



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NO. 775 OF 2012

DAVID MWANGI MBURU.....CLAIMANT

VERSUS

HOTEL INTERCONTINENTAL NAIROBI LTD.....RESPONDENT

RULING

Introduction

1. On 27th April 2018, the Claimant/Applicant filed the Notice of Motion dated 24th April 2018 and supported by his Affidavit sworn on the same day. The application seeks the following orders:

- a) **THAT** the order made by this court on 16th April 2018 dismissing the suit for non attendance on the part of the Claimant be set aside.
- b) **THAT** the costs of this application be provided for.

2. The Respondent opposed the Application by the Replying Affidavit sworn by Stephen Mutuma on 25th July 2018 and urged the court to dismiss the Application because it was in the interest of justice that the Applicant's negligence should not be visited upon the Respondent.

The Applicant's Case

3. The Applicant's Application was based on the following grounds:

- a) Through a notice dated 9th March 2018, parties were invited to attend court on 17th April 2018 for a mention of this case.
- b) The Claimant's Advocates were not aware that the case would be heard on 17th April 2018 as that date was for a mention. As such, the Claimant was not informed of the date because his Advocates presumed the mention was for the purpose of taking a hearing date.
- c) The Claimant's Advocates attended court on 17th April 2018 but found that the case had been listed as a hearing and since the Claimant was not present in court to give evidence, the case was dismissed for want of prosecution.
- d) The Claimant has been vigilant in prosecuting the claim since the claim was filed in court and has taken every step to have the matter prosecuted despite attempts by the Respondent not to have the matter proceed to hearing.

The Respondent's Case

4. The Respondent contended that the notice issued to the Applicant, indicated that the matter was to be dealt with during service week and as such the Applicant had been given 1 months' notice. Further, the notice was pursuant to a service week which was well publicized and whose purpose was to clear the backlog of cases that have been pending before the Industrial Court for more than five years. As such, the Claimant was aware that the cases listed during service week were listed for hearing.

5. The Respondent further averred that the cause list for this particular matter was published three days before the date fixed for hearing, which indicated that the matter had been fixed for hearing to which its Advocates came ready to proceed to hearing.

6. The Respondent avers that the Applicant has acted in bad faith by failing to highlight the facts hereinabove to this Honourable Court.

Further, had the Applicant been prudent by checking the cause list in good time, he would have been aware that the matter was scheduled for hearing and ensured his proper attendance.

7. The Respondent avers that the Claimant has not been vigilant in prosecuting his claim as he slept on his rights by failing to take reasonable steps to prosecute his case on the stipulated date.

8. The Respondent also avers that if the Applicant's Application is allowed, it will be prejudiced on the basis that:

a) The Respondent would continue to unnecessarily incur costs and expenses connected to these proceedings; and

b) This matter has been pending in this Honourable Court for more than 6 years, key evidence shall be difficult to obtain as key witnesses have left the Respondent's employment.

9. The application came up for hearing on 27.9.2018 but the counsel agreed to dispose the same by written submissions.

Claimant's Submissions

10. The Claimant submitted that the Civil Procedure Rules has not stipulated a particular method of how a suit is set down for hearing. The practice of having cases set down for hearing during service week and without invitation to the parties is new and does not appear to have been accommodated within the practice rules. prosecuting his case during service week, it must be proven that the party read the notice in the newspapers, was aware of the date, time and place his case would be heard and deliberately failed to attend

The Claimant further submitted that for a party to be faulted for not court. He relied on the case of *Wanjiku vs. Esso Kenya Ltd [1995-1998] EA 332* where the Court held that it is irregular for substantive orders to be made on a mention.

12. The Claimant submits that the case of *Tana and Athi River Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR* as relied upon by the Respondent is irrelevant to the Applicant's case and its facts can be distinguished while the case of *Shah vs. Mbogo* supports the Claimant's Application.

13. The Applicant submitted that the delay is not prolonged, is excusable and justice can still be done to the parties as witnesses and documents for the case are available and have been filed in these proceedings. He relied on the case of *Allen vs. Sir Alfred McAlpine & Sons Limited* referred to in the case of *Irita vs. Kyumba [1984] Eklr 441 at 449* where the court was of the opinion that the principle to be applied in cases of dismissal for want of prosecution is whether the delay is prolonged and inexcusable.

The Respondent's submissions

14. The Respondent in its written submissions filed in court on 30th October 2018 (not-dated), submitted that service week is anchored on the constitutional principles that justice should not unnecessarily be delayed and that all parties in a dispute should be accorded fair treatment.

