

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 94 OF 2013

SHADRACK MWIRIGI BAARIU.....CLAIMANT

VERSUS

MARANIA LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant seeks the reinstatement of his suit which was dismissed on 7th March 2018 at Meru. The matter was called out and there was no representative for the Claimant and neither was the Claimant in court. The Claimant's motion is to the effect that the case was called out and when his counsel walked in at 9.09 am, he found the matter having been dismissed. The Respondent is opposed to the reinstatement.

2. In matters of this nature, the principles enunciated in a long line of precedents is worth mentioning. 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.

3. The Claimant is alleged to have walked out to call his lawyer. The counsel for the Claimant was late and so was his client as far as the court record goes. They were well aware of the time courts sit. The matter was dismissed procedurally. Prior to the hearing scheduled at Meru, the suit was scheduled for dismissal for want of prosecution and notice to show cause issued before Ongaya J. on 16th June 2016 and the suit was indeed dismissed on 7th October 2016 for want of prosecution. This is the second time the suit is being dismissed. The Claimant is clearly not keen on proceeding with the suit and the Claimant satisfies the description of a person seeking to delay or otherwise deliberately obstruct the determination of the matter. The suit is not fit for readmission and it stands dismissed. The notice of motion is devoid of merit and is accordingly dismissed.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2018

Nzioki wa Makau

JUDGE