



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 911 OF 2016

ALFRED IMBWAGA MUSUNGU.....CLAIMANT

VS

PROTECTIVE CUSTODY LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 12th April 2018 and filed in court on even date, the Respondent seeks orders of stay of execution and setting aside of an *ex parte* judgment entered in favour of the Claimant, by my brother **Rika J**, on 24th October 2017.
2. The application, which is supported by an affidavit sworn by Ratemo Enock, Advocate is based on the following grounds:
 - a. That an *ex parte* judgment has been entered against the Respondent;
 - b. That the matter proceeded *ex parte* on the assumption that the Respondent had not entered appearance nor filed a Response to the Memorandum of Claim;
 - c. That contrary to that assumption, the Respondent had filed a Memorandum of Appearance together with a Response to the Memorandum of Claim and Counterclaim on 22nd December 2016;
 - d. That for unknown reasons, the Court record does not include the documents filed by the Respondent;
 - e. That the Advocates for the Respondent were not aware of the proceedings leading to judgment as they were never served;
 - f. That the Respondent has a meritorious defence and this is a matter which ought to proceed for full hearing;
 - g. That the Respondent stands to suffer immense loss and damage as its two motor vehicles stand to be sold;
 - h. That the Respondent's right to be heard has been infringed over fault which is not of its own making;
 - i. That it is in the greater interest of justice and equity that this application be allowed.
3. The Claimant's response is contained in his own replying affidavit sworn on 25th April 2018. In his affidavit, the Claimant gives a detailed chronology of events from the date of filing of his claim to the date of judgment.
4. Of significance is the Claimant's averment that the Respondent's Response and Counterclaim were served on his Advocates on 6th July 2017 at 3.22 pm. The Claimant claims that the said documents appear to have been filed in court on 6th July 2017 and the receiving court stamp backdated to 22nd December 2016.
5. The single issue for determination in this application is whether the Respondent has made out a case for setting aside of the *ex parte* judgment delivered by the Court on 24th October 2017. I have had occasion to read the said judgment and note that my brother Judge proceeded on the premise that the Claimant's claim was undefended. In his replying affidavit the Claimant confirms as much but goes ahead to impute dishonesty on the part of the Court by suggesting that the stamp on the Respondent's pleadings had been backdated. On its part, the Respondent suggests that its pleadings were removed from the court file.
6. These are serious allegations made against the Court which are however not supported by any tangible evidence. I will therefore determine the application on the basis of the material placed before me. The Respondent has produced copies of its Memorandum of Appearance

together with Response and Counterclaim all dated 20th December 2016 and filed in court on 22nd December 2016.

7. In addition, the Respondent has produced a receipt issued by the Court on the same date. If indeed the receipt stamp on the Respondent's pleadings had been backdated, the receipt would have carried a different date. It seems to me therefore that by the time the matter was fixed for formal proof on 14th March 2017, the Respondent had filed its Response and Counterclaim but for some reason, the pleadings were not placed in the court file.

8. As held in *Shah v Mbogo & another [1968] EA 93*, the discretion of the Court to set aside an *ex parte* judgment is to be exercised so as to avoid an injustice or hardship resulting from an inadvertence or excusable mistake. In this case, the omission cannot be attributed to the Respondent and I find that this is a proper case for setting aside the *ex parte* judgment entered against the Respondent.

9. The judgment dated 24th October 2017 and all consequential orders are therefore set aside and the Respondent's pleadings admitted as duly filed.

10. Parties are directed to take a date for pretrial conference. The matter will thereafter commence *de novo*.

11. The costs of this application will be in the cause.

12. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MAY 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Asige for the Claimant

Mr. Ratemo for the Respondent