



REPUBLIC OF KENYA

THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1326 OF 2012

JASBIR KAUR DALIP SINGH.....CLAIMANT

VERSUS

DESIGNWEAR LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant herein seeks to set aside the Judgment of this Court entered on the 1st of November 2013. The Grounds on which the Notice of Motion dated 11th November 2013 is predicated are that the matter came up for hearing before this Court on 18th September 2013 and was heard in the presence of the Claimant but in the absence of the Respondent and that the Respondent or its Advocate did not deliberately fail to attend Court for the hearing on 18th September 2013. The Respondent/Applicant's Application was supported by the Affidavit of C. W. Mungai Advocate sworn on 11th November 2013. It was deponed that the defence raised triable issues, that the Respondent/Applicant stood to suffer substantial loss if the orders sought were not granted. It was further deponed that the Hearing Notice was received but the date was not diarised in the Advocate's Court diary.
2. The Claimant/Respondent was opposed to the Application and filed a Replying Affidavit sworn by the Claimant/Respondent Jasbir Kaur Dalip Singh on 27th November 2013. The Claimant/Respondent deponed that failure of the counsel and the Respondent to attend Court cannot be blamed on her and stated that the Counsel for the Respondent did not explain why she did not inform the Respondent of the Hearing. The Claimant/Respondent deponed that the Judgment was regular and should not be set aside as the hearing proceeded regularly.
3. The Respondent/Applicant and the Claimant/Respondent both filed submissions and authorities in support of their positions. What lies for determination is whether the Respondent/Applicant is entitled to a setting aside of the Judgment of this Court. Under Rule 32 of the Industrial Court (Procedure) Rules 2010, any party may seek a review of the decision of the Court. In the case before me, the Respondent/Applicant seeks to rely on Rule 27(1)(g) which provides as follows:-

27. (1) The Court shall, after considering all relevant facts and supporting documents and in accordance with the procedures set in these Rules—

- (a) where the suit was originated by a statement of claim, deliver an award,
- (b) where the suit was originated by a memorandum of appeal, deliver a judgment, or
- (c) in any other proceedings, deliver a ruling:

Provided that, subject to these Rules and to any other written law, the Court may at any time in the conduct of its proceedings issue—

- (a) an injunctive order;
- (b) a prohibitory order;
- (c) a declaratory order;
- (d) an order for specific performance;
- (e) an order for payment of costs;
- (f) an order for payment of interest on any principal sum awarded by the Court; or
- (g) any other order to meet the ends of justice.

4