



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 349 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 2nd December, 2015)

JOHN KAMWERE MWANGICLAIMANT/DECREE HOLDER

VERSUS

REGISTERED TRUSTEES OF NAIROBI

GYMKHANA SPORTS CLUBRESPONDENT/APPLICANT

RULING

1. The application before Court is the one dated 5/8/2015 which application is to set aside the *exparte* judgment delivered on 21/7/2015. The Application is brought under a Notice of Motion of even date and is supported by the affidavit of Lucy Nyaencha.
2. The gist of the application is that though the hearing date was served on the Applicants, the same was by mistake of the Counsel's Secretary not diarised and so when the matter came up for hearing, it proceeded without the input of the Respondents.
3. The Applicants aver that their defence on the file had raised serious issues. They aver that their mistake is excusable, and inadvertent. They submit that they are ready to proceed with the defence so that the mistake of Counsel not to the Applicants detriment. They have cited **CA No. 329/2001 CMC Holdings Limited vs. Nzioki.**
4. The Respondents opposed this application. They relied on their replying affidavit sworn on 21/8/2015. They aver that the application is incompetent in that it did not comply with the mandatory rules of this court i.e. Rule 32 of Industrial Court (Procedure) Rules 2010 on review.
5. They have also deponed that excuse of non-attendance is not a reason for setting aside a proper judgment. They have submitted that if this Court is willing to grant the Respondent another chance, they should be asked to deposit the entire decretal sum in court. They aver that the application is an afterthought and should be disallowed.
6. I have considered submissions of both parties. This is an application which in law the Court can exercise its discretion in allowing or rejecting the same. This discretion should however be exercised judiciously. This was the holding in **CMC Holdings Limited vs. Nzioki CA No. 329/2001.**
7. The discretion on whether or not to set aside an *experte* judgment is meant to ensure that a Litigant does not suffer injustice or hardship as a result of among other things, an excusable mistake or

error. Is failing to diarise a hearing date an excusable mistake?. I may not find this an excusable mistake because Counsel must endeavour as part of his duty to his client to properly keep and/or maintain his diary. This is because the client's case properly and intimately depends on the Counsel being able to inform the client and be present at all hearings.

8. However, I also take notice of the fact that a party should not be punished for his Counsels mistakes. Bearing this in mind and the fact that a man should not be condemned unheard, I exercise my discretion and allow the application and set aside the exparte judgment delivered by this Court on 21/7/2015.
9. This is however subject to the Respondent depositing the entire decretal sum in a joint interest earning account held in the joint names of Counsel on record and this is to be done within 30 days from the date of this ruling. In default the judgment will stand unaffected and execution may proceed.

Costs in the course.

Read in open Court this 2nd day of December, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Claimant

No appearance for the Respondent