



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.998 OF 2013

PATRICK KIILU MUNYAU.....CLAIMANT

VERSUS

THIKA NURSING HOME..... RESPONDENT

RULING

1. The respondent, Thika Nursing Home filed application dated 1st May, 2017 seeking orders that there be stay of execution and any further proceedings herein pending the hearing of the suit and that the court should set aside the *ex parte* judgement.
2. The application is supported by the affidavit of E. Chege Nganga and based on the grounds that the judgement was entered against the respondent by error made by the advocate's former receptionist who failed to diarise the hearing notice served by the claimant. The respondent and their advocate were unaware of the hearing date and thus did not attend at the hearing on 7th February, 2017. The respondent is willing to deposit the decretal sum in court as commitment of their intention to have defence canvassed in court. there is a good defence which should be heard.
3. Mr Nganga avers in his Supporting Affidavit that as advocate for the respondent, he is aware that the claimant served the office with a hearing notice which was received by the former receptionist who failed to diarise the same. The mistake of advocate for the respondent should not be visited upon the client who is innocent.
4. In reply, the claimant filed hi Replying Affidavit and avers that the respondent's intention is to delay the determination of this matter after severally being invited to take hearing dates but failed to attend. In three occasions the claimant served the respondent with hearing notice but they refused to attend court. no reasonable cause has been given as to why the respondent failed to attend court on all occasions until the alleged date of 7th February, 2017 when the claimant was heard and case closed. The application lacks merit and should be dismissed with costs.
5. Both parties made oral submissions in court.

Determination

6. The application by the respondent is premised on the facts that there should be stay of execution and further proceedings and that the judgement herein should be set aside for the respondent to be heard on their defence. The respondents admit that the hearing notice of 7th February, 2017 was served upon them but was received by their former receptionist who failed to diarise the same and therefore the mistake of advocate should not be visited upon the innocent respondent who has a good defence.

7. On 7th February, 2017 the claimant was heard on his evidence in the absence of the respondent upon the court being satisfied that the respondent was served, there was an acknowledgement of the hearing notice and the claimant had gone ahead and filed an Affidavit of Service to confirm the same. The claimant closed his case and judgement was read on 30th March, 2017.

8. whereas mistake of an advocate is one of the factors to be considered in an application seeking stay of execution, the mistake must be an excusable mistake for it to inure to the benefit of an applicant as held by the Court of Appeal in the case of **Marangu Rucha & Another versus Bernadette Muthina Nzioki & Others (2015) eKLR.**

9. As correctly submitted by the claimant, on three (3) occasions, this matter came up for hearing and the respondent and advocate were absent. On 11th October, 2016 the claimant's advocate requested the court to be allowed to serve the respondent again as they were absent on the hearing date. This was a reasonable request and it was allowed. On 1st December, 2016 the respondent was served but remained absent. The claimant's advocate requested to be given one more chance to serve the respondent with another hearing notice. This request was found reasonable and allowed. On the 7th February, 2017 when the matter came up for hearing, the court directed the claimant to proceed with the hearing as the respondent had been served, Affidavit of Service filed and the respondent remained absent from court.

10. In the respondent's application, there is no explanation as to why they remained absent from court on various occasions including the 7th February, 2017 when the matter was scheduled for hearing. The allegation that the hearing notice with regard to the hearing on 7th February, 2017 was received by a former receptionist is not supported by any material evidence.

11. I find the averments by Mr Nganga in his supporting affidavit bare. The allegations that a former receptionist was served, accepted service but failed to diarise is without support. The alleged receptionist is not named. The mere assertion that this is a *former receptionist* does not aid the respondent at all.

12. The claimant attended court on 7th February, 2017, he was given a hearing and has a valid judgement and with legitimate expectations that he should be allowed to enjoy the fruits of the same. The court can only set aside such valid judgement.

13. Paragraph 5 and 6 of the judgement delivered on 30th March, 2017 put into account the defence filed by the respondent. no new issues have been set out in the application as not addressed at the hearing.

14. The offer by the respondent to deposit the judgment amount with the court does not vilify the respondent of the responsibility to attend court as and when required. An application seeking to set aside judgement that is regularly entered should not only be on the grounds that an applicant can afford to deposit with the court the judgement amount. To the contrary, the claimant filed the current suit in 2013 seeking to assert his rights. on four different occasions the matter came up for hearing and the respondent opted to be absent until judgment was entered.

15. I find no sufficient grounds to warrant the orders sought by the respondent.

Application dated 1st May, 2017 Is hereby dismissed with costs to the claimant.

Delivered in open court at Nairobi this 17th day of July, 2017.

M. MBARU

JUDGE

In the presence of:

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