

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 191 OF 2017

DOMINIC MURITHI NYAGA.....CLAIMANT/RESPONDENT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant's notice of motion application dated 28th February 2018 and filed on 1st March 2018 seeks stay of execution of the judgment of the court as well as to set aside the *ex parte* judgment entered by the Honourable Court on 17th November 2017 and grant the defendant leave to file defence out of time. The grounds set out on the face of the motion are that the Respondent was not aware of the existence of the Claimant's suit until 8th February 2018 when it received the Claimant's Advocates letter. The Respondent asserts that it came to find the notice of summons and other correspondences having been received by rubber stamping and filed away without being signed and without action. The Respondent regretted the mistake of its registry and was willing to pay thrown away costs and meet any conditions the court may impose for setting aside the *ex parte* judgment. The final ground was that the Respondent had been condemned unheard and that it had a good defence to the claim herein. The application is supported by the affidavit of Denis Michieka the head of Human Resource and in charge of administration of the Respondent. He reiterated the above and further deponed that the Respondent had been condemned unheard and that if the Claimant is paid the colossal sum he will benefit from a crime he committed amounting to a mockery of justice. He stated that he sought a copy of the judgment from the Claimant's advocate and upon perusal noted that the court was grossly misled. He thus sought the setting aside and hearing of the defence case within 90 days or such shorter time as the court may direct.

2. On 14th March 2018, the Claimant's counsel filed a Replying Affidavit sworn on 12th March 2018. In it, he deponed that the Respondent's application was unmerited, misconceived and bad in law and purely meant to delay the Claimant's inalienable right to the enjoyment of the fruits of the judgment. He stated that the Respondent was served at every stage of the suit and affidavits of service filed reflect this. He asserted that when the judgment was delivered on 17th November 2017, the Respondent was notified by notice of entry of judgment after which the Respondent's representative requested for a copy which was sent to him by email. Mr. Karigi submitted that what the Respondent was referring to in his deposition was a letter of 8th February 2018 which was a follow up as Mr. Michieka had requested to be given time to study the judgment so that the Respondent would pay the decretal amount. He stated that the Claimant will continue to suffer prejudice if execution is stayed and thus sought the dismissal of the application and uphold the Claimant's right to enjoy the decree.

3. The Respondent filed submissions in support of the motion on 28th March 2018 while the Claimant filed his submissions on 10th April 2018. The Respondent submitted that the Claimant's file at the Respondent had the documents but the served documents did not have the signature of receipt and did not appear on the letter receipt register which scenario had denied the Respondent the opportunity to defend the claim. It was submitted that the draft defence filed alongside the notice of motion application raised serious triable issues. The Respondent argued that the suit was filed in 2017 and the delay that may be caused by the setting aside will not be inordinate. The Respondent relied on the case of **Mavji Devji & Co. Limited v Ruaha Concrete Co. Limited [2009] eKLR** which set out the guiding principles in setting aside an *ex parte* judgment. The Respondent submitted that the court had unlimited jurisdiction to exercise its discretion by setting aside the *ex parte* judgment and allowing the Respondent to defend the claim on such terms or conditions as the court may consider fit.

4. The Claimant submitted that the law for setting aside is as laid out in **Shah v Mbogo & Another [1967] EA 470** where the Court of Appeal for East Africa held that the *applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct the course of justice.* The Claimant submitted that the Respondent was lackadaisical and had sought to delay or obstruct justice given the inordinate delay in moving court. The Claimant submitted that to set aside the judgment would only be to postpone the day of reckoning for the defendant and will serve no purpose as the defence contains mere denials which cannot stand. The Claimant submitted that the affidavit in support raised issues which were not raised in the draft defence which was unconvincing and whimsical. The Claimant relied on the cases of **Hass Petroleum Limited v A.O. Basid Limited [2015] eKLR** and **Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR** and urged the court to dismiss the Respondent's notice of motion application with costs to the Claimant.

5. In cases where setting aside is sought, the principles in **Shah v Mbogo & Another (supra)** come into play as do the principles in the case of **Mavji Devji & Co. Limited v Ruaha Concrete Co. Limited (supra)**. In this latter case, it restated the finding of the Court of Appeal in **Pithon Waweru Maina v Thuka Mugiria (1982-88) I KAR 171** {also reported online under [1983] eKLR}. In the decision, Potter, Kneller JJA and Chesoni AG. JA held as follows:-

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 concerns of the court is to do justice to 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 it 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. A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically.

d. The power to set aside does not cease to apply because a decree has been issued.

The principles in the decision have stood the test of time as they are cited in the cases cited by the Claimant and the ones by the Respondent. My discretion is not fettered as the court is enjoined to do justice to the parties. The Respondent asserted that it was not aware of the matter till there was execution levied against it. However, there is an email on 20th December 2017 where Florence Taip writes stating that the Respondent had not received the court judgment as had been promised. This means that before 20th December 2017, the Respondent was aware of the judgment in this matter. Her email even mentions Mr. Michieka having had a conversation with the lawyer for the Claimant. The discretion to be exercised by courts it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice as the Respondent seems to be doing. Having become aware of the judgment in mid December 2017 there was no action till 1st March 2018 which is roughly two and a half months. There is no explanation for the delay. The absence of candor disentitles the Respondent of the equitable remedy now sought. The Respondent is guilty of dilatoriness and the motion is devoid of merit. Whichever way one looks at it, the Respondent did not act prudently and it cannot now seek to reset the clock. I dismiss the application for stay and setting aside with costs to the Claimant. The Claimant may proceed to execute the decree.

It is so ordered.

Dated and delivered at Nyeri this 30th day of May 2018

Nzioki wa Makau

JUDGE