and **Bilha Ngonyo Isaac v Kembu Farm Limited & Another [2018] eKLR**. The Respondents urged the dismissal of the Claimant/Applicant's motion with costs.

5. The facts surrounding the genesis of the motion are not in dispute. The suit was set for hearing on 6<sup>th</sup> February 2019 which date was fixed in the presence of the Claimant's advocate on 7<sup>th</sup> November 2018. Directions were given on additional documents that were to be filed. Come the hearing date, the Claimant and his Advocate were not present in Court at 9.00am when the case was first called out for call over when the cause list is settled. The Claimant's Advocate had requested a colleague to hold his brief as the record shows. The case was set down for hearing and was dismissed when the matter was called out next in the absence of the Claimant and his counsel. The Advocate for the Respondents was present in Court. It is asserted for the Claimant that the Advocate who held his Advocate's brief misinformed him of the time set for hearing hence the absence of the Claimant and his Advocate. The court dismissed the suit as there was no appearance of the Claimant and his advocate. The Claimant has not given any explanation as to where he was as courts start at 9.00am. He was not present at 9.00am and only came to court at 11.30am. I do not know which in which universe cases start at 11.30am half an hour before noon. If his advocate had sought a time allocation at 11.30am and that was acceded to that would have been the time for hearing of the case. That would not mean that it was the time for the Claimant to make his way to court. As stated in the case of **Shah v Mbogo (supra)** the discretion to set aside is as follows:-

The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

- 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. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E*
- 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. *Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.*
- 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. *Mbogo v Shah [1968] EA 93*

6. The Claimant herein is underserving of the exercise of the discretion of the Court in his favour. While I agree with him that issues of fact are best articulated in an affidavit and not on grounds of opposition, there is no merit in his motion as there was no reason for his absence in court at 9.00am when the matter was first called and at 9.30am when the hearing of the case was scheduled. As correctly pointed out the affidavit of Muriuki Advocate was not availed to prove that indeed he advised that the case was scheduled for 11.30am. It was incumbent for the Claimant to show this was the factual position and not a connivance now that he is faced with the demise of his suit. Application is devoid of merit and is dismissed with costs to the Respondents.

It is so ordered.

**Dated and delivered at Meru this 4<sup>th</sup> day of October 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true Copy of the original

**Deputy Registrar**