



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 232 OF 2013**

**RAJAB WAKOLI.....CLAIMANT/RESPONDENT**

**VERSUS**

**ABSON MOTORS LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent/Applicant seeks through the notice of motion application dated 3rd November 2015 for review of the orders made on 2nd November 2015 and reopen the case closed by the Court. The motion is expressed to be brought under Rules 25(2) and 32 of the Industrial Court (Procedure) Rules 2010. The grounds are set out on the face of the motion and on the affidavits of Mercy Njogu Advocate and Ali Mbwana both sworn on 3rd November 2015. The main ground of the application was that the counsel and her client's witness were late to arrive in Court due to unavoidable circumstances in spite of setting out for Court in time.

2. The Claimant/Respondent was opposed and filed a replying affidavit sworn on 25th November 2015 by Jane Awino Bukachi. The affidavit in the main is to the effect that on the material date there was no attendance on the part of the Respondent/Applicant and that it was clear manifestation of loss of interest of the Respondent/Applicant in the matter. The Claimant/Respondent thus urged that the case for the defence be closed and a judgment delivered.

3. The application was urged before me on 1st December 2015. Mrs. Ng'arua for the Respondent/Applicant submitted that the counsel and the witness due to testify set of for Court but were held up in a massive traffic jam along the route and arrived in Court after the matter had been mentioned and the defence case closed in their absence. She submitted that the witness had travelled from Mombasa and was ready to testify. The Respondent/Applicant thus urged the Court to review its orders whose review was sought at the soonest possible time. Counsel submitted that the mistake of the advocate should not be visited on the Respondent/Applicant.

4. In opposing the application, Miss Mombo for the Claimant/Respondent submitted that the application was opposed on the strength of the affidavit filed by the Claimant/Applicant. She urged the Court to determine the matter on the material availed to Court.

5. In matters review, the Industrial Court (Procedure) Rules 2010 provide as follows under Rule 32:-

*32. (1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—*

(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, the judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

(2) An application for review of a decree or order of the Court under subparagraphs (b),(c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.

(3) A party seeking review of a Court decree or order of the Court shall apply to the Court in Form 6 set out in the First Schedule.

(4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.

(5) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.

(6) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(7) An order made for a review of a decree or order shall not be subject to further review.

6. In the case of **National Bank of Kenya v Ndungu Njau [1997] eKLR** the Court of Appeal held that:-

*A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.*

7. Whereas the Respondent/Applicant's motion is for setting aside the orders of the Court, there is a decision from the Court of Appeal on setting aside judgment which is instructive. In it the Court held that the judge or magistrate should be mindful of various factors factors. In the case of **CMC Holdings v Nzioki [2004] 1 KLR 173**, the Court of Appeal considered the grant of discretionary orders to set aside. The learned judges of appeal, Tunoi, O'kubasu JJA, Onyango Otieno Ag. JA (as they then were), held as follows:-

1. *In an application before a court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.*

2. *On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.*

3. *In law, the discretion on whether or not to set aside an ex parte order was meant to ensure that a*

litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.

4. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.

5. In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.

6. In an application for setting aside *ex parte* judgment, the Court must consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raised triable issues. (emphasis mine)

8. The Respondent/Applicant has given a narration of the sequence of events leading to the failure to attend Court on the material date. The Respondent/Applicant was ready to proceed with the defence case and had a witness lined up to testify. The witness had travelled from Mombasa to give testimony in this case and save for the closure of the case by Court was ready to testify. In the **Nzioki v CMC** case above, it was clear that a Court should exercise discretion to set aside its orders where a mistake or excusable error is noted. It is apparent there was an excusable error in not attending the matter on time. The Respondent/Applicant moved to Court with dispatch and filed the motion the very next day. That is not conduct of a party undesirous to conclude the matter or one who has lost interest in the case. The Claimant/Respondent was ready for the defence case but for the mishap on the material date. The Court notes that the delay occasioned in conclusion of the case could be mitigated by costs. The upshot of the foregoing is that the Respondent/Applicant's motion succeeds but the Respondent/Applicant will pay thrown away costs of Kshs. 25,000/- to the Claimant/Respondent within 14 days of today failing which the matter will proceed to judgment. Matter to be listed for directions 14 days from the date of the Ruling.

Orders accordingly.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of January 2016**

**Nzioki wa Makau**

**JUDGE**