



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1392 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH MOTE NZUKI.....CLAIMANT

-VERSUS-

MEMBA MURIUKI.....RESPONDENT

RULING

The application before me for determination is filed under certificate of urgency on 29th November 2017 by the respondent, Mr. Memba Muriuki who seeks the following orders –

1. That the application be certified urgent.
2. That the court hears and determine the matter in the first instance and service of the application be dispensed with.
3. That pending the hearing and determination of the application, the court be pleased to set aside the judgment delivered on the 24th November 21 by the Hon. Judge Mathews Nderi Nduma.
4. That such further and other relief be granted as this court deems fit and expedient in the circumstances.

In the grounds in support of the application and in the supporting affidavit the respondent avers that he instructed Paul Kiarie an advocate in the matter, that a hearing notice was served and acknowledge on 9th July 2016 for hearing on 27th September 2017. That the advocate had a hearing in Kisumu and was not able to attend court. The advocate instructed another advocate Mr. Emmanuel Kyalo to hold his brief and seek adjournment but the said Mr. Kyalo failed to attend court without giving any explanation. He deposes that his advocate was negligent to his detriment and he has now instructed another advocate to represent him. He prays that it is in the interest of justice to grant the orders sought by him in the application.

The claimant opposed the application and filed a replying affidavit in which he deposes that the applicant has admitted service of hearing notice and failure to attend court on the hearing date. He deposes that between the time of service of hearing notice and the time of hearing there was sufficient time for the respondent's counsel to organise his diary to ensure the date of hearing was not interfered with. He deposes that the matters deposed in the affidavit of the respondent are not supported by any documents to show that Kiarie Advocate was in Kisumu on 27th September 2017 or instructed Mr. Kiarie to hold his brief. He deposes that it is the duty of a litigant to keep himself updated especially when he misses a hearing.

The application was argued in court on 22nd February 2018. Mr. Kimathi for the respondent/applicant in his very brief oral submissions urged the court to set aside the judgment of 24th November 2017 and that the respondent be allowed to defend the suit in the interest of justice. He submitted that the respondent was not aware of the judgment until he perused the court file and instructed another advocate. He submitted that the claimant can be paid some money for attendance and the respondent can deposit the decretal amount in court.

For the claimant Mr. Nzuki submitted that the respondent was served with hearing notice on 9th June 2017 and the hearing was on 27th September 2017. That there was no reason to serve judgment notice, that what is stated in the application is not true as there was no demonstration that counsel was in Kisumu on a matter under certificate and no proof that another advocate was instructed to appear in court on the hearing date.

He submitted that there is no reason for setting aside but should the court exercise its discretion in favour of the respondent, an amount of Kshs.10,000 should be paid to Mr. Nzuki as his expenses and Kshs.100,000 be granted by the court to the applicant.

Determination

The only issue for determination in this application is if there are justifiable reasons for setting aside the ex parte judgment herein delivered on 24th November 2017.

Section 16 of the Employment and Labour Relations Court Act gives this court powers to review its decisions.

The principles for setting aside ex parte judgments has been ventilated in many decisions of the court. In **PATEL -VS- EAST AFRICA CARGO HANDLING SERVICES, Duffus V. P.** stated –

“The main concern of the court is to do justice to the parties and the court will not impose condition on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

Sufficient cause was defined in the case of **Registered Trustees of the Archdiocese of Dar es Salaam -vs- The Chairman Bunju Village Government & Others** as follows –

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however that the words should receive a liberal construction in order to advance substantial justice, when no negligence or inaction or want of bona fides is imputed to the appellant.”

In the case of **Daphne -vs- Murray Alexander Carson** the court expressed itself as follows –

“Though the court should no doubt give a liberal interpretation to the words ‘sufficient cause’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy.”

In the present case the applicant/respondent does not deny service. He avers that his advocate was in Kisumu on a matter under certificate. There is no evidence to support the contention. He further avers that his advocate had instructed another counsel to hold brief, again without any evidence to support the same. He has not produced an affidavit from his erstwhile advocate or from the advocate sent to hold brief. His averments are therefore of facts which he did not witness and is therefore hearsay. He did not state the case number or append the pleadings in the Kisumu Court to his application.

Besides the foregoing he has not stated why he was not in court on the material day.

I do not find any sufficient cause to warrant the setting aside of the ex parte judgment and dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE