



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1180 OF 2012**

**ENOCH NYAKUNDI ONCHWARI.....CLAIMANT/RESPONDENT**

**VERSUS**

**RURAL ELECTRIFICATION AUTHORITY.....RESPONDENT/APPLICANT**

**RULING**

1. What is for determination is the Respondent's Notice of Motion application dated 10<sup>th</sup> February 2016. The motion is brought under a certificate of urgency and is expressed to be pursuant to Sections 3, 12(3) and 16 of the Employment & Labour Relation Act, Rules 16 (1) and (2), 27(g) and 32 of the Industrial Court (Procedure) Rules 2010 and the inherent power of the court and all enabling provisions of the law. It is supported by grounds on the face of it and the affidavit of Godwin Maina, a process server, sworn on 10<sup>th</sup> February 2016. In the main, the application seeks to set aside proceedings herein and reopen the case for hearing.
2. The Claimant is opposed and filed a replying affidavit sworn by Carolyn Muumbo Advocate on 8<sup>th</sup> March 2016 and filed on 18<sup>th</sup> March 2016. The Claimant/Respondent asserts that the application is unmerited, incompetent and ought to be dismissed with costs. She deponed that she is seized of two matters involving the same firm of advocates and that it is odd they noticed the other case on the cause list but not this one. She stated that it would be out rightly unjust and prejudicial to the Claimant to set aside the judgment and reopen the case.
3. Gravamen of the application and the affidavit are the assertions that the Respondent's agents and counsel misapprehended the date of hearing as 10<sup>th</sup> February 2016 and not the date actually set which was 2<sup>nd</sup> February 2016. The Respondent/Applicant states that the matter was not diarized for 2<sup>nd</sup> February 2016 and was therefore not attended to when the hearing came up.
4. In matters involving setting aside, there are a series of considerations. In *Patel v EA Cargo Handling Services Ltd [1974] EA 75* at page 76 letters C and E, Duffus P stated thus:

*“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide*

*discretion given it by the rules.”*

5. In **Shah v Mbogo [1967] EA 116** at page 123 letter B, Harris J said:

*“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”*

6. The Court of Appeal approved the decision of Harris J. in the resulting appeal in **Mbogo v Shah [1968] EA 93** where Newbold P held at page 96 letter G as follows:-

*“ ... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”*

7. The Court of Appeal had occasion to pronounce itself on the factors to consider in setting aside in the oft cited case of **CMC Holdings v Nzioki [2004] 1 KLR 173**. The Court learned judges of appeal Tunoi, O’kubasu JJA, Onyango Otieno Ag. JA (as they then all 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 is filed already or if a draft defence is annexed raised triable issues.

8. The case had been set for judgment after hearing the Claimant. Judgment has not been issued yet. The Respondent/Applicant has shown that it was unable to attend and demonstrates that the failure was due to carelessness by its process server who did not enter the date fixed for the hearing of the suit. The application to set aside was made with speed and it is only the absence of the trial Court that delayed the hearing of the application. As the Claimant is not being unseated from his perch, the Court exercises discretion and will allow the Respondent to cross examine the Claimant on a date to be set after the Ruling and if minded avail a witness for hearing.

9. However, as this reopening of the case will occasion the Claimant additional expenses, the Court

awards him thrown away costs of Kshs. 20,000/- to be paid within 14 days of today.

Orders accordingly.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of June 2016**

**Nzioki wa Makau**

**JUDGE**