REPUBLIC OF KENYA

THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1225 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 8th March, 2018)

GEORGE WAMBUA MUTUKU……. CLAIMANT

VERSUS

CROWN INDUSTRIES LTD……...……. RESPONDENT

RULING

1. Before this Court is a Notice of Motion dated 13th November 2017 brought under Section 1(A), (B) and 3A, Order 12 r.7 of the Civil Procedure Rules and all enabling provisions of the law seeking orders:

> ***1) That the Employment and Labour Relations Cause No. 1225 of 2012 be reinstated.***
>
> ***2) That the cost of this Application be provided for.***

2. The application is premised on the grounds that:

> ***1. The suit was dismissed due to non-attendance of the Claimant and his Advocate on 7th November 2017.***
>
> ***2. The clerk who took the hearing date at the registry served the hearing date upon the Respondent but inadvertently failed to diarise the right date in the Advocate's diary hence the firm of Atieno Opiyo and Company Advocates did not deliberately fail to attend Court for the hearing.***
>
> ***3. The Claimant has a good case and the suit should be determined on its merit.***
>
> ***4. The Claimant stands to suffer irreparably unless the dismissal order is discharged and the suit reinstated as to ensure that justice is done.***
>
> ***5. The firm of Atieno Opiyo and company is extremely apologetic for the embarrassment and inconvenience caused to this court by the absence in court to Claimant's case.***
>
> ***6. The Application has been filed without delay and the Claimant is willing to set the suit down for hearing as soon as the suit is reinstated by this Honourable Court.***
>
> ***7. It is in the interest of justice that this application be allowed.***

3. The application is supported by the Affidavit of one Linet Opiyo the acting Legal Coordinator for the Claimant who reiterates facts on the face of the Application.

4. The Respondent has opposed the Application by filling a replying affidavit wherein he avers that on 3rd April 2017, the matter came up for hearing during the Employment and Labour Court's Service Eeek having not been set down for hearing for over two years where the Claimant was not present but the Respondent was represented and had a witness.

5. The Respondent further avers that in the absence of the Claimant, the Honourable Court directed that the parties take a date for hearing at

the registry as it was a part-heard matter rather than dismissing the suit and gave the Claimant a final chance to prosecute the suit.

6. The firm of Atieno Opiyo and Company Advocates took over the conduct of this matter on behalf of the Claimant in the place of Musili Mbiti and Company Advocates on 8th May 2017. **(annexed and marked "JM-1" is a copy of the Notice of change of Advocate duly filed and served),** and upon coming on record, the Advocates of the Claimant on 29th May 2017 fixed the case for hearing, which was scheduled for 7th November 2017. The aforementioned date was taken ex-parte on behalf of the Advocate of the Claimant as stated in paragraph 4 of Linnet Opiyo's affidavit.

7. On 7th July, 2017 the firm of Messrs. Oraro and Company Advocates was served with a hearing Notice with a view of bringing to their attention that the matter was set to proceed on 7th November, 2017. **Annexed and marked "JM-2" is a copy of the Hearing Notice**. The Hearing Notice bears the signature of the Advocates of the Claimant and thus the Advocates must have been duly aware of the Hearing date therein.

8. The Respondent avers that despite fixing the matter for hearing and preparing the Hearing Notice that was served on the Respondent's advocates, the Claimant Advocate failed to attend Court on 7th November, 2017. Consequently, the Court dismissed the Claim for non-attendance.

9. The Respondent states that on 3rd April, 2017, the matter came up for hearing on which date neither the Claimant nor his Advocate were present in Court following which the matter was adjourned. Prior to 3rd April 2017, the matter last came up for hearing on 10th December 2014.

10. The Respondent avers that despite being aware of the unending adjournments, the Claimant's Advocate yet again failed to attend Court to attend to this matter. The pendency of this suit is causing needless anxiety to the Respondent and the Claimant and his Advocates appear to be prolonging prosecution of the claim and thus the application herein is misconceived, is an abuse of the Court process and untenable in law hence devoid of merit and should be dismissed with costs to the Respondent.

11. The Claimants filed submissions where they stated that in exercise of discretion, the setting aside of an exparte hearing is a matter of discretion of the Court where they relied on the case of **Pithon Waweru Maina Versus Thuka Mugira (1983) e KLR**. The Court of Appeal set out the principles governing the exercise of judicial discretion to set aside an exparte judgment obtained in the absence of appearance or defence by the Defendant or upon failure of either party to attend the hearing as follows:

> ***a) "There are no limits or restrictions on Judge's discretion except that if he does vary the judgement he does so on such terms as may be just.***
>
> ***b) This discretion is intended so to be exercised to avoid injustice or hardships resulting from accidents, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.***
>
> ***c) The court of Appeal….. should not interfere with the exercise of 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 arrived at the 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 injustice".***

12. This position was aptly reiterated by Odunga J in **Lucy Bosire versus Kehancha Div Land Dispute Tribunal and 2 others [2013] e KLR** where he cited the case of **CMC Holdings Limited vs Nzioki [2004] 1 KLR 173** in which the Court reiterated the principles above as follows:

> ***"That discretion must be exercised upon reasons and must be exercised judiciously… in law discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle ...The answer to that weighty matter was not to advice the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate" .***

13. The Respondent filed submissions wherein they stated that the Claimant has on countless occasions demonstrated a lack of need to prosecute their case as is seen in their absenteeism from the proceedings in Court despite the fact that they themselves were the ones who served the Respondent with the hearing notices for the proceedings to continue on 7th November 2017. The Claimant has also shown this aforementioned lack of prosecution interest by the 2-year delay in which they did not proceed in initiating any hearing up until the Honourable Court brought the matter up.

14. The Respondent also avers that the Employment and Labour Relations Court (Procedure) Rules 2016 are clear on the issue of non-attendance on the part of the Claimant. The Respondent had appeared at the hearing and did not admit any part of the Plaintiff's claim and the matter was dismissed pursuant to Order 22 (2) of the Employment and Labour Relations Court (Procedure) Rules 2016 and therefore the Court was merited in dismissing the suit given the circumstances and the Claimant's adamant resilience in not prosecuting the matter and no good reason for non-attendance has been provided by the Claimant.

15. I have considered the averments of both parties. The reasons given by the Applicant/Claimant on failing to prosecute their claim on

7/11/2017 was due to a mistake in failing to diarise the same. Indeed the law is that a party should not be made to suffer the mistake of Counsel. However, this Court notes that this case was filed in July 2012.

16. This case then came up for mention on 26/9/2012 and the Honourable Justice Rika set this case for hearing on 27.3.2013.

17. The Claimant's case proceeded on this day and the Claimant gave his evidence and closed his case. The defence case was set for 27.9.2013. On this day, the Claimants were present but the Respondents were absent. The next hearing date was scheduled for 10/12/2014 and on this day, the Respondents were also present but not ready to proceed.

18. The case was never set for any further hearing again until 7/4/2017 when the case came up during this Court's service week and was ordered set for hearing on a priority basis.

19. On 7/11/2017, the Claimant despite serving the Respondents failed to attend Court and this Court dismissed their claim for want of prosecution.

20. From the chronology of events above, I see a mistake/error on the Court's part by dismissing this case for want of prosecution when infact the Claimant had already prosecuted his case. This was a mistake for which this Court regrets as the Court inadvertently assumed that the Claimant had never prosecuted his case.

21. In the premise, I exercise my discretion to allow this application and reinstate this claim so that a determination can be made on merit upon hearing both parties.

22. Costs of this application will be in the cause.

Dated and delivered in open Court this **8th day of March, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Barasa holding brief for Mrs. Ogalo for Respondent – Present

Claimant – Absent