



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 31 OF 2012**

**COLLECTIVE BARGAINING ADVISORY  
CENTRE.....PETITIONER/APPLICANT**

**VERSUS**

**MINISTRY FOR LABOUR AND HUMAN**

**RESOURCE DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**CENTRAL ORGANISATION OF**

**TRADE UNIONS (KENYA).....3<sup>RD</sup> RESPONDENT**

**KENYA HUMAN RIGHTS AND**

**EQUALITY COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Petitioner herein sought, through a Notice of Motion Application dated 29<sup>th</sup> September 2014 and filed on 16<sup>th</sup> October 2014, to set aside the dismissal of the suit on 20<sup>th</sup> May 2013 for want of prosecution; reinstate the suit herein for hearing forthwith and that costs be in the cause. The application was supported by the grounds on the face of the motion as well as the Affidavit of Wilberforce Khalwale. In opposition to the motion, the 2<sup>nd</sup> Interested Party/Respondent filed a Replying Affidavit sworn by Wilfred Akhonya Mutubwa on 3<sup>rd</sup> February 2015. In it she deposed that the matter came up for hearing on 20<sup>th</sup> May 2013 and the Petitioner did not show up and the Petition accordingly dismissed.

2. To dispose of the application, the parties consented to file written submissions. The Petitioner filed submissions on 16<sup>th</sup> April 2015 while the 2<sup>nd</sup> Interested Party filed submissions on 15<sup>th</sup> April 2015. The

Petitioner submitted that the petitioner had moved the constitutional and human rights division of the High Court and the matter was transferred to the Industrial Court (as it then was) and was listed before Rika J. The Petitioner submitted that the petition raised serious constitutional issues. The Petitioner submitted that it learnt of the dismissal of the suit when the matter was at taxation. It was submitted that the Interested Party could not seek or recover costs in the matter. The Petitioner thus sought the reinstatement of the suit urging the Court not to visit the mistake of counsel upon it. Reliance was placed on Section 16 of the Industrial Court Act and Order 12 Rule 7 of the Civil Procedure Rules 2010 as well as the cases of **Cameron Bankrupt v Cole Petitioning Creditor (1944) 68 CLR 571** and **Captain Philip Ongom v Catherine Nyero Owota SCCA 14/2/2001 [2003] KALR**.

3. The 2<sup>nd</sup> Interested Party submitted that the Court acted properly in dismissing the petition as the Petitioner had acted indolently and had lost interest in pursuing its own petition.

4. The Petitioner hinged the dismissal on mistake of counsel. It was of the view that the petition had been assigned a new number leading to confusion to the litigant. The Petitioner beseeched the Court not to visit the mistake of counsel on it.

5. On setting aside, the law is clear. 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....

6. 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)

7. Further 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. (emphasis mine)

8. These principles are applicable *mutatis mutandi* when considering setting aside a dismissal of a suit for want of prosecution. Does the Petitioner demonstrate any of the grounds for setting aside?

9. The application was made on 16<sup>th</sup> October 2014 approximately 16 months after the dismissal of the Petition. Was there excusable mistake or error? Assuming the counsel had no idea the notice had been given and assuming that the case numbers were confusing, was absence at two hearings on 8<sup>th</sup> May and 20<sup>th</sup> May explained away? If indeed there were weighty constitutional issues in the Petition, wouldn't the Petitioner be at the forefront of moving the case forward? Both of the times the matter was progressed before this Court it was at instance of the 2<sup>nd</sup> Interested Party.

10. The Court (Rika J.) did not act without basis. The learned judge did not act perversely on the facts and made a proper determination that the Petition was ripe for dismissal and he so did. That exercise of discretion is not faulted or dislodged by the arguments and legal precedent cited by the Petitioner. In the premises I will dismiss the application by the Petitioner as it has no merit. I will however make no order as to costs. Matter may now proceed to taxation.

Orders accordingly.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of May 2015**

**Nzioki wa Makau**

**JUDGE**