



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 8 OF 2017

ZAKARIA JILO KITOKO.....1ST CLAIMANT

JOHN DUKO RHIGHO.....2ND CLAIMANT

VS

AFRICAN MUSLIM AGENCY.....RESPONDENT

RULING

1. This ruling flows from the Respondent's application brought by way of Notice of Motion dated 16th August 2018 seeking orders to stay the *ex parte* judgment dated 8th November 2017, together with all consequential orders arising therefrom. The Respondent further seeks leave to file its Reply out of time.

2. The application which is supported by an affidavit sworn by the Respondent's Manager, Mohamed Omar is based on the following grounds:

- a. That the Claimant filed his claim on 21st April 2017;
- b. That the firm of Ali & Company Advocates was instructed to represent the Respondent in the matter sometime in July 2017;
- c. That the Advocate who was attending to the matter, one Esther Thiong'o inadvertently misfiled the Statement of Claim and forgot about it and later on in November 2017, she left the firm and relocated to the United Kingdom to rejoin her spouse who is resident and working there. She also forgot to hand over the matter;
- d. That the pleadings were located accidentally in early June 2018 when the firm of Ali & Company Advocates was doing an audit and review of its files;
- e. That subsequently a Memorandum of Appearance, Notice of Appointment and Reply to Claim were filed on 11th June 2018 and served immediately on the Claimants' Advocates, J.K. Mwarandu & Company Advocates;
- f. That it has transpired that the matter proceeded for formal proof on 20th September 2017 and judgment delivered on 8th November 2017;
- g. That despite service being effected upon the Claimants' Advocates they never advised that the matter was pending ruling on taxation scheduled for 3rd August 2018;
- h. That the delay in entering appearance is inadvertent and excusable;
- i. That the judgment amount in the matter is colossal;
- j. That it is trite law that a mistake of an Advocate should not be visited upon an innocent litigant;
- k. That the Respondent has an arguable defence with high chances of success;
- l. That the application has been brought timeously;
- m. That the Respondent seeks determination of the matter on merit;

n. That unless the orders sought are granted, the Respondent is bound to suffer irreparably;

o. That it is in the interest of justice that the application be granted as prayed.

3. The Claimants' response is contained in a replying affidavit sworn by the 1st Claimant, Zakaria Jilo Kitoko on 12th September 2018. He states that the application has not been brought within reasonable time and the delay is inordinate and inexcusable.

4. Kitoko depones that the Respondent was duly served with Summons to Enter Appearance on 16th May 2017 as shown in the affidavit of service sworn by the process server. The Respondent did not enter appearance nor file a defence within the stipulated time.

5. It is further deponed that the reasons given by the Respondent for the delay in entering appearance and filing a defence are not satisfactory. First, no reason has been given as to why the Respondent instructed its Advocate in July 2017 yet it had been served with Summons way back in May 2017.

6. Second, on 11th May 2018, the Respondent was served with a Bill of Costs and Notice of Taxation but did not move the Court by filing the present application. Instead on 11th June 2018, the Respondent filed a Notice of Appointment of Advocates dated 8th June 2018, a Memorandum of Appearance, a Reply to Claim, a list of documents and a list of witnesses together with their statements, all without leave of the Court.

7. As held in the well-known case of *Mbogo & another v Shah [1968] EA 93*), the discretion of the Court to set aside proceedings is intended to avert an injustice or hardship resulting from an inadvertent or excusable mistake. It should by no means be used to delay or obstruct the cause of justice.

8. In this case, the Respondent was duly served with the Claimants' claim together with Summons to Enter Appearance issued by the Court. If the Court were to believe the contents of the supporting affidavit sworn by the Respondent's Manager, Mohamed Omar, what emerges is this; that the Respondent kept the Summons for at least two months after service before deciding to instruct an Advocate. Secondly, even after instructing an Advocate, the Respondent did not bother to follow up the case and thirdly, the Respondent ignored the Bill of Costs and Notice of Taxation served on it and instead went ahead to file pleadings in an already concluded matter, without leave of the Court.

9. This is not the kind of party that *Mbogo v Shah* (supra) had in mind. This application is clearly an abuse of the court process and is dismissed with costs to the Claimants.

10. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Shujaa for the Claimants

Mr. Ogeto h/b Mr. Ali for the Respondent