REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2009 OF 2013

BEATRICE ANGESO ONYURO…………….………..CLAIMANT

VERSUS

NITI DISTRIBUTORS LIMITED…………………...RESPONDENT

RULING

1. The Notice of Motion Application dated 8th December 2014 by the Respondent/Applicant seeks to set aside the Judgment of this Court delivered on 15th October 2014. The application is supported by the affidavit of Manish Talati the Respondent/Applicant's Senior Manager Operations. The application had grounds on the face of it. The Respondent/Applicant sought time to be enlarged and leave be granted to file an appearance and enter defence. The Respondent/Applicant averred that the person alleged to have been served with the summons was out of the country at the time the service is alleged to have taken place. It was averred that the person served was not a principal officer of the company. The deponent attached some pages of his passport as proof of being abroad. The Respondent/Applicant thus sought the setting aside of the judgment herein.

2. The Respondent/Applicant filed written submissions on 11th February 2015 in support of the Motion. The submissions were to the effect that service was not proper in terms of Section 20 of the Civil Procedure Act and Order 5 Rule 3 of the Civil Procedure Rules 2010. It was submitted that the summons ought to have been served upon the secretary, director or other principal officer of the Respondent as defined by Section 2 of the Companies Act. The Respondent/Applicant relied on the case of **Yamko Yadpaz Industries Limited v Kalka Flowers Limited Nairobi HCCC 591 of 2012 (unreported)** where Havelock J. cited with approval the decision of Mwilu J. (as she then was) in **Kamau Mwangi v Wambui Kariuki [2012] eKLR** on setting aside an irregular judgment. Reliance was also placed on the case of **Lal Chand Shah & Another v Kenindia Assurance Nairobi HCCC 981 of 2003** per Nyamu J. (as he then was). The Respondent/Applicant urged the Court to set aside the judgment entered and grant leave to defend.

3. The Claimant/Respondent does not seem to have filed any opposition to the application. The only documents filed by the Claimant/Respondent are the written submissions filed on 17th February 2015. In the submission she submitted that the Respondent/Applicant had not established that it was not served. It was submitted that Section 391(1) of the Companies Act makes provision on service at the registered office of the company in addition to service on an officer of the company or through registered post. She relied on the case of **Mbogo v Shah (1968) EA 93** where the Court

refused to exercise its discretion to set aside on behalf of a party who had deliberately sought to obstruct or delay the course of justice. The Claimant/Respondent submitted that the service was proper and the Court should thus dismiss the application with costs to the Claimant/Respondent.

4. The Claimant/Respondent states that service was proper. The deponent of the affidavit states that he served a Mr. Manish. The Respondent asserts that Mr. Manish was out of the country. There is reference to Section 391(1) of the Companies Act. Section 391(1) provides that service of documents may be to an officer of the company, or by sending it by registered post to the address of the company in Kenya or by leaving it at the registered office of the company. It is not established by the Claimant/Applicant that the office where service was effected is the registered office. In addition the Civil Procedure Rules 2010 raise the threshold on service of summons somewhat.

5. The Claimant/Respondent cited a series of other cases but declined to avail copies of the decisions to Court.

6. As regards the exercise of discretion to set aside a judgment, certain principles are now well established in our law. In the case of **Shah v Mbogo [1967] EA 116** Harris J. held as follows:-

Applying the principle that Court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice….

7. The decision of **Mbogo v Shah [1968] EA 93** cited in aid by the Respondent/Applicant was an approval of the decision in **Shah v Mbogo**. Newbold P stated thus:

> " … 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."

8. These principles were applied and expounded in the case of **CMC Holdings v Nzioki [2004] 1 KLR 173** by the Court of Appeal. The learned judges of Appeal, Tunoi JA (as he then was), O'kubasu JA sitting with Onyango Otieno Ag. JA (as he then was) considered the grant of discretionary orders to set aside. The court unanimously 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)

9. Further in the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** 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."

10. In **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365** the Court of Appeal per Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that

The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisified that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

11. Though the service of summons is disputed, the Respondent/Applicant has not attached the passport page showing the exit of the deponent so as to prove that he left Kenya on the date he alleges. Additionally there is no proof that there is no principal officer or another person named Manish in the Respondent. In addition there is no security tendered or offered as a precondition. In **CMC v Nzioki** above, the Court of Appeal held that one of the factors to consider is whether the draft defence raises triable issues. In this case, some triable issues have emerged and this means that if the defence raised is not a sham, the Respondent should be allowed to defend. In spite of the nonproduction of the documents that may have conclusively demonstrated that the judgment was in error, and in order that justice may be served, I will set aside the default judgment entered on 12th June 2014 and the final Judgment delivered on 15th October 2014 but on terms. The Respondent is to pay throwaway costs of Kshs. 25,000/- to the Claimant before the appearance and defence can be filed. Suit will be set down for hearing after the close of pleadings at the Registry in the normal manner.

12. Regarding the payment of NSSF dues, the payments stand as my decision was for an audit of the Respondent by NSSF to ensure payment of statutory deduction. The fact that the Respondent paid more than what was due for the Claimant herein shows non-compliance on NSSF was extremely high. That part of my judgment stands.

Orders accordingly.

Dated and delivered at Nairobi this **4th** day of **March** 2015

Nzioki wa Makau

JUDGE