



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1824 OF 2014

ELIZABETH NJERI KINYUA.....CLAIMANT

VERSUS

NORTHLINE LIMITED.....1ST RESPONDENT/APPLICANT

JOEL MUNGO.....2ND RESPONDENT/APPLICANT

RULING

1. The Respondents/Applicants filed a Notice of Motion application dated 24th February 2015 expressed to be brought under Rule 13(4) of the Industrial Court (Procedure) Rules 2010. The application sought to set aside the interlocutory judgment entered on 5th February 2015. The second limb of the application was that the Court be pleased to extend time within which to file the memorandum of defence. The application was supported by the grounds on the face of the motion and the annexed affidavit of the advocate for the Respondents. The grounds for the application were that the Respondents' counsel had misplaced the Respondents file in the office registry and did not therefore file the defence in time. Additionally the receptionist who received the mention notice did not diarize the mention and thus occasioned the absence when the matter came for directions whereat the interlocutory judgment was entered in default of defence. The affidavit in support reiterated the grounds and added that when counsel received the file the mention had already taken place and upon perusal established that formal proof was ordered by the Court after interlocutory judgment had been entered. The Respondents attached a draft memorandum of defence and an extract of the counsel's diary.

2. The Claimant/Respondent was opposed and filed a Replying Affidavit sworn by the Claimant. In the affidavit she deponed that she was informed that the deponer of the Respondents affidavit had not informed the Court whether the Respondents had a valid defence to the claim that raises triable issues. She deponed that the draft defence of the Respondents was a sham and calculated to unseat her from the throne of judgment despite proper service having been effected.

3. Parties urged and opposed the application on 15th April 2015 and I reserved the ruling to today. Mr. Githinji for the Respondents/Applicants submitted that the applicant sought to set aside the judgment entered and as a consequence that the Court should extend time. The Respondents sought that the draft defence attached be deemed to have been duly filed upon payment of the requisite fees. He submitted that the Respondents handed over the documents to the firm and due to the fault of the counsel for the Respondents the defence and documents were not filed. He urged that the Respondent should not be punished for the mistake of counsel. He stated that the delay was not particularly great and he applied that the Court should set aside the judgment and allow the Respondents to file defence.

4. The counsel for the Claimant Mr. Kandere submitted that the principles for setting aside are clear. Service had been admitted and in the Claimants view the draft defence annexed did not raise any triable issues. He stated that the threshold had not been met and thus urged the Court to dismiss the application as the defendant had not deemed it necessary to defend itself.

5. Mr. Githinji in a brief reprise submitted that the Respondent had sought original documents and further denied dismissing the Claimant and that there were a triable issues.

6. In setting aside the Court has to be minded to consider the request against the Rules and judicial precedent. Under Rule 13(4) of the rules of this Court, the Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading. The Court has to consider various factors in coming to the decision as to whether the Court may extend or reduce the time.

7. 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....

8. 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.

9. The Respondents assert that the counsel failed to take steps due to a mistake of counsel and the Respondents attach a draft defence. The defence raises a triable issue. Was the Claimant dismissed or not? That issue is one of the issues that has to be determined and in light of the fact that the defence at least raises this triable issue I would exercise my discretion in granting leave to defend. The principles in **Shah v Mbogo** as enunciated by Harris J. apply to this case. I will not visit the mistake of counsel on the Respondent. I however will give thrown away costs of Kshs. 10,000/- to the Claimant as she was ready to proceed with hearing after the interlocutory judgment was entered against the Respondents.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of May 2015

Nzioki wa Makau

JUDGE