



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2033 OF 2013

AGGREY AKIVAGA NGAIRA.....CLAIMANT/APPLICANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant seeks through the Notice of Motion application dated 9th April 2015 to set aside the dismissal of the suit on 18th March 2015. The application was supported by the affidavit of the Claimant sworn on 9th April 2015. The Claimant deposed that he had been in Court and the matter was set aside to 11.30am for hearing. He deposed that around 11.30am he appeared with his counsel and found that the matter had been dismissed for non-attendance. He thus sought the Court to set aside the dismissal order.
2. The Respondent was opposed and filed a Replying Affidavit sworn on 25th May 2015. In it the deponent Peter M. Wambua deposed that the hearing date had been taken by consent and when the case was called out during the callover the Claimant was present as was counsel for the Respondent and that the Claimant indicated his advocate would be ready to proceed with the hearing. The matter was set for 11.30am and when the case was called at 11.30am the Claimant and his advocate were not present. He deposed that there was no indication of counsel for Claimant attending any other case. The deponent deposed that the Claimant's application was made almost a month after the dismissal.
3. The application was urged by counsel on 27th May 2015. In his submissions, counsel for the Claimant submitted that the application sought to reinstate the dismissed suit. He submitted that the Claimant was actually in Court on 18th March 2015 and he sought a time allocation so that he would be able to locate his counsel. The request was granted and matter set aside to proceed at 11.30am. He submitted that he was in another matter at the High Court being ELC 1140 of 2014 and that around 11.30am the Claimant and his counsel found the matter had been dismissed and Court had closed. He submitted that he sought audience with the judge in chambers but the judge had already left. He submitted that the Claimant was ready and willing to prosecute the claim. He submitted that the mistake of 18th March can be attributed to the counsel and it was regretted and should not be visited on the Claimant.
4. The Respondent submitted through its counsel that the application was opposed and that the matter had been fixed by consent and on the morning of 18th March the Claimant was present in

person and he confirmed he was ready and his counsel was on the way. That is why the case was set down for hearing at 11.30am. Counsel submitted that he was ready and had one witness and when the matter was called at 11.30am the case was dismissed on his application as neither the Claimant nor counsel were present. He submitted that the advocate for the Claimant is stated to have been attending another matter and he submitted it would have been courteous to inform the Court. He submitted that litigation has to come to an end and it is in the interest of justice that matters are heard expeditiously. He submitted that the Claimant was guilty of laches as the application was made almost after one month. He urged the court to dismiss the application with costs and in the event the Court was minded to grant the orders sought by Claimant then the Respondent should be compensated in terms of costs.

5. The Claimant's counsel in his brief reprise submitted that the mistake was not of the Claimant's making and he had explained what had happened. He submitted that the one month delay in making the application was not an inordinate delay. He thus sought the application be allowed as prayed.
6. In setting aside, the Court is bound to consider various factors and the Court may grant the order setting aside the dismissal but must do so on terms that are just. The principles upon which a Court can set aside are encapsulated in precedent. 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 considered the grant of discretionary orders to set aside the learned judges of appeal Tunoi, O'kubasu JJA, Onyango Otieno Ag. JA (as they then were) 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.

8. The Claimant was in Court on 18th March 2015. He indicated readiness to prosecute his claim. He thereafter was absent when the matter was called out at the preset time. He alleges that his counsel was in another court attending another matter. The Claimant alleges that he came to court around 11.30am and found the matter had been dismissed and the court closed. Was the absence in Court an excusable mistake or error?
9. The Court is not able to accede to the request for various reasons. The fact that the Claimant has not indicated the exact time he appeared with counsel indicates dishonesty. What time did he return to Court? The allegations that the Court was closed at 11.30am are preposterous and an outright lie. The Court had other matters it was dealing with on the material day and the appearance made must have been in the afternoon or so late as to complicate matters for the Claimant. Both the Claimant and his counsel are not keen to express the precise time they came to Court. Counsel indicates that he sought to see the judge in chambers. If counsel has been practicing law for a while, he must be aware that judges do not see parties in chambers. Courts handle cases in open Court unless the space constraints dictate otherwise. Even matters that are heard in-camera are taken in open court with the Court officials ensuring that there is no ingress by parties who are not permitted to be in court.
10. On the material day the Claimant indicated his lawyer was on the way. The Court granted him a time allocation. At the time the case was due to be heard, the Claimant was not present. Was this a mistake or inadvertent error? It does not seem to be a mistake as none of the two – Claimant or his counsel have indicated a mistake, inadvertence or error. They did not misapprehend the Court or time indicated. They were sure of the Court the case was hearing the case. They were plainly late or disinterested in the matter. The Claimant has brought a matter the Claimant's counsel was allegedly involved in. Why was this not mentioned to Court when the indication was given that counsel was on the way? If indeed counsel had a time slot indicated, why did he not instruct someone to attend on his behalf? Secondly, why was the Claimant absent at 11.30am? He was not handling the matter in the High Court. He, at the minimum, should have been in Court at 11.30am the time set down for the hearing. He would most probably have been able to secure an adjournment on account of his counsel being absent or even proceeded to testify.
11. The Claimant did not raise any grounds that would entitle him to the discretion to set aside the orders. I thus find no merit in his notice of motion and proceed to dismiss the application with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of July 2015

Nzioki wa Makau

JUDGE