REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 286 OF 2010

TRANSPORT & ALLIED WORKERS UNION……..…….CLAIMANT/APPLICANT

VERSUS

EVEREST ENTERPRISE LIMITED……..……..…….....RESPONDENT

RULING

1. The Claimant/Applicant seeks through the Notice of Motion application dated 6th May 2015 to set aside the dismissal of the suit on 4th May 2015. The Claimant asserted that on the material date, the representative of the Claimant and the counsel for the Respondent were in the Court precincts trying to establish which Court was hearing the case on that date and that the matter had previously been before Monica Mbaru J. The Claimant asserted that there had been partial agreement on the matters in issue and the dismissal would negate the intended settlement of the dispute and justice would be denied to the grievant.

2. The Respondent was opposed and filed Grounds of Opposition dated 15th June 2015. The Respondent asserted that the application was fatally defective and offended the mandatory provisions of Order 51 Rule 4 of the Civil Procedure Rules and that the date was taken by consent and at the insistence of the representative of the Claimant on 21st January 2015. Further it was asserted that the application was misconceived and misleading as parties had not recorded consent nor agreed on any terms of settlement. The Respondent thus sought the dismissal of the suit with costs.

3. The application was urged before me on 15th June 2015. Mr. Makuwa for the Claimant submitted that the absence in Court on 4th May 2015 was not deliberate and that parties were in the throes of a settlement when the dismissal occurred. He submitted that it was the insistence of counsel for the Respondent that led to deferment of the suit on 21st January 2015.

4. Mr. Gitaka for the Respondent urged that the application be dismissed. He submitted that the date had been taken at the insistence of Mr. Makuwa and that though the matter may have been before Mbaru J. on the 21st of January 2015, on 4th May 2015 it was before this Court and that there was no reason advanced as to why there was no appearance. He submitted that the application offends Order 51 Rule 4 and no grounds are relied on and referred to a consent that was reached by parties and attached a letter on ‘without prejudice’ basis. He submitted that the parties had not reached a

consent and that there had been indication to court that there were ongoing discussions on possible settlement. The Respondent had not reverted on the proposals for settlement. He urged the Court to dismiss the application as grounds relied on were not sufficient.

5. Mr. Makuwa in a brief reprise submitted that it was counsel for the Respondent who had sought time to bring a consent and the Claimant agreed to negotiate.

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 it's 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 4th May 2015 and from all accounts was looking for the correct Court. The Respondent was in Court before me, and when the case was called out for hearing there was no appearance for the Claimant. The suit was therefore dismissed. In this suit, there was an appearance by parties on 4th December 2014 before Mbaru J. On that date it was indicated clearly to Court that parties were in agreement on some aspects and the learned judge granted parties time to negotiate on overtime and set mention for 21st January 2015. It was at this mention in January that the Hearing was set for 4th May 2015. As noted above, on 4th May 2015 the

Claimant was absent precipitating the dismissal of the suit. Was this an excusable mistake? The Court is persuaded that there were negotiations going on and notwithstanding the fact that the Claimant attached a document that is privileged, there was proof of negotiations from the Court record. Even during the arguments on this application there was indication that there had been some negotiations and instructions from the Respondent had been sought. The Claimant was correct in as far as ongoing negotiations went. The Respondent asserted that the application was fatally defective and offended the mandatory provisions of Order 51 Rule 4. As held in the case of **Andanas Indiazi v Halai Concrete Ltd Industrial Cause 866 of 2012** (unreported), the Industrial Court (Procedure) Rules 2010 provide under Rule 36 that subject to these Rules, the Court may regulate its own procedure. In decisions made by this Court, recourse can be had to the Civil Procedure Rules where there is lacuna in the Rules of this Court. In the Industrial Court (Procedure) Rules 2010, there is provision in Rule 16 on what applications may comprise.

9. The Industrial Court (Procedure) Rules 2010 provides under Rule 16(5) as follows:-

   (5) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served.

10. It would seem that the application made was not deficient if these provisions are considered. The application stated in general terms the grounds of the application. It did not however have grounds set out on the face of the motion. In the premises, the Court holds there was no departure from the expectations of the Rules of this Court. The only drawback was the attachment of the letter to the motion.

11. The only order that would commend itself is one upholding the dismissal of the suit as the Claimant did not bring itself to the grant of the orders sought in the appropriate manner. However, in the interests of justice the dispute herein is referred to a conciliator to be appointed by the Ministry of Labour and Social Security Services to bring the dispute to an end once and for all. It would seem there was a negotiation that was almost finalized and this is what guides the Court in giving the order. Parties are at liberty to apply.

Orders accordingly.

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

Nzioki wa Makau

JUDGE