



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.419 OF 2014**

**NATHAN OGADA ATIAGAGA ..... CLAIMANT**

**VERSUS**

**DAVID ENGINEERING LIMITED .....RESPONDENT**

**RULING**

1. The application by the respondent/applicant dated 18<sup>th</sup> January 2016 was filed on the basis that;
  1. *Spent.*
  2. *Spent.*
  3. *That this Court be pleased to set aside the ex parte judgement entered against the respondent;*
  4. *That this honourable Court be pleased to set aside the ex parte proceedings taken and orders issued on the 27<sup>th</sup> July 2015 and all consequential proceedings thereafter.*
  5. *That this honourable Court be pleased to order that the hearing of this suit allowed to commence de novo.*
  6. *That the costs of this application be in the cause.*
2. The application is supported by the annexed affidavit of James Rimui and Felix Nzioka and on the grounds that the matter proceeded ex parte on 27<sup>th</sup> July 2015 and the Respondent only became aware that judgement was reserved for the 16<sup>th</sup> September 2015, on the 12<sup>th</sup> August 2015 when the matter came up for mention. The Respondent prepared an application dated 26<sup>th</sup> August 2015 seeking stay of proceedings but the registry could not accept the application as the file was said to be in chambers with the judge. A skeleton file was opened and an application filed on 9<sup>th</sup> September 2015. Judgement was supposed to be delivered on 16<sup>th</sup> September 2015. The Respondent application was not listed for hearing and the judges were out on a retreat by the Judicial Training Institute (JTI) and Respondent prepared another Certificate of Urgency on 21<sup>st</sup> September 2015. When the respondent's advocate Court clerk tried to file the application, the skeleton file went missing and the main file remained with the judge. The Respondent later learnt that judgement was delivered on 24<sup>th</sup> November 2015 when they were served with party and party costs dated 8<sup>th</sup> October 2015.
3. Other grounds in support of the application are that the Respondent was condemned unheard. There is a bona fides defence which raise triable issues which should be ventilated failure to which the Respondent shall have been driven from the seat of justice.
4. In the affidavit of James Rimui, he avers that as an advocate for the Respondent on 26<sup>th</sup> August 2015, he learnt the matter had proceeded ex parte on 27<sup>th</sup> July 2015 and judgement reserved. An application was filed but the file could not be traced. On 8<sup>th</sup> September a letter was written to the deputy registrar in

the registrar and a skeleton file opened and mention scheduled for 16<sup>th</sup> August 2015 but Court was not seating. Counsel sent Court clerk Felix Nzioka to file another certificate of urgency but the skeleton file went missing. This matter only came up again on 24<sup>th</sup> November 2015 when the Respondent advocate was served with the bill of costs. The current application was then filed without delay seeking the orders set out in the Notice of Motion. The Claimant shall not suffer any prejudice as he can be compensated by an award of costs.

5. In the affidavit of Felix Nzioka, he avers that as the Respondent advocate Court clerk on 9<sup>th</sup> September he was sent to file application dated 26<sup>th</sup> August 2015 and was informed the file was with the judge in chambers for judgement due on 16<sup>th</sup> September 2015. Efforts were made to open a skeleton file but it went missing. He made follow up visits to trace the file without success. The Respondent was later served with the bill of costs.

6. In reply to the respondent's application the Claimant filed a Replying Affidavit sworn by the Claimant on 2<sup>nd</sup> February 2016. He avers that on 18<sup>th</sup> November 2014 the Respondent was invited for fixing of hearing date and failed to attend. A hearing date was taken and they were served and an affidavit of Service filed for 27<sup>th</sup> July 2015 but failed to attend. The matter was placed for mention on 12<sup>th</sup> August 2015 when the Respondent advocate was present in Court when judgment was scheduled for 16<sup>th</sup> September 2015 but on the due date the judge was engaged in other duties. There was notification that all matters for judgement would be on 21<sup>st</sup> September 2015, which was read in open court. Despite the Respondent being represented in Court ton 12<sup>th</sup> August 2015 the application for stay was not done until 9<sup>th</sup> September 2015 and Claimant was only served on 10<sup>th</sup> September 2015. That there is no good ground(s) set out for the grant of the orders sought and application by the Respondent should be dismissed with costs.

### **Submissions**

7. Both parties addressed the application by way of written submissions. The Respondent filed their submissions on 19<sup>th</sup> February 2016 and the Claimant on 23<sup>rd</sup> February 2015.

8. The Respondent submit that Rule 25 of the Court Rules provides that the Court shall not re-open hearing or review facts unless there are sufficient reasons it considers fit. There are circumstances that are just to set aside judgement obtained ex parte as held in the case of **Shah versus Mbogo [1967] EA**. The Court should consider the defence that has been brought to the attention of the Court however irregularly and consider if the Claimant can be compensated by costs for any delay occasioned to him. The Court should also consider that a party does not suffer injustice or hardship as a result of among other excusable mistake or error as held in **CMC Holdings Ltd versus James Mumo Nzioki [2004] eklr**. The Court should consider why a defence was not filed; why the Respondent failed to attend hearing and also consider whether there is a reasonable defence which raises triable issued.

9. The Respondent also submit that the hearing notice for 27<sup>th</sup> July 2015 was served on 5<sup>th</sup> December 2014 but the advocate failed to diarise the same. This was because the advocate had not acquired a 2015 diary at the time and when it was acquired the file had been filed away. This was an administrative error by the advocate. When the matter came to the attention of the Respondent advocate again on 26<sup>th</sup> August 2015, the Respondent learnt the matter had proceeded ex parte and an application was filed but could not be heard as the file was placed in chambers and a skeleton file went missing. A mistake of advocate should not be visited upon the client as held in **Lucy Bosire versus kenhancha Div. Land Dispute Tribunal & 2 Others [2013] eklr**.

10. The Respondent also submit that there is a defence with triable issues. The Respondent has challenged the claim for unlawful and unfair dismissal as he voluntarily resigned his employment. The defence is that the Claimant created disharmony with staff which led to his dismissal. The reliefs sought are challenged. These are matters that should be addressed where the Respondent is given a chance to argue their defence.

11. The Claimant on his part submit that the Respondent was invited to take a hearing date on 18<sup>th</sup> November 2014 and later served with a hearing notice on 5<sup>th</sup> November 2014. On 27<sup>th</sup> July 2015 when the matter came up for hearing, the Respondent was absent; on 12<sup>th</sup> August 2015 the Respondent was in Court when judgement was scheduled for 16<sup>th</sup> September 2015. Such judgement was only delivered on 21<sup>st</sup> September 2015 and the Respondent does not explain why they failed to take any action to secure their right to be heard then. The Respondent has therefore established sufficient reasons for the reopening of the case as there is no dispute as to service of hearing notice and on the mention date to take judgement date the Respondent was represented in Court and therefore aware matter had proceeded *ex parte* and did nothing.

12. The Claimant also submit that in the judgement the Court made reference to the defence filed by the Respondent and where the Respondent is aggrieved should file an appeal. The Claimant will suffer prejudice and injustice by being made to re-open the case that has since been closed and judgement delivered. The discretion to be applied should be for justice on both parties not just to the applicant. The application should therefore be dismissed with costs.

13. From the respondent's application dated 16<sup>th</sup> January 2016, several issues for determination arise that I can set out as follows;

Whether Court should set aside judgement entered *ex parte* against the respondent.

Whether the Court should set aside proceedings of 27<sup>th</sup> July 2015;

Whether hearing should commence *de novo*.

14. Stay if proceedings cannot be ordered where judgement has been entered as there are no proceedings capable of being stayed. See Court of Appeal decision in **Caneland Ltd & Another versus Delphis Bank Ltd Civil Application No.307 of 1998**. Where the judgement is regular the affidavit in support of the application for setting aside judgement or proceedings must show the circumstances obtaining for non-attendance to offer any defence if any. Even in a case seeking to set aside proceedings, where such proceedings have since closed and judgement entered, there remains nothing to set aside. Also, an application seeking to commence proceedings *de novo* where judgement has been entered must have sufficient cause. Where such sufficient cause relate to a mistake by advocate the Court may apply its discretion to avoid injustice due to excusable mistake but the same should not be designed to assist a party who deliberately is seeking to obstruct or delay the course of justice.

15. On the second issue with regard to setting aside proceedings of 27<sup>th</sup> July 2015. On the 27<sup>th</sup> July 2015 the matter was scheduled for hearing where the Respondent was absent. Court proceeded on the basis that the Respondent was aware upon service and an Affidavit of Service had been filed as sworn by Richard Wachira confirming service upon the Respondent advocate on 5<sup>th</sup> December 2014 as this notice was acknowledged with a stamp and signature.

16. The Respondent in the application dated 18<sup>th</sup> January 2016 has not given reasons as to why there was no attendance at the scheduled hearing date despite service and acknowledgment. In the affidavit of James Rimui, he opts to start his explanations from 26<sup>th</sup> August 2015 where he avers that it came to his attention that the matter had proceeded *ex parte* on 27<sup>th</sup> July 2015 and judgement reserved for 16<sup>th</sup> September 2015. From paragraph 1 to 20 of the affidavit, there is nothing at all to support the application seeking to set aside the proceedings held on 27<sup>th</sup> July 2015. I find the matters set out in the grounds and affidavits in support of the application deliberately chose to dwell on peripheral issues not directly related to the orders sought.

17. Even where I may allow chance for error, upon the Court hearing the Claimant on 27<sup>th</sup> July 2015 noting the Respondent was properly served, the matter was reserved for mention to confirm the filing of written submissions on 12<sup>th</sup> August 2015. The Respondent was represented in Court where counsel made

presentation that they were not aware of the purpose of the mention and further asked for leave to file application for the matter to be re-opened for purposes of defence hearing. Court reserved judgement for 16<sup>th</sup> September 2015. Where indeed the hearing notice was served on 5<sup>th</sup> December 2014 and counsel for the Respondent was in Court on 12<sup>th</sup> August 2015 for mention, it must have been evident from his file that there existed a hearing Notice for 27<sup>th</sup> July 2015. Such hearing notice should have alerted counsel that immediate action was necessary and prudent to secure the Respondent interests even before he appeared in Court on 12<sup>th</sup> August 2015 allegedly for a mention that he did not know its purpose. Where the mistake was to fail to diarise the hearing date, there was no mistake in the filing of such a notice in the relevant file. On the prompting for mention on 12<sup>th</sup> August 2015, it would have been apparent that the Respondent was one step behind and remedial action necessary. To then appear and seek to re-open proceedings in such circumstances does not speak of justice, rather it would be an injustice to the claimant.

18. On this basis, I take it as of 12<sup>th</sup> August 2015, the Respondent were aware that the Claimant was heard in their absence and judgement had been reserved for 16<sup>th</sup> September 2015. I have heard chance to see application dated 26<sup>th</sup> August 2015 filed by the Respondent. For reasons best known to the respondent, this application though filed before the current one has not been prosecuted.

19. The ripple effect of it is that, there are no reasons as to why the Respondent failed to attend hearing on the due date. Court proceeded and heard the Claimant who had diligently attended and there was no reasons as to why the Court would fail to attend to him. There are lawful proceedings herein, such proceedings took place with the knowledge of the Respondent and judgement delivered. Such can only be disturbed on good cause which does not exist herein.

20. In the submissions, the Respondent make effort to explain why there was no attendance at the hearing on 27<sup>th</sup> July 2015. Submissions in any case and particularly to an application before Court must as a rule seek to address the orders sought, the grounds to and the affidavit in support. In actual practice, Court can on the application and supporting affidavit proceed and make necessary orders or direct as appropriate. Therefore a party cannot seek to change the content and context of an application at the submissions stage as to do so is to deny the other party chance to challenge the new matter, facts and or evidence that is not at their notice at the time. Without delving into the application dated 26<sup>th</sup> August 2015, the matters therein are not subject of this ruling.

21. On whether judgement herein should be set aside, on the basis the proceedings leading to the judgement has not been challenged as being improper, proceedings were with the knowledge of the respondent, the Claimant had made all effort to satisfy all requirements so as to be heard on 27<sup>th</sup> July 2015, to set aside the judgement correctly delivered as a result is he injustice. The reasons set out by the Respondent for the setting aside of the judgement herein are mute. They come after the fact.

22. Equally to commence proceedings herein *de novo* on the basis that there are proceedings not challenged and judgement has since been delivered would be to cause the Claimant great injustice. Indeed the rationale to be found in the decision in **Shah versus Mbogo**, is that a party who acts in a manner that does not aid the course of justice should not be a beneficiary of the Court discretion. The Respondent has now pending several application. None is linked herein. It is not clear why there is a conflagration of issues. All the issues as to why the first application dated 26<sup>th</sup> August 2015 was not heard, when the Respondent got the chance to be heard by this Court on 25<sup>th</sup> January 2016, no effort was made to prosecute the pending applications. I will also to disturb these applications, but the consequence of it is there I find no sufficient reasons to commence proceedings herein *de novo*.

23. One last issue that I must before conclusion is paragraph 7 and 8 of the judgement delivered on 21<sup>st</sup> September 2015 is dedicated to analysis of the defence filed by the Respondent. The Respondent does not make reference at all to these proceedings and the totally of the findings of the Court as a result.

**I therefore find no sufficient reasons to grant the orders sought by the Respondent in their**

**application dated 18<sup>th</sup> January 2016. The application is dismissed. Costs awarded to the claimant.**

**Orders accordingly.**

**Delivered in open Court at Nairobi this 2<sup>nd</sup> day of March 2016.**

**M. Mbaru**

**JUDGE**

In the presence of

Court Assistant: Lilian Njenga.