



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1745 OF 2013

MARY WANJIKU MUCHINA.....CLAIMANT

VERSUS

RIVERDALE BLOOMS LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant herein seeks through her Notice of Motion application dated 5th August 2014 to set aside the orders of 22nd July 2014 dismissing the suit for non-attendance. The Claim was set for hearing before Marete D. K. Njagi J. and the Claimant and her counsel were absent. The Claimant/Applicant's Notice of Motion application was that the Claimant failed to attend Court due to failure to diarise the mention date. It was deposed that the Advocate's sent the clerk to ascertain outcome on the date set for mention being 22nd July 2014. At the mention the case was dismissed due to failure to attend Court precipitating the present application.
2. The Respondent was opposed to the Application and filed an Affidavit through the Advocate on record for the Respondent John Kirk Kamunyori. In it he deposed that the claim that counsel failed to appear in Court on 22nd July 2014 because of failure to diarise was untenable.
3. The Claimant/Applicant filed submissions on 11th November 2014 in support of her arguments. She submitted that she had a meritorious claim against the Respondent and relied on Article 159(2)(d) of the Constitution as well as the cases of **Patel v E.A. Handling Services Ltd [1974] EA 75**, **Universities Non-Teaching Staff Union (Untesu) v Moi University [2014] eKLR** and **HCCC 830 of 1997 Rao & Others v Prudential Dry Cleaners**.
4. The dismissal of the suit was at a date which was taken in presence of Counsel. On 16th June 2014 the matter was before the Court and the advocate for the Claimant in not indicated as holding brief. The Court gave directions that the case was to be mentioned on 22nd July 2014 to explore settlement. It was on this date that the suit was dismissed.
5. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the Court of Appeal per Duffus President of the Court 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 or fetter the wide discretion given it by the rules.....the principle obviously is that unless and until the

Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any of the rules of procedure” (emphasis mine)

6. In the case before me, there is an argument advanced that counsel failed to diarise as a result of inadvertence on the part of his clerk. 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 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.
 7. In the case of **Untesu v Moi** (supra) cited by the Claimant/Applicant, the learned Judge of Appeal in allowing the extension of time to file and serve a notice of appeal held that routine chores in an advocate’s office are usually executed either by a clerk or a secretary. While I agree there are no limits to a judges discretion in setting aside, I am not persuaded that failure by a clerk or secretary is sufficient excuse especially where the person alleged to have made the mistake has not given any explanation. This is because excusable mistake or error has to mean that. An error that is excusable or a mistake that is excusable and the only means of ascertaining this is through an explanation given. The clerk who allegedly failed to diarise has not been named nor did he/or she explain the failure to diarise.
 8. The dismissal at a mention date is the only saving grace for the Claimant/Applicant. I am in agreement with the Court of Appeal in **CMC v Nzioki** (supra) that 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.
 9. The suit was not set for hearing and contrary to assertions by counsel the dismissal was not at a date when counsel was to give explanations as to why he was absent. I have pored over the proceedings but failed to see any such inference. I therefore find merit in the application but reinstate the suit on terms. The Claimant/Applicant must pay to the Respondent’s counsel the sum of Kshs. 15,000/- being thrown away costs plus the 5,000/- ordered by the Court on 16th June 2014. These sums must be paid within 7 days of today failing which the Application stands dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of January 2015

Nzioki wa Makau

Judge