REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 306 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

CALEB NASENGO.....CLAIMANT

VERSUS

SHANIR DISTRIBUTORS LIMITED.....RESPONDENT

RULING

The Application before the Court is dated 4th September 2017, wherein the Applicant seeks for Orders:

a. That this Application be certified as urgent, service of the same be dispensed with in the first instance and the same be heard exparte.

b. That pending hearing and determination of this application interpartes there be a stay of execution of the decree herein.

c. That the firm of Ngala Awino and Company Advocates be allowed to come on record in place of Rotuk and Company Advocates.

d. That judgment entered against the respondent

e. That/Applicant herein on 4th May 2017, and the decree arising therefrom and all consequential orders be set aside.

f. That costs of the application be provided for.

The Application is premised on the grounds that:

1. The Applicant did instruct the firm of Rotuk and Company Advocates to defend them in this suit but the said firm filed its defence but failed to attend Court on the date of the hearing leading to exparte judgment being entered against the Applicant.

2. That the Applicant statement of defence raises triable issues.

3. That the Applicant shall have been condemned unheard in breach of both its constitutional rights and rules of natural justice.

4. That mistake of previous counsel on record should not be visited on an innocent party.

5. That the Claimant does not stand to suffer loss, damage and or prejudice if orders sought are not granted as prayed as the Claimant shall be compensated by way of thrown away costs.

6. That the Applicant herein stands to suffer substantial damages, loss and prejudice, as he shall have been condemned without being heard, the mistakes of his Advocate shall have been visited on him.

7. That this Court has jurisdiction power and authority to make such orders.

The Application is supported by the affidavit of Viral Hasmukh a director of the Respondent Company wherein he avers that they instructed the firm of Rotuk and Company Advocates to defend the suit who filed a defence on the respondent's behalf but later failed to attend court

leading to exparte judgment being entered against them.

That the Respondent was not aware of the progress of the suit until it were served with a proclamation notice by Lifewood Traders.

Mr Hasmukh contends that the respondent's defence raises triable issues and it should not be condemned unheard. That in any event the Claimant will not suffer any prejudice that cannot be compensated by way of costs. He urges the Court to allow the application.

The claimant has opposed the application by filing a Replying Affidavit wherein he states that after the firm of Rotuk and Company Advocates took over conduct of the matter they sought leave of the Court on 7th July, 2015, to file a Response to the Statement of Claim which leave was granted on condition that the same was filed and served within 14 days from 7th July, 2015 and the Respondent pays thrown away costs of Kshs.5,000/=. The Claimant deposes that these orders were not complied with as no response has ever been filed and served to date nor was his fees of Kshs.5,000 paid.

That on 2nd June 2016, the matter was fixed for hearing which notice of hearing was served on the firm of Rotuk and Company but they failed to attend Court and no reason was advanced for failure to do so. In the claimants view it is untrue that the Respondent was not aware of the proceedings in the instant suit.

That the matter was again fixed for hearing on 31st October 2016, and service was duly effected on the firm of Rotuk and Company and the notices were received and stamped on 21st June 2016. That yet again neither the Respondent nor their counsel attended Court and no reason was advanced for failure to do so.

That the matter was then scheduled for mention on 30th November, 2016 and 13th December 2016 for purposes of confirmation of filing of submissions which notices were served, received and stamped on 15th November, 2016 and affidavits of service filed. The Claimant states that on all those occasions the Respondent's counsel on record failed to attend.

It is the Claimant's contention that upon delivery of judgment on 23rd March 2017, judgment notices and taxation notices were served upon the Respondent's counsel but still there was no response. Thereafter the Respondent's counsel was served with certificate of costs, decree and several demands for payment but it was all in vain.

Furthermore the Claimant contends, the application has been brought under the wrong provisions of the law as it has been brought under the provisions of the Civil Procedure Rules whereas the same should have been brought under the Employment and Labour Relations Court (Procedure) Rules.

The Claimant avers that should the orders be granted he stands to suffer substantial loss as the Applicant has not established an arguable case to warrant setting aside of the judgment and no security has been furnished for the due performance of the decree. He prays for the Application to be dismissed with costs.

Submissions

It is submitted on behalf of the Applicant that the predicament it is in is as a result of the conduct of its former Advocates who failed to take any action on the matter to their detriment. That even if there was disagreement between the Respondent and the Firm of Rotuk and Company Advocates, the proper procedure would have been to file an application to cease acting which in this case was not done.

Counsel for the Applicant submits that the mistakes of the previous advocate should not be visited on the Respondent and urges the Court to allow the suit to be heard and determined on merit as the respondent has an arguable defence. That the Respondent is amenable to paying thrown away costs if so ordered.

He prays for the application to be allowed as no prejudice will be suffered by the Claimant unlike what the Respondent will suffer if the application is denied.

The Claimant on the other hand submits that the application does not meet the threshold for granting of the orders sought. That the principles to be fulfilled are:

1. That substantial loss may result to the applicant unless the order is made

2. That the application has been made without undue delay

3. That the applicant provides security for the performance of the decree as may be binding on him.

It is submitted that there has been unreasonable delay on the part of Applicant, the applicant entered appearance on 7th July 2015, and sought leave of the Court to file a response to the statement of claim which leave was duly granted by the Court on condition that the same is filed and served within 14 days and thrown away costs of Kshs.6,000/= are paid. That the said orders are yet to be complied with to date.

That the Claimant has established that all services of notices were properly done but the Respondent failed to take any action and as such the Court should not condone indolence by the Respondent. Counsel for the Claimant cites the case of ***Jaber Mohsen & Another vs Priscilla Boit & Another*** cited by Justice ***Mativo in Gladys Wamuyu Ngira vs Mary Wamaitha Ruiru (2016) eKLR***; The Court was of the view that:

> "…what is unreasonable delay is dependent on the surrounding circumstances of each case, even one day after judgment of the court and any order given thereafter. In the case of **Christopher Kendagor vs Christopher Kipkorir** the applicant had been given 14 days to vacate the suit land. He filed an application a day after 14 days. The application was denied. The Court held that, the application ought to have come before expiry of the period given to vacate the land."

It is further submitted that the Applicant has not demonstrated substantial loss that may result unless the orders of stay of execution are made. He cites the case of ***Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43/2000*** cited in ***Kenya Power & Lighting Co. Ltd vs Esther Wanjiru Wakobi (2014) eKLR*** where it was held:

> "In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting an order."

Further that the Respondent has not filed any defence on record to enable the court determine whether they have an arguable case or not. Counsel cites the case of **Sameer Africa Limit Vs Aggarwal & Sons Limited (2013) eKLR** where it was held that –

> "…Although I have every sympathy with the Defendant which has been caught out by no mistake of its own but of its advocates in not filing its statement of Defence in time, I do not consider that the same raises any triable issues worthy of the name… As a result, I refuse to exercise my discretion to set aside the default judgment entered herein on 18th April 2013. I dismiss the Defendant's Notice of Motion dated 22nd May, 2013 with costs to the Plaintiff."

He also cites the case of ***PATEL VS EAST AFRICA CARGO HANDLING SERVICES LIMITED (1974) EA*** where a triable issue was held to be one that must be sufficient to persuade the Court that the Applicant has a prima facie case.

Claimant's counsel submits that no loss has been established by the Applicant to warrant granting of the orders sought. Furthermore, that the principle that outweighs all other principles in considering stay of execution of a monetary award is that Court must not deny or delay the employees the enjoyment of compensation.

As to the allegation that the orders sought should be granted since mistakes of counsel should not be visited on a litigant, counsel submits that this defence is not available to the Applicant herein. As it has been shown that the Claimant took various steps to move the Respondents to no avail and as such the Applicant should pursue damages from his supposed indolent advocates. Counsel urges the Court to dismiss the application with costs.

Determination

I have considered the application together with the grounds and affidavit in support thereof. I have also considered the replying affidavit and the submissions filed by both parties.

Courts have wide discretion in setting aside ex-parte judgments as stated in the case of **ESTHER WAMAITHA -V- SAFARICOM LIMITED** in which the court held interalia that –

> "The discretion is free and the main concern of courts is to do justice to the parties before it (See **PATEL -V- EA. CARGO HANDLING SERVICES LIMITED**) The discretions is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See **SHAH -V- MBOGO**) The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court (see **SEBEI DISTRICT ADMINISTRATION -V- GASYALI**). It also goes without saying that the reason for failure to attend court should be considered."

In the case of **ONGOM -V- OWOTA**, it was held that the court must be satisfied that either the defendant was not properly served or failed to appear in court at the hearing due to sufficient cause.

In **DAPHENE PARTY -V- MURRAY ALEXANDER CARSON**, the court stated as follows –

> "Though the court should no 'doubt' give a liberal interpretation of 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."

Sufficient cause was defined in the case of the **REGISTERED TRUSTEES OF THE ARCH DIOCESE OF DARE SALAAM -V- THE CHAIRMAN BUNJU VILLAGE GOVERNMENT AND 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 bonafides, is imputed to the appellant."

Again, in the case of **SAMEER AFRICA LIMITED -V- AGGARWAL AND SONS LIMITED**, the court stated –

> "…Although I have every sympathy with the Defendant which has been caught out by no mistake of its own but of its advocates in not filing its statement of Defence in time, I do not consider that the same raises any triable issues worthy of the name… As a result, I refuse to exercise my discretion to set aside the default judgment entered herein on 18th April 2013. I dismiss the Defendant's Notice of Motion dated 22nd May, 2013 with costs to the Plaintiff."

In the instant case, there is no defence on record although VIRAL HASMUKH deposes at paragraph 3 of his affidavit that Rotuk and Company Advocates did file defence on the applicant's behalf. The applicant does not refer to any "sufficient cause" in the affidavit in support of the application. It does not state what prevented it from either filing defence or attending court for the hearing.

On the contrary, the claimant has annexed all affidavits of service of mention notices, hearing notices, judgment notice, decree and certificate of costs. The respondent was granted leave to file defence on 7th 2015 but failed to do so or pay fees awarded to counsel for the claimant in the sum of Kshs.5,000 as well as court adjournment fees of Kshs.1,000 imposed on the respondent on the same date.

It appears that the respondent was only woken from its deep slumber by the proclamation. The respondent's inaction in this case can in the least be described as reckless or negligent.

The judgment herein was regular. The claimant complied with all requirements and served the respondent at every stage even though the respondent did not appear to be moved by any notice served upon it. All mention and hearing notices served were stamped received by counsel. Some of the affidavits of service show that counsel for the respondent was served in person. One of the affidavits of service shows that the claimant served both the respondent and its counsel.

I do not find any justification to deny such a diligent litigant the fruits of his judgment. The fact that he can be compensated by costs in the application and the delay is not sufficient cause to grant the orders. The respondent has failed to demonstrate the most basic justification; that it has any defence at all to the claim.

For the foregoing reasons I find no merit in the application and dismiss it with costs to the claimant.

DATED AND SIGNED AT NAIROBI ON THIS 23RD DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 31ST DAY OF OCTOBER 2018

MATHEWS NDERI NDUMA

JUDGE