15. The Respondent relied on *articles 50 and 159 of the Constitution* and *section 1A of the Civil Procedure Act, Cap 21*. The Respondent also relied on the Court of Appeal decision of *Keren Buaron vs. Sony Holdings Limited & 2 Others [2017] eKLR* where the Court held that:

"The last issue for determination is on the overriding principle espoused in Article 159 (2) of the Constitution and under section 3A and 3B of the Appellate Jurisdiction Act. We must say that these are provisions that must be invoked only in deserving cases and should not be applied with unfettered abandon. The same cannot also be invoked to assist a party who has clearly demonstrated willful or negligent non-compliance with lawful court orders...the overriding principle does not debunk the cherished and well settled principles which the courts have applied persistently and consistently over the years in the administration of justice. Nor does it aid a party who fails knowingly to abide by orders of the court."

16. The Respondent further relied on the case of *Shah vs. Mbogo [1968] EA 93* as quoted with favour in the case of *Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR* where it was held that:

"... the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

17. The Respondent therefore submitted that it is inexcusable for the Claimant's Advocates to feign ignorance of the hearing on 17th April 2018 noting that service week disposes of matters by way of hearing and the said hearing was well publicized in the newspapers and cause list. Further, it was the Claimant's Advocates' duty to inform the Claimant of the hearing date and the Claimant's duty to monitor the legal proceedings.

18. The Respondent also submitted that it would be unfair to subject the Respondent to further legal proceedings after the Claimant's failure to adhere to the lawful directions of the Court as it stood to suffer prejudice as it had averred in its Replying Affidavit.

19. The Respondent also relied on the case of *Ivita vs. Kyumbu [1984] KLR 441* as quoted with favour in the case of *Mwangi S. Kimenyi vs. Attorney General & Another [2014] eKLR* where the Hon. Justice Chesoni held that:

“Justice is justice to both the Plaintiff and the Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.

20. The Respondent also relied on the case of Shah Hirji Manek Limited vs. Ramesh Premchand Shah & 3 Others [2013] eKLR where the Hon. Lady Justice Kamau held that:

“... the sword of justice must cut both ways. No party should suffer prejudice as a result of a right being given to the other party. Bearing in mind the aforesaid guiding principles, I do not find this to be a case which merits the exercise of my discretion in favour of the Plaintiff herein. I concur with the 3rd and 4th Defendants that the Defendants have suffered as a result of the delays by the Plaintiff prosecuting the application dated 9th May 2007.”

21. Consequently, the Respondents submitted that the Application should be dismissed as it is inexcusable and prejudices the Respondent’s right to a fair trial and fails to provide any proper excuse to warrant the setting aside of the Court’s orders.

The Analysis

22. After careful perusal and consideration of the application, rival affidavits and written submissions, the following issues arose for determination:

- a) Whether the court is functus officio and without jurisdiction
- b) Whether the claimant was notified of the hearing date. if the judgement is set aside
- c) Whether the Respondent stands to suffer any prejudice
- d) Which orders should be made?

Is the court functus officio and without jurisdiction?

23. The Court dismissed the suit for want of prosecution on 17.4.2018. The date was fixed by the court in the context of the now “infamous service week” when courts hear or dismiss the old suits after giving notice to the parties. The application is anchored on the ground that his Advocate was served with Mention Notice for 17th April 2018 and not a hearing notice. The question that arises is whether the court can revisit the impugned decision.

24. In my opinion, dismissal of a suit for want of prosecution is a final determination of the suit on merits because what the court does in such circumstances is to make a finding of fact that the claimant has tendered no evidence to prove his/her case in the required standards. Consequently, after such a decision the court becomes *functus officio* save for the power to review if properly invoked.

25. In Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR the Supreme Court held that :

“it is a general principle of the law that a court after passing judgment, becomes functus officio and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by the law”

26. The application before me is not for review but for setting aside the judgment. The provisions of the law upon which it is premised do not donate any power to revisit its final decisions otherwise than through review. The request herein should be directed to the appellate court. Consequently, I find that the jurisdiction of the court has not been properly invoked and proceed to uphold the objection by the respondent that the court is *functus officio* and without jurisdiction to determine the application.

Disposition

27. For the reasons that the court is *functus officio* and without jurisdiction, I strike out the Notice of Motion dated 10.5.2018 with no costs to the respondent because she is not the one who moved the court for the dismissal and she also never attended court on the material.

Dated, Signed and Delivered at Nairobi this 20th day of December, 2018

ONESMUS MAKAU

JUDGE