REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1013 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JULIUS WAFULA CHEBI.....CLAIMANT

-VERSUS-

GIBBON AKIFUMA.....1ST RESPONDENT

E-GAP SOLUTIONS LIMITED.....2ND RESPONDENT

RULING

The judgment herein was originally delivered on 14th March 2014 following an ex parte hearing on 28th January 2014 after the respondents failed to attend court on the hearing date. The respondents successfully applied for setting aside of the ex parte judgment through a ruling rendered on 16th October 2014.

In the ruling, the judgment was set aside and the claimant's case re-opened so that he could be cross-examined by the respondent's counsel. The ruling was also conditional upon the respondents apologising for referring to myself as Justice Maureen Odero, instead of Justice Maureen Onyango, a condition that the respondent has not complied with to date.

The claimant applied to enforce the condition vide his application dated 21st November 2014, which was however compromised by consent of the parties.The case was thereafter fixed for hearing on 9th April 2015 when the court was not sitting. It was rescheduled to 28th July 2015 by the Deputy Registrar. The date was taken by consent of counsel for both parties.

On 28th July 2015, the respondent again failed to attend court prompting hearing of the case was fixed to reinstate the judgment of 14th March 2014.

On 30th May 2017, the claimant filed a Bill of Costs after serving a copy of the decree on the respondent's counsel on 23rd March 2017. Taxation was fixed for 12th June 2017 and a hearing notice in respect thereof served upon the respondent's counsel on 23rd March 2017.

The claimant's party and party bill of costs was delivered on 14th September 2017 in the presence of the respondent's representative. The claimant applied for execution of the decree on 22nd September 2017 and a warrant of attachment of movable property in execution of the decree on 22nd September 2017 and a warrant of attachment of movable property in execution of decree of money was issued UPSTATE KENYA AUCTIONEERS who proclaimed the respondent's goods on 2nd October 2017.

By an application dated and filed on 4th October 2017 the respondent's sought leave for the firm of **Mwenda Kinyua and Company Advocates** to come on record in place of **Mwagambo and Okonji Advocates** who had hitherto been on record for the respondents, stay of execution the setting aside of the ex parte judgment and all consequential orders. On 5th October 2017 the respondents filed another application seeking orders that:

> *1. This Honourable Court be pleased to revisit the application dated 4th October 2017 and filed in court on the same day and issue an order of stay of execution of the decree herein pending the hearing and determination of the said application.*
>
> *2. That costs of the application be provided for."*

Both applications were withdrawn by a notice of withdrawal dated 6th October 2017. On the same date, the respondents filed the present application which is dated 6th October 2017. Suffice to state that the application dated 4th October 2017 was certified urgent but the court declined to grant orders staying the execution hence the application dated 5th October 2017 which was also not granted, the court directing that the application be served upon the claimant and be heard on 6th October 2017. The court granted a stay conditional upon the respondents depositing the decretal sum in court. The deposit was made on 11th October 2017.

In the present application dated and filed on 6th October 2017, the respondents seek the following orders –

1. The Court be pleased to grant leave to the firm of Mwenda Kinyua and Company Advocates to come on record on behalf of the applicants

2. That the court do set aside the judgment of Hon. Lady Justice Onyango delivered on March 14, 2014 pending the hearing and determination of this application.

3. That this court be pleased to grant orders for stay of execution of the decree issued by this court on the 4th of April 2017 pending the hearing and determination of this application.

4. That the costs of this application be provided for.

The grounds in support of the application are the following –

1. That the applicants had specifically instructed the firm of Mwagabo and Okonjo Advocates to attend to all other issues incidental to this suit.

2. That the counsel on record failed to proceed on the matter through no fault of applicants thereby exposing them to injustice.

3. That the matter proceeded *ex parte* and judgment was entered against the applicants.

4. That a proclamation notice has been served upon the applicants and will lapse on the 9th of October 2017.

5. That it is just and fair in the circumstances that the applicants should not be adversely prejudiced by circumstance beyond their control.

6. That it is therefore necessary in the interest of justice to set aside the judgment and the grant the stay the execution of the decree.

7. That the applicants are willing to deposit reasonable security a condition for stay of execution.

8. That the balance of convenience tilts in favour of the applicants due to the substantial amount of the decretal sum.

9. That an award of costs would compensate the claimant if the said judgment was set aside.

The application is supported by the affidavit of GIBBON AKIFUMA, the 1st respondent sworn on 6th October 2017 in which he reiterates the grounds in support of the application.

In the replying affidavit of JULIUS WAFULA CHEBI, the claimant, sworn and filed on 16th October 2007, he deposes that in the application dated 11th March 2014, the reason given was that the respondent's counsel had received the hearing notice but mis-diarised the date. He deposes that the respondent has not complied with the conditions set by this court on 16th October 2014 when the court set aside the first judgment and is therefore in contempt of the court order.

He deposes that the judgment was reinstated following failure by the respondents' advocates to attend court. He deposes that since the judgment was reinstated the respondents' lawyers have been attending court for taxation and the proclamation could not have come as a surprise to the respondents. That the present application is *res judicata* as a similar application had already been made vide notice of motion dated 8th April 2014 and filed on 9th April 2014 over the same subject matter.

He deposes that he is entitled to the fruits of his judgment that has been owing since 2014, that justice delayed is justice denied and that the respondents have had sufficient time to defend themselves in this case. He prayed that the application be dismissed with costs.

The application was disposed of by way of written submissions.

Submissions by Respondents

It is submitted on behalf of the Respondents that under Order 12, Rule 7 of the Civil Procedure Rules, the court is empowered to set aside or vary its judgments or orders upon such terms as may be just and that under Section 31 of the Civil Procedure Act the court has inherent jurisdiction to make such orders as may be necessary for the ends of justice to be met. The respondents further submit that they have a right to have the dispute resolved in a fair and public hearing before a court. The respondents rely on the case of **Shailesh Patel T/A Energy**

Company of Africa -vs- Kessels Engineering Works Pvt. Limited & 2 Others [2014] eKLR in which it was held that –

> *"A regular judgment will normally not be set aside unless the court is satisfied there is a defence on its merits. The main concern of the court is to do justice to the parties. I have looked at the proposed defence. It does not appear to me to address the issue in the same way the defendant has addressed the issues in this application, it does not strike me to be a good defence. However a good defence does not mean a defence which must succeed. It merely needs to satisfy the concept of a prima facie defence. I will therefore give it the benefit of the doubt."*
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> *In exercising my discretion to set aside the ex parte judgment, I must state for avoidance of doubt that the defendant has not convinced me as to why it failed to file a defence… The above misgivings notwithstanding and in the exercise of my discretion, I also acknowledge that the defendant has a constitutional right under Article 50 of the constitution to a fair hearing."*

It is submitted that there is sufficient cause to set aside the ex parte judgment as there is a defence on record and that the decretal sum of Kshs. 441,143 is substantial.

It is submitted for the respondents that it will be against the interests of justice to deny the orders to set aside the ex parte decree. They rely on the decision of the Court of Appeal in **CMC Holdings Limited -vs- James Mumo Nzioki [2004] eKLR** in which the court stated as follows–

> *"Our view is that in law, the discretion that a court of law has in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrate such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. In the case before us, it is our view that the learned Magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it could not appear was true or not and if true, the effect of the same on the ex parte judgment that was entered as a result of the nonappearance of the appellant and on the entire suit. We do not thing the answer to that weighty issue was to advise the appellant of the resource open to it, as the learned Magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.*
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> *The second disturbing matter which arises from the decisions of the learned Magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial Magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the court must consider no only reason why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."*

The respondents submit that the application is not *res judicata* as alleged by the claimant as the issues raised in the application have not been heard and finally determined by a court of competent jurisdiction provided in Section 7 of the Civil Procedure Act.

Submissions of the Claimant

The claimant submits that the respondents have been given sufficient opportunities and their constitutional rights under Article 50 of the constitution have been met by the court.

The claimant relies on the case of **Shah -vs- Mbogo and Another [1967] EA. 116** where the court stated –

> *"Applying the principle that the court discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice resulting from accident, inadvertence or excusable mistake or error but to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."*

Determination

Having considered the history of this case, the grounds and affidavit in support of the respondent's application and the affidavit in opposition thereof and having also considered the authorities cited by both parties, it is my considered opinion that the issues for determination are the following –

1. Whether the application by the respondent is *res judicata.*

2. Whether the respondents are entitled to the orders sought.

Res judicata

Res judicata is provided for under Section 7 of the Civil Procedure Act as follows: -

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

The claimant argues that the respondents' application is *res judicata* as a similar application dated 11th March 2014 was heard and granted by the court. The respondents on the other hand contend that the application herein is not *res judicata* as the application reinstated the case and this is an application to set aside an order reinstating the judgment.

I think both parties are right depending on the context in which they view the application. For the claimant, the judgment dated 14th March 2014 was set aside on 16th October 2014 and the application under consideration dated 6th October 2017 is seeking a similar order setting aside the same judgment. For the respondents the orders reinstating the judgment is what they are seeking to set aside and therefore the same is not *res judicata.*

Based on the foregoing I think *res judicata* may not be a relevant issue in determining the instant application. In my opinion I think the relevant issue for the court to determine is whether it is in the interest of justice to set aside the orders reinstating the ex parte judgment.

When considering justice, one has to take into account the interests of both parties. As the respondents have submitted, Section 31 of the Civil Procedure Act, which is similar to section …… in of the Employment and Labour Relations Court Act espouse this court to make orders necessary to meet the ends of justice. What the court has to consider in exercising discretion in this application is justice for both the claimant and the respondents.

As already set out above, the respondents failed to attend court on 28th January 2014 and the case proceeded in their absence. The court set aside the said ex parte judgment pursuant to their application dated 8th April 2014 on grounds that counsel had mis-diarised the date. The court considered that as an inadvertent and therefore excusable mistake of counsel that should not be visited upon counsel. Again on 23rd February 2017 the Respondents and their counsel failed to attend court for hearing.

After that the respondents' counsel attended court for taxation of the claimant's party and party bill of costs. No action was taken from the time the respondents'' counsel was served with the decree on 23rd March 2017 or when served with the Bill of Costs or during the hearing of the Bill of Costs. The respondents waited until auctioneers proclaimed their property before coming to court.

In the application the only reason given for the setting aside is that the respondents are considering filing a complaint against their erstwhile counsel. No other reason has been given.

The court has to balance the interest of a decree holder who has been denied the fruits of his decree since 14th March 2014 against the interests of the respondents who have twice failed to attend court and who even after failing to attend court, did nothing until execution commenced.

Justice is like a two-edged sword. It cuts both ways. The court cannot close its eyes to the plight of the innocent claimant in favour of the miscreant respondents.

The respondents relied on the case of **Shailesh Patel** (supra) in which the court held that in exercising discretion in setting aside an ex parte judgment the court will consider if there is a defence on the merits. In the present case there is no doubt that there is a defence that would under normal circumstances entitle the respondents to a hearing. However, this is not a normal situation. The defence of the respondent is not the issue here. The issue is the failure of the respondent to attend court on a hearing date, not once but twice, the second time being after the court bent backwards to accommodate them.

The respondents further relied on the decision of the Court of Appeal in **CMC Holdings Limited -vs- James Mumo Nzioki [2004] eKLR**. In that case, the court stated that one of the factors to be taken into account in an application to set aside an ex parte order is to ensure that a litigant does not suffer injustice or hardship as a result of among other grounds, an excusable mistake or error. The circumstances of the present application do not disclose an excusable mistake or error. They disclose recklessness on the part of the respondents and their counsel, or a deliberate intention to deny the claimant the fruits of his judgment. Having had the case heard in their absence once, the respondents should have been extra vigilant with their erstwhile counsel whom they now accuse of negligence. The claimant is the one who will suffer injustice if he is denied the fruits of his judgment for the second time, for the same reasons, after waiting from March 2014 to April 2018, a repaid of more than 4 years.

The respondents further referred to the amount of the decree as 'substantial'. Substantial is subjective. I would however throw back the same argument at the respondents. If they consider the amount in issue herein substantial, why were they not vigilant in the prosecution of their defence?

As I have already observed, justice cuts both ways and justice to the respondents' should not be at the cost of injustice to the claimant. I would consider the respondents conduct in sum to be an attempt to delay or obstruct the cause of justice and relying on the authority of **Mbogo and Another -vs- Shah**, exercise my discretion in favour of the innocent claimant.

For the foregoing reasons I find no merit in the application and dismiss it with costs to the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE