REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

SUIT NO. 177 OF 2017

LABAN MURIITHI NYAMWEA......................CLAIMANT/RESPONDENT

VERSUS

GYTO SECURITY SERVICES LIMITED…..RESPONDENT/APPLICANT

RULING

1. The Respondent through the Notice of Motion application dated 1st March 2018 and filed on 2nd March 2018 seeks to have a stay of execution and the setting aside of the judgment entered on 17th November 2017. The Respondent seeks to have the suit reinstated and costs of the application be provided for. The application is supported by the affidavit of Charles M. Ongoto and on the grounds on the face of the motion which were, in brief, that there was a mix up at the office and the defence of the suit was filed at Milimani law courts and that they were not served with the hearing notice and hence had no knowledge of the court's directions in the matter. It was asserted that allowing the Claimant to proceed with execution following the judgment in the circumstances would be condemning the defendant unheard. The Respondent sought the setting aside of the proceedings in the matter in the interest of justice be set aside as well as all consequential orders.

2. The Claimant was opposed and filed a replying affidavit sworn on 16th March 2018 by Davidson Warutere Iregi who deponed that the Respondent was personally served with the summons and subsequent mention and hearing notices and did not at any one time in course of the proceedings indicate it had instructed a firm of advocates to represent it. He stated that it was only after the proclamation notice was served upon the Respondent that it sprang into action and filed the present motion. He asserted that the Claimant will suffer irreparable loss if the judgment and the execution of the decree is set aside. He deponed that the Respondent's lawyer had a casual approach to the suit as evidenced by his own admission in the application for setting aside. He stated that the application filed on 2nd March 2018 was served upon him on 16th March 2018 despite being filed under a certificate of service. He deponed that the principle objective of the court was to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by the Act for which the court is enjoined to give effect to the said principle.

3. The oral arguments on the application were made on 14th March 2018. In the submission for the Respondent/Applicant, Mr. Nzioka argued that the Respondent had appointed the firm of Ongoto & Co. Advocates to represent them and the defence to the suit was wrongly filed at Milimani law courts in August 2017. He stated that the Respondent's advocates were not served with the hearing date and were thus not aware of the matter proceedings. He submitted that to allow the execution is tantamount to not hearing the Respondent. He argued that the filing of the pleadings in the wrong court was an honest mistake and that if it was not an honest mistake they would not have paid for it. He stated that their client had every intention to defend the suit and should be accorded an opportunity to do so; that the Claimant will not suffer any prejudice and the Respondent should not be condemned unheard.

4. The Claimant was of a contrary view and Mr. Warutere in his argument stated that the summons and claim were served upon the Respondent and it had the option to appear in person or through an advocate. He submitted that the Respondent had come to court with dirty hands and urged the court to note that even if they filed the documents in Nairobi in August 2017 they had a duty to serve them upon the Claimant's advocates. He stated that under Section 3 of the Employment Act, the principle objective of the court was to facilitate the just, expeditious, efficient and proportionate resolution of disputes and fir purposes of realising the objectives the parties are to facilitate the achievement of the just and expeditious resolution of the dispute. He stated the Respondent had violated this principle to the detriment of the Claimant and noted that the subsequent notices and mentions were served upon the Respondent and it is only upon the decree and execution being levied that they have come to court. He submitted that the negligence of the advocate should be borne by the advocate and the Respondent had a sufficient remedy against the law firm. He submitted the Claimant will suffer prejudice as he was heard, has incurred heavy costs and should the proceedings be set aside he will be held hostage by the Respondent.

5. In his reply, Mr. Nzioka submitted that he was alive to the provisions of Section 3 but however the root cause arose from an honest mistake. He urged the court to note the party cannot be condemned unheard. The Respondent thus sought the grant of the orders in the motion.

6. I reserved the Ruling for today and proceed to render it. The Respondent has sought the setting aside of the proceedings herein and in a sense, place the parties to the position they were at the time of filing the pleadings. In setting aside a judgment or decree of the court, there some considerations to be had. These are well set in principles enunciated by various courts in the realm. The power to set aside a judgment is donated under Order 10 Rule 11 of the Civil Procedure Rules 2010. In the case of **Shah *v* Mbogo (1967) EA 166** the Court of Appeal held that the principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are twin. Firstly, there are no limits or restrictions on the judge's discretion to set aside except that if the judge does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Secondly, this discretion to set aside is intended to be so 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.

This was further reiterated by the Court of Appeal in the case of **Patel *v* E.A. Cargo Handling Services Ltd (1974) EA 75** and myriad other notable cases too numerous to enumerate.

7. The manner of handling the suit was decried as casual because the Respondent filed appearance at the Employment *&* Labour Relations Court registry at Milimani Commercial Law Courts Nairobi instead of the Employment *&* Labour Relations Court registry at Nyeri. Notably, despite filing the appearance and defence in August 2017, there was no service of the documents on the Claimant's advocate or at worst, on him. The Respondent was, from the record before me, served with the mentions and hearing dates given. Affidavits of service confirm this and the Respondent consistently failed to turn up in court. The Respondent was given a chance to be heard but did not take the opportunity. The Respondent was not only unwilling to participate but treated the matter with casualness and thereby fell in the class of deliberately by evasion or otherwise of obstructing the course of justice. Failure to serve a memorandum of appearance and defence and the attendant failure to follow up to ascertain the position of the case are not inadvertence, mistake or excusable error. Additionally, the fact that execution has been levied is not of itself sufficient to order a setting aside as the sword of justice may fall on either side and that is not a mistake. To the Claimant the court will say, go and enjoy the fruits of your judgment. It is plainly obvious from the matters considered above that the application before is entirely devoid of merit and is unfit for grant. It is dismissed with costs to the Claimant. The Claimant is at liberty to execute the decree.

It is so ordered.

Dated and delivered at Nyeri this 26th day of April 2018

Nzioki wa Makau

<u>JUDGE</u>