



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 65 OF 2016

JOSEPH GACHANJA NGARI.....CLAIMANT

VERSUS

THE ARK LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant's motion seeks the setting aside of the Court's order dismissing the suit for non-attendance on 31<sup>st</sup> January 2019. The Application is the one dated 25<sup>th</sup> July 2019 and in it the Claimant seeks the vacation of the dismissal on account of the grounds expressed therein. It is argued that the failure to attend court was inadvertent and that the orders sought will meet the ends of justice. The application is supported by the annexed affidavit of Muhoho Gichimu Advocate. He depones that he was doing bring ups when he came across the file on 22<sup>nd</sup> June 2019 and sought to have the clerk request for formal proof. He stated that the matter came up before court on 14<sup>th</sup> November 2018 and it had a date for 31<sup>st</sup> January 2019 with a mention date of 4<sup>th</sup> December 2019 (sic). He deponed though in attendance he did not diarize the matter due to inadvertence and mistake on his part. He deponed that the file thus did not come up in bring up files until he saw the file on 22<sup>nd</sup> July 2019 and upon perusing the court file he found that the file was dismissed for non-attendance as none of the parties were present when the matter came up for hearing on 31<sup>st</sup> January 2019. He averred that the failure to attend court was excusable and there would be no prejudice that will occur if the file is reinstated and if any loss occurred it can be remedied by payment of throw away costs.

2. The Respondent filed a replying affidavit in which it was deposed that there were no good reasons advanced warranting the court to set aside the dismissal orders of 31<sup>st</sup> January 2019. He stated that the counsel for the Claimant said that he came across the file on 22<sup>nd</sup> June 2019 and thereafter says he saw the file on 22<sup>nd</sup> July 2019. The deponent stated that the matter having been dismissed on 31<sup>st</sup> January 2019 and the delay in filing the application on 30<sup>th</sup> July 2019 shows and inordinate delay> he deponed that there was no extract copy of the diary for the day attached to the affidavit. The deponent averred that it was very clear as portrayed by the applicant's supporting affidavit that the Claimant himself has not been vigilant and/or has completely lost interest in prosecuting this matter as if he had visited or consulted his advocate from 14<sup>th</sup> November 2018 to enquire on the status of his case his advocate would have realized his mistake and rectify the same within good time. The Respondent's counsel deponed that that this case was given a mention notice after the notice to show cause and the Claimant had stated that he would wish to have one last chance to prosecute the case which was granted. Counsel deponed that it was probable that the Claimant was not even aware that the suit had been dismissed as he had not sworn an affidavit in support of the motion or otherwise show he had instructed the advocate to file the application for reinstatement. He urged the dismissal of the application dated 25<sup>th</sup> July 2019.

3. Mr. Muhoho argued the motion for the Applicant while Miss Mwai argued for the Respondent. Mr. Muhoho submitted that the Claimant was keen on prosecuting the claim and that there was inadvertence on his part as counsel and the fault was not that of the Claimant. He sought the reinstatement of the suit. Miss Mwai argued that there was a delay of 6 months before the motion seeking to set aside the dismissal was made and no explanation was given for the delay. She stated that the case had a notice to show cause and the Claimant was given one last chance. She submitted that the Claimant had not sworn an affidavit to show he was interested in pursuing the matter. She stated that counsel did not state why upon perusing the file in June he did not notice that the suit had been dismissed. She argued that the motion lacked merit and ought to be dismissed.

4. The Claimant/Applicant seeks the exercise of judicial discretion in setting aside the dismissal orders that issued on 31<sup>st</sup> January 2019 due to his and his advocate's absence at the hearing. In the cases of **Mbogo & Another v Shah [1968] EA 93** and **Pithon Waweru Maina v Thuku Mugiria [1983] KLR 78**, the law on setting aside of *ex parte* judgment or order was considered in great detail. The principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in default of either party to attend the hearing are stated to be:

- a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.
- 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. Additionally, a discretionary power should be exercised judicially and not arbitrarily or idiosyncratically

5. Can be absence of diligence be prescribed as an excusable mistake or error? I think not. The Claimant was alive to the precarious position his suit held being one of the oldest in this court. He was granted one last opportunity to attend court and failed to take the offer to present his case and have a determination on the merits. The conundrum that he faces is compounded by the failure of his advocate to articulate clearly

the reasons for the absence in court. Surely there is a daily return an advocate is required to maintain for the matters he attends to in court. In this case the advocate realized either in June or July that the matter had not been acted on. The bring ups in any event are too far apart on a matter that is this aged thereby showing the Claimant was indolent and guilty of laches. In the premises the motion is not fit for grant and is dismissed albeit with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 5<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**