



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 749 OF 2017

NAOMY OSIEMO.....CLAIMANT

-VERSUS-

GEOFFREY NYANG'AU T/A MAVUNO MINI SUPERMARKET.....RESPONDENT

RULING

Introduction

1. The application before the court is the Respondents Notice of Motion dated 25.9.2019 brought under Article 159 of the constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. It seeks the following order:

- (a) **THAT** this Honourable Court be pleased to certify this application as urgent and the same be heard ex-parte in the first instance.
- (b) **THAT** this Honourable court be pleased to stay any other proceedings pending the hearing and determination of this application.
- (c) **THAT** the mention for submissions is scheduled on the 15th October, 2019.
- (d) **THAT** this Honourable Court be pleased to **re-open** the Respondent/Applicant's case.
- (e) **THAT** this Honourable Court be pleased to grant leave to the Respondent/Applicant to file a Supplementary List of Documents to include the Respondent's Statement.
- (f) **THAT** this Honourable Court be at liberty to make and issue any such orders as it may deem fit and fair to grant.
- (g) **THAT** costs of this Application be in the cause.

2. The Application is premised on 7 grounds set out in the body of the motion and it is supported by the Affidavits sworn by the Applicant and his counsel on 26.9.2019. In brief, the applicant contends that when the suit herein came up for hearing on 16.9.2019, he sought for adjournment to enable her file his witness statement and documents but the court declined the request. That as a result, the claimant gave his evidence and the hearing was closed. He therefore seeks for the hearing to be reopened and that leave be granted to him to file witness statements and documentary evidence.

3. The claimant opposed the application by the affidavit sworn by her counsel on 7.10.2019. In brief, the claimant contended that the Applicant had ample time to file witness statements and exhibits from the time he filed his defence on 23.6.2017. That the parties attended pretrial conference on 15.5.2018 before the Principal Judge and they agreed that they had complied with the rules and the suit was certified ready for hearing. That on 20.3.2019 the parties fixed the suit for hearing by consent on 16.9.2019. She therefore contended that the delay in filing witness statements and exhibits for over two years after filing the defence is inordinate and prayed for the application to be dismissed with costs.

Applicant's Submissions

4. The applicant submitted that the failure to file his witness statements and exhibits was not deliberate but through inadvertent omission. He contended that a genuine mistake on the part of his counsel should not be visited on him. He contended that unless the hearing is reopened and leave granted he will suffer injustice. He relied on *Esther Wamaita Njihia & 2 Others Vs Safaricom Limited [2014]eKLR* where Havelock J. agreed with several precedents that unless there is fraud or intention to overreach, there is no error or default that cannot

be put right by payment of costs.

Claimant's Submissions

5. The claimant submitted that the respondent has been indolent and not diligent. She maintained that a delay to file his witness statement and exhibits for over two years even when there was a hearing date fixed by consent was inordinate and inexcusable. She therefore viewed the application for reopening of the hearing as a show of bad faith with intention to delay justice. She further contended that the respondent confirmed that during the pretrial hearing that the suit was ready for hearing and the court gave a certificate to that effect.

Analysis and determination

6. The issue for determination herein is whether the applicant has made out a case to warrant the court's discretion to set aside the impugned orders and to grant leave to her to file his witness statement and exhibits.

7. The reason advanced by the applicant for the application is that his counsel made an inadvertent omission and prayed that the mistake of counsel should not be visited on him. The claimant, is however, of a different view and contends that the default to file his witness statement and exhibits 2 years after close of pleadings is inordinate. She underscored the importance of pretrial hearing where the applicant confirmed to the court that the suit was ready for hearing and proceeded to fix the hearing date by consent and still failed to file any witness statements or exhibits.

8. I have carefully considered the application, affidavits and submissions by the parties. I agree with the precedents cited by the applicant that the court does not exist to punish parties for their errors but to decide on their rights in the dispute under consideration. I am also alive to the fact that the court has unfettered discretion to set aside its orders upon terms.

9. In *Shah v Mbogo and Another [1966] EA 166*, Harris J set out the guiding principles on a Judge's discretions in setting aside a judgment, or order thus:

"I have carefully considered the principles governing the exercise of the courts' discretion to set aside a judgment obtained ex parte. 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."

10. Applying the foregoing principles to this case, I return that the applicant has failed to prove that failure to file his witness statement and exhibits before the hearing date was a genuine mistake or accidental default. First the respondent failed to file witness statements and exhibits within the 21 days after service of summons. Instead, he filed a Memorandum of Appearance on 22.5.2017. After one month he filed defence on 23.6.2017 and did not annex any supporting documents or witness statements, instead he indicated that he will provide the same before the trial. He however did not file any and when the suit came up for pretrial hearing on 15.5.2018, he indicated that he had "complied" and the suit was certified ready for hearing. Thereafter, he never sought leave to file document but participated in fixing the suit on 20.3.2019.

11. The fixed hearing date was over 5 months away and again the applicant never filed any witness statement or exhibits. On the day of the hearing, the court allowed the defence to testify even without a written statement on record but the counsel confirmed that the defendant did not attend the hearing.

12. In all fairness, this court finds the default by the applicant to have been both deliberate and inordinate. Even if the court's discretion is unfettered in setting aside its orders, I must state that the discretion must be exercised judiciously. It should be exercised in cases where default is due to genuine mistake or accidental omission and not where a party persists in deliberate or reckless disregard to rules of procedure that guide fair trial. The right to fair trial accrues equally to both parties and none should be allowed to take advantage of the other through delay because justice delayed is justice denied.

13. The Supreme Court dealt with late filing of affidavit evidence in *Raila Odinga V Independent Electoral and Boundaries Commission & Others[2013]eKLR* where it held:

"Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality." [Emphasis Added]

14. This court find that the default by the Applicant to file his written statement and exhibits and failure to attend the hearing on a date fixed by consent is inexcusable. Consequently I decline to grant the orders sought proceed to dismiss the application with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 1st day of November, 2019

ONESMUS N. MAKAU

JUDGE