REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 842 OF 2015

PAUL MUTUKU MULWA.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT

MBOONI BOYS HIGH SCHOOL.....RESPONDENT

RULING

Introduction

1. The application before me is the Respondent's Notice of Motion dated 3.6.2019. It is brought under section 16 of the ELRC Act and Article 159(2) (d) of the Constitution and it seeks the following orders:-

(a) **THAT** this Honourable Court be pleased to recall the Claimant for the purpose of cross-examination by the Respondent/Applicant.

(b) **THAT** this Honourable Court be pleased to grant a stay of the proceedings slated for 6th June 2019 pending the hearing and determination of this application interparties.

(c) **THAT** this Honourable Court be pleased to set aside and or review the orders made on the 3rd April 2019 when the matter proceeded ex-parte.

(d) **THAT** the costs of this Application be in the cause.

2. The application is supported by the Affidavit sworn by the defence counsel Mr. Martin Munene on 3.6.2019. In brief, he deposed that the reason for not attending court for hearing on 3.4.2019 was because of the short notice and negligence on the part of his receiving Clerk to present the Hearing Notice to counsel in good time so as to prepare for the hearing. According to him, the hearing notice was served one day before the hearing. That upon receipt of the hearing notice, he caused the file to be perused and it was confirmed that the suit was heard and concluded and it was scheduled for submissions on 6.6.2019. He contended that the Claimant resigned and is therefore not entitled to any compensation. He further contended that error on the part of the counsel should not be visited on the innocent client. He therefore prayed for the orders sought.

3. The application is opposed by the claimant and has filed grounds of opposition. In summary the claimant contends that the application is an afterthought having been filed too late 2 months after the close of the hearing. That the hearing notice was served on 20.3.2019 for a hearing on 3.4.2019, which was ample time. That the negligence manner in which the respondent handled the hearing notice after service is none of his business. Finally, he contended that even if the applicant has a defence on record, he lost the opportunity to prosecute it by failing to attend court to prosecute it. He therefore prayed for the application to be dismissed with costs.

4. The application was disposed of by written submissions. The applicant submitted that he has a right to be heard in his defence and also to cross examine the claimant. That the said right should not be denied due to his Advocates mistake/error. He relied on Article 159(2) (d) of the constitution to urge that justice should be administered without undue regard to procedural technicalities. He referred to several authorities to fortify his submissions.

5. The claimant submitted that the delay in making the application, was inordinate and should not be exercised because no explanation has been given for the same. He further contended that payment of costs will not adequately compensate the financial and psychological inconvenience. Finally, he urged this court on without prejudice basis that if the hearing is reopened, the respondent be allowed to adopt her pleadings, statements and documents and be allowed to file submissions to pave way to the determination of the suit.

Analysis and determination

6. The issue for determination herein is whether the applicant has met the legal threshold for the court to exercise discretion in granting the orders sought.

7. The discretion of the court to review and set aside its own exparte orders is wide and unfettered provided that the aim is to do justice. However, the guiding principle for setting aside exparte judgment (read orders) were set out in ***Shah vs Mbogo and Another [1966]EA 166*** where the court held that:-

> ***"I have carefully considered the principles governing the exercise of the court's 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 not designed to assist a person who has deliberately sought, whether by erosion or otherwise to obstruct or delay the course of justice."***

8. Applying the foregoing principles to the fails of this case, I find that the failure by the respondent to attend court was not deliberate but a genuine mistake on the part of the counsel and his receiving clerk after service of the hearing notice. The court takes judicial notice that the State Law Office is a large institution where documents could easily be mixed up under the normal procedures. That is not to say that the State Law Office should be given any special treatment compared to other law firms.

9. All what I am stating is that in the circumstances of this case where there is a defence on record the court is inclined to excuse a genuine mistake by counsel for the ends of justice. The inference I draw from the affidavit by the defence counsel is that, even the applicant was not made aware of the hearing date because the counsel who was supposed to give her notice, was also made aware of the date too late. Consequently, I find that this this a good case to exercise discretion in favour of the applicant in order to accord the parties a fair trial.

10. The court is however in agreement with the claimant that the delay in making the instant application for two months is inordinate and no sufficient explanation has been given. I therefore compensate the claimant for the said inconveniences by awarding throwaway costs.

Conclusion

11. I have found that the applicant has demonstrated that the failure to attend the hearing on 3/4/19 was not deliberate but due to a genuine mistake. I have however found that the delay in filing the application was inordinate. Consequently, I allow the application in the following terms:-

(a) The defence case is reopened and the respondent is granted leave to prosecute the same.

(b) Parties will be at liberty to file submissions after close of defence case.

(c) Applicant to pay the claimants throw away costs of Kshs.12,000 before the defence case is heard.

Dated, Signed and Delivered in Open Court at Nairobi this 15th day of November, 2019

ONESMUS N. MAKAU

JUDGE