



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 309 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 13th June, 2018)

GERALDINE MUSABI ORIEDO.....CLAIMANT

VERSUS

ROSE MASAKU T/A OJAY HOSTELS.....RESPONDENT

RULING

1. Before this Court is a Notice of Motion Application dated 7th February 2018 brought under Order 12 Rule 7 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of Law seeking Orders:

- a. That this Honourable Court do issue a stay of execution of the Judgement delivered on the 15th day of November 2017.*
- b. That the ex-parte hearing and the resultant judgement delivered on 15th November 2017 be set aside and the matter be heard on merit.*

2. The Application which is supported by the affidavit of one Rose Masaku sworn on 7/12/2018 and is premised on the following grounds:

- 1. On 10th April 2017 the advocate on record for the Respondent received a hearing notice however the staff member who received the notice did not file it in the respective file nor did she diarize it.*
- 2. The advocate on record consequently did not attend the hearing that was fixed on 12th July 2017 as he was not aware.*
- 3. Since institution of the suit, the said advocates have faithfully attended court when the matter is listed for mention or hearings.*
- 4. The Respondent honestly and sincerely intended to be present during the hearing of the suit.*
- 5. The Respondent should not bear the consequences of the advocate's staff member's default given that she was not privy to the same.*
- 6. The non-attendance was solely occasioned by human error on the part of the advocate's staff member and neither the advocate on record nor the Respondent negligently failed to attend.*
- 7. The advocates on record were however never served with a mention notice that was given for purposes of taking a judgment date.*
- 8. That it is in the interest of justice that the orders sought be granted as the Respondent stands to suffer substantial loss as a result of a mistake which was not in any way occasioned by her.*
- 9. There will be no prejudice occasioned to the Claimant if the orders sought are granted and if any inconvenience is occasioned to the Claimant it can be remedied by way of costs.*

3. The Claimant filed her replying affidavit where she avers that the said application is irregular, an abuse of Court process and does not lie as the Respondent/Applicant lost interest in the matter and did not wish to participate in obtaining a hearing date since the judgment on

record is valid and regular because the reasons given for seeking to set aside the judgment are not valid, and if the Respondent/Applicant's Application is granted the Claimant stands to suffer loss and prejudice as this is a long subsisting matter and she requires her terminal dues to meet her expenses.

Submissions

4. The Respondent/Applicant filed their submissions where they submit that it is trite in law that setting aside of an ex-parte judgment is a matter of the Court's discretion. They relied on the case of **Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014]**.
5. They aver that they failed to attend the hearing due to the reason that the secretary to the advocate on record failed to diarize the hearing date. She also did not file the hearing notice in its respective file. Her non-attendance was therefore not as a result of negligence but rather out of an inadvertent mistake on her Advocates part.
6. They also aver that the Applicant has been keen on defending the suit and has made tremendous efforts to attend Court when the suit is called or mentions and/or hearings, she has always been present during the mentions and has kept abreast with the proceedings of the suit therefore the applicant honestly and sincerely intended to remain present when the suit was called for hearing and has in no way acted in a negligent manner. They relied on the case of **Pithon Waweru Maina vs Thuka Mugira (1983) eklr.**
7. They further state that the delay occasioned to the Respondent, if any, can be compensated by way of costs and they therefore pray that this Honourable Court does not refuse the Applicant's paramount right to be heard.
8. The Claimant filed her submissions where she submitted that this Court's jurisdiction has not been properly invoked and the application should fail as the Respondent/Applicant brought this application under the provisions of the Civil Procedure act and the Civil Procedure Rules while this Court has been established under the constitution of Kenya and has its own statute. She states that a judgment cannot be executed; a decree can, therefore execution of a judgment cannot be stayed meaning that this prayer cannot be legally granted.
9. She avers that the unnamed staff who did not diarize the hearing notice has not sworn an affidavit to corroborate this assertion and the source of the Respondent/Applicant's knowledge has not been disclosed therefore they cannot succeed factually and there is also no evidence that the Applicant's advocate followed up.
10. She further avers that the Respondent/Applicant alleges that her advocates attended most of the mentions but there is no explanation why not all mentions were attended to and therefore for this Honourable Court to be persuaded to exercise its powers as prayed, the Respondent/Applicant should demonstrate that she filed this application without undue delay. He relied on the case of **Chandaria Industries Limited vs. Sonat Holdings Limited & Another [2014] Ekkr.**
11. The Claimant states that there is no matter of course and looking at the totality of the Respondent/Applicant's actions it cannot be said that this Application has been brought in good faith. They have also not explained their reasons for granting of this Application nor met the requirements for granting the just, expeditious, efficient and proportionate resolution of dispute and hence pray that the Application be dismissed with costs.
12. I have examined the averments of both parties. This case was filed in Court in 2013 and came up for mention on 3 different occasions. The Respondent attended Court on all those occasions and even filed their defence and documents.
13. When matter came up for hearing on 12/7/2017, the Respondents failed to attend and the matter proceeded exparte.
14. It is apparent that from previous attendances, the Respondents were all along desirous of presenting this case. There was a mistake on the Respondent's Counsel which turned out to be costly in that the case proceeded exparte.
15. The mistake of Counsel cannot however be visited against the Respondents. In order that justice is done and that the Respondents be allowed to present their case and not be condemned unheard, I exercise my discretion and allow the application in the form that the Claimants' case shall be re-opened and the Respondents allowed to cross examine him and also present their case.
16. The Respondents shall pay to the Claimant a thrown away costs of 20,000/= before the case proceeds for further hearings.
17. Costs in the case.

Dated and delivered in open Court this 13th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Khasiani for Claimant/Respondent

Applicant/Respondents – Absent