



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1626 OF 2015

DR. EDWARD RUKWARO.....CLAIMANT

VERSUS

CIC INSURANCE GROUP LIMITED.....RESPONDENT

RULING

1. The Respondent filed application dated 5th October 2015 through Notice of Motion seeking for orders that the Court do set aside the orders of 5th October 2015 issued without justice. The application is supported by the annexed affidavit of Bryan Muindi and on the grounds that the Claimant concealed material facts and or through misrepresentation was able to obtain *ex parte* injunctive orders against the respondent. The Claimant failed to disclose that he had applied for a loan from the Respondent at the sum of Kshs.5, 600,000.00 which loan remains unpaid and is the proper subject of the application dated 18th September 2015. The orders issued on 18th September 2015 were issued and extended and then application allowed when the matter came for hearing but counsel for the Respondent had not arrived in court.
2. Other grounds are that the application dated 18th September 2015 was served upon the Respondent 10 days before hearing date on 5th October 2015 where the Respondents endeavoured to file response and filed on the morning of 5th October 2015. The application was therefore opposed in terms of the Grounds of opposition dated 4th October 2015. The advocate who was to argue the respondent's case was delayed in attending Court when he went to the Court building at Commercial Courts only to learn that the Court seats at the High Court building. By the time counsel was present the application had been called and orders issued.
3. Other grounds are that the mistake of counsel cannot be visited upon the Respondent who was condemned unheard. Application dated 18th September 2015 should proceed and be heard on merit. The orders made have occasioned the Respondent substantial and irreparable harm and should be set aside for justice to be achieved.
4. In the affidavit of Mr Muindi he avers that as an advocate for the respondent, on 18th September 2015 the Respondent was served with notice of motion and interim orders then issued by the Court where they proceeded and instructed their advocates to respond. Responses were prepared and filed on 5th October 2015. The application dated 18th September is opposed through the Replying Affidavit of Gail Odongo sworn on 5th October 2015.

5. Mr Muindi also avers that the Claimant obtained ex parte orders through concealing material facts and misrepresentation noting that he owes the Respondent kshs.5, 600,000.00 in a loan that remain outstanding. The Claimant shall not suffer any irreparable injury which cannot be compensated by way of damages and is therefore enjoying ex parte injunctive orders that would not stand the scrutiny of an inter parties hearing. On 18th October 2015 the claimant's application was allowed while the Respondent was absent upon counsel going to a different Court house other than where the Court was seating. This mistake of counsel should not be visited upon the respondent as upon realising the mistake, they moved immediately and filed the current application.

6. In reply the Claimant filed his Replying Affidavit sworn on the 23rd October 2015 and opposed the application by the respondent. He avers that the averments in the Supporting Affidavit of Bryan Muindi are not true as he disclosed all material facts to the Court when he filed application dated 18th September 2015 on his loan with the respondent. The fact that the respondents are aware that there is a loan in issue confirms that such are matters raised by the Claimant in his application. The Claimant at his supporting affidavit to his application dated 18th September 2015 as paragraphs 3 and 8 discloses that he wrote to the Respondent on 23rd June and 1st September 2015 requesting for a tabulation of his terminal dues and a statement on his car loan but there was no response.

7. The Claimant also avers that he applied to the Court to have the Respondent restrained from illegally attaching his motor vehicle registration KBW 831Q and the Respondent is keeping the chattel mortgage agreement. The Respondent has unlawfully made effort to repossess the motor vehicle while they owe the Claimant terminal dues unpaid in excess of kshs.600, 000.00 contrary to article 31(b) of the Constitution. The Court cannot assist a party not abiding by law where the Respondent is keen to deprive the Claimant his right to property contrary to article 40 of the Constitution.

8. The Claimant also avers that the Respondent was served with application dated 18th September 2015 in good time but filed Grounds of opposition on 5th October 2015 but did not attend Court or serve the claimants with such documents until the Court gave directions on 13th October 2015. The cause list of 5th October 2015 was clear and it indicated the matter was before court, the room and building but the Respondent was absent. When the Court granted the orders sought, there was nothing in opposition to the Claimant application and on this basis, the Court issued appropriate orders. The Court directed the Respondent to issue the Claimant with a tabulation of terminal dues and supporting documents in relation to the car loan but have refused to oblige. The application should be dismissed with costs.

9. Both parties filed their written submissions with regard to the application dated 5th October 2015.

10. The Respondent submit that mistake of advocate should not be visited on the client. The Respondent advocate admit they were late to attend Court which was an honest mistake and seek the Court to do substantive justice to all parties and allow the application. The Respondent has relied on the case of **Philip Chemwolo 7 Another versus Augustine Kubede [1986] eklr** where the Court held that unless there is fraud or intention to overreach, an error that can be put right in costs should be allowed. In the interests of justice and despite the counsel mistake the respondent/client should not be adversely affected as held in **Lazarus Kibui Ndegwa versus Labule Okello Litwa [2015] eklr**. the courts over time have addressed the principles governing the setting aside of ex parte orders in the case of **Shah versus Mbogo & another (1967) EA** where the Court is required to exercise its discretion to avoid injustice or hardship due to an inadvertent and excusable mistake.

11. The Respondent also submit that the ex parte orders confirmed on 5th October 2015 have caused the Respondent financial hardship and injustice and such protect the Claimant from repayment of Kshs.3,957.40 owed and the Respondent cannot exercise its right to repossess or sell the security as per the loan agreement executed by the parties. The application dated 18th September 2015 raised substantial questions of law particularly the respondent's right to repossesses motor vehicle in the claimant's possession and in the interests of justice such legal issues should be addressed. The Claimant was terminated from service with the Respondent in June 2015 but only moved the Court on 18th September

2015 after auctioneers had been instructed to repossess the security.

12. The Respondent also makes references to various cases and authorities by citing **Patel versus EA Cargo handling Services Ltd; CMC holding Ltd versus nzioki [2004] eklr; and Kenya Ports Authority versus Kustron (K) Ltd [1997] eklr.**

13. The Claimant on his part submit that the Respondent was served with the application dated 18th September 2015 due for hearing on 5th October 2015 which the respondents admit was served 10 working days before the hearing date but only filed a response on the 5th October 2015 when the matter was coming up in Court for hearing. The matter was listed for on 5th October 2015 but the respondents were absent and had not filed any appearance or responses. At the time the Court allowed the application, on record there was nothing to oppose the application. The Court issued the orders appropriately. In any event without the Respondent filing a memorandum of appearance, they had no right of audience.

14. The Claimant has relied on **Crush Security Guards & Another versus Kenya power 7 Lighting Co. Ltd, HCCC No.108 of 2007 (Eldoret)** where the Court dismissed a case on the grounds that a party had filed pleadings with falsehoods. This was also the subject for the dismissal of an application due to falsehoods in the case of **Kisii Petroleum Products Ltd versus Kobil petroleum Ltd & 2 Others, Nairobi Civil Appeal, Civil Appl. No.218 of 2005.**

15. The Claimant also submit that the Respondent have not demonstrated that they have any defence, and as such by setting aside the orders of the Court of 5th October 2015, there will be nothing to defend. The Respondent has not complied with the orders of the Court so as to enjoy any discretionary orders sought in their favour. The agreement and chattel mortgage has not been produced or issued to the Claimant as directed. The Court cannot therefore assist a party that is not willing to be bound by its directions and orders as held in the case of **Josphat Muthui versus Ezeetec ltd, Cause No.1224 of 2012.**

16. The gist of the application before Court is that the orders made on 5th October 2015 should be set aside on the reason that counsel for Respondent was late and not able to attend Court and such is a mistake that should not be visited upon the respondent. The application is however opposed by the Claimant noting that on 5th October the Respondent had not filed any replying affidavit and the application was allowed as it was unopposed.

17. Where the Court is invited to set aside its orders, even with the best application of the Court discretion, the conduct of the applicant is important to revisit as held in **Michael Njai versus Juan Torres and Another, Cause No. 1279 of 2013.** In this case, Mr Muindi avers in his affidavit that on 5th October 2015 counsel for the Respondent was in Court but only arrived after the matter had been called and adverse orders made against the respondent.

18. The submissions by the respondents come into focus. There is admission that the Respondent was served immediately the Claimant obtained the ex parte orders on 18th September 2015 directing parties to attend hearing on 5th October 2015. On record is the respondents Grounds of Opposition to the claimant's application filed on 5th October 2015. Where indeed the Respondent was served on 18th September 2015, I find there was ample and sufficient time to enter appearance and file their responses before the hearing date. I vision that the delay in filing such crucial documents was delayed until the last minute and while the Court was ongoing the Respondent was filing the Grounds of Opposition. That as it may, appearance was only filed on 2nd November 2015. This was not until the Claimant remained adamant about this fact and the respondent, despite filing their application dated 5th October 2015 failed to address this fact.

19. The record is therefore very clear; on 5th October 2015 the Claimant was in Court and there was no appearance for the respondent. The Affidavit of Service by Anthony Thuo filed on 2nd October 2015 confirming service upon the Respondent who received and acknowledged the Court order and application served upon them on 18th September 2015. On 5th October therefore, the Court being satisfied the Respondent was aware of the matter before Court and opted to be absent allowed the application as it was

unopposed.

20. I note the respondent filed application seeking to set aside the orders made on 5th October 2015 on the same date. However, there was no service upon the Claimant with this application which was an issue addressed in Court on 13th October 2015. Further on 29th October the Claimant had not been served with the memo/notice of appointment or appearance by the Respondent and this is despite the Respondent filing Grounds of Opposition and application both on 5th October 2015 but memo of appearance was only filed on **2nd November 2015**. By the Respondent advocates thus moving the Court on 5th October 2015, up and until 2nd November 2015, they lacked proper standing before court.

21. This lapse is not explained.

22. No effort has been made in the affidavit of Mr Muindi to set out why they would attend Court on 5th October 2015 while a simple process of filing and putting on record their appearance had not been complied with. Even where the Court is to disregard the technicality involved with such lapse, the conduct of the Respondent does not aid their case at all. The refusal, neglect and failure to abide with directions to serve the claimants does not show good faith. Such cannot be rewarded by this Court by allowing the subject orders sought. In any event, there exists no statement of defence since 2nd November 2015 when the Respondent entered appearance. This is another lapse that has not been explained. The nature of the orders granted on 5th October 2015 were of the nature that parties should set the main suit for hearing. As such, the Respondent should have moved with speed to ensure that the defence is immediately placed on record even as they agitate for the grant of the orders of setting aside the orders of 5th October 2015.

23. In the circumstances, I find no justifiable reason(s) advanced by the Respondent to warrant the grant of the orders sought. Such are declined.

The application dated 5th October 2015 is hereby dismissed. Costs to the claimant.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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