



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1661 OF 2013

SAMMY GATIMU KARANJA.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. By this application which is brought by Notice of Motion dated 13th December 2016 the Respondent seeks to set aside the *ex parte* judgment by my brother **Rika J** delivered on 2nd September 2016. The Respondent also seeks leave to defend the Claimant's claim.

2. The application which is supported by the affidavit of Allan Sitima, Advocate sworn on 13th December 2016 is based on the following grounds:

- a) That the hearing notice setting down the matter for hearing was not communicated to the Respondent;
- b) That the Respondent's failure to attend Court for the hearing was not intentional;
- c) That the judgment obtained herein is null and void *ab initio* as the Respondent had responded to the claim by filing and serving a Statement of Defence;
- d) That the Statement of Defence raises triable issues and if the judgment is not set aside, the Respondent will have been condemned unheard contrary to the rules of natural justice;
- e) That the Court should exercise its power under the overriding objective to facilitate just, expeditious, proportionate and affordable resolution of disputes;
- f) That the Claimant will not suffer any prejudice if the orders sought are granted.

3. In the supporting affidavit sworn by Allan Sitima, Advocate it is deponed that the Respondent filed its Statement of Defence on 14th April 2014 which was served on the Claimant on 17th April 2014.

4. Counsel further depones that this matter had failed to take off twice on 3rd July 2014 and 11th December 2014 after which the Claimant took no further action to prosecute his claim.

5. On 8th April 2016, the Respondent was served with a hearing notice dated 7th March 2016 prepared by the Court listing the matter for hearing on 22nd April 2016 during the Court Service Week. Contrary to

the hearing notice served by the Court, the matter was listed on the cause list before **Marete J** on 21st April 2016. The Respondent was represented but there was no appearance for the Claimant. The Judge referred the matter back to the Registry for action.

6. Counsel confirms that the matter was not listed on 22nd April 2016 and that the Respondent expected to be notified of another hearing date. He was later to learn that the matter had in fact proceeded *ex parte* on 22nd April 2016 and judgment entered against the Respondent.

7. The Claimant opposes the application by his replying affidavit sworn on 12th January 2017. He depones that his Advocates had endeavoured to set down the matter for hearing without success due to unavailability of dates at the Court Registry.

8. The Claimant further depones that the Deputy Registrar of the Court had issued a hearing notice dated 23rd March 2016 notifying the parties that the matter would proceed on 22nd April 2016 during the Court Service Week. The hearing notice was duly served upon the Respondent.

9. On 22nd April 2016, the Claimant and his Counsel went to the Registry where they were notified that the matter had been placed before **Rika J**. The Respondent failed to attend Court and the Claimant was therefore heard *ex parte*.

10. The Claimant goes on to depone that the Respondent has filed a Notice of Appeal thus rendering this Court *functus officio*.

11. The single issue for determination in this application is whether the Respondent has established a case for setting aside of the *ex parte* judgment delivered by the Court on 2nd September 2016. The Court was referred to the decision in **Shah v Mbogo [1967] EA 116** where it was held that in an application for setting aside a judgment, the Court should exercise its discretion so as to avoid an injustice occasioned by an inadvertence or error. This discretion is not meant to aid a party who deliberately seeks to obstruct or delay the cause of justice.

12. The facts surrounding the *ex parte* proceedings on 22nd April 2016 and the subsequent judgment delivered on 2nd September 2016 are not in dispute. The matter was slated to be heard during the Service Week where all the Judges of the Employment and Labour Relations Court converged at the Nairobi station to deal with old cases. The hearing notice was therefore served by the Court and it would appear that there was a mix up of dates because although the hearing notice was for 22nd April 2016 the matter appeared on the cause list for 21st April 2016 and finally proceeded *ex parte* on 22nd April 2016.

13. It seems to me that the Court itself made an error which should not be visited on either party. For this reason I allow the Respondent's application, set aside the *ex parte* proceedings of 22nd April 2016, the judgment delivered on 2nd September 2016 and all consequential orders.

14. The matter will proceed *inter partes* at a mutually convenient date to be taken at the Registry.

15. The costs of the application will be in the cause.

16. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF MARCH 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Ole Kamwaro for the Claimant

Mrs. Naeku for the Respondent