



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 875 OF 2012**

**JOB K. MURIUKI.....CLAIMANT**

**VERSUS**

**MADA HOTELS LIMITED.....RESPONDENT**

**RULING**

1. The Claimant/Applicant seeks through his application dated 11<sup>th</sup> February 2015 to set aside the order dismissing the suit for non-attendance on 3<sup>rd</sup> February 2015. The application was supported by the affidavit of the Claimant sworn in support. Mrs. Kerio urged the application and submitted that the Claimant was in Court on that date and that the matter was listed before Court 301 on the online cause list and that they checked in Court 301 and on walking to Court 401 they found the case had been dismissed for non-attendance. She thus sought the suit be reinstated and a date for hearing be given.
2. The Respondent was opposed and filed a Replying Affidavit sworn by Mr. Ochwo advocate for the Respondent. In it he deposed that he was served with a hearing notice and was in Court with his witness in spite of the short notice. The case was dismissed due to non-attendance of the Claimant and his advocate.
3. In a brief reprise Mrs. Kerio urged the Court to reinstate the suit. She was of the view that counsel did not oppose the application.
4. 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....
5. In the case of **CMC Holdings v Nzioki [2004] 1 KLR 173**, the Court of Appeal - Tunoi, O'kubasu JJA, Onyango Otieno Ag. JA (as he then was) considered the grant of discretionary orders to set aside. The learned judges of appeal 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.
  6. The Court is bound to consider the reasons for the parties absence in Court. The Claimant asserts that the cause was listed on the online cause list as appearing before Court 301. Court 301 is the Presiding Judge's Court. Hon. Justice Nduma Nderi had only 3 hearings on 3<sup>rd</sup> February 2015 as per the online cause list which can still be accessed even today under the archived cause lists on kenyalaw.org. The Claimant's case was not one of them. The case was listed before Court 401. This Court cannot exercise its discretion to someone who is lying, worst of all under oath. This suit was not on the list before my learned brother. Failure to attend the hearing has not been explained and for this reasons I will dismiss the application seeking to set aside my order dismissing the suit with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 15<sup>th</sup> day of April 2015

**Nzioki wa Makau**

**JUDGE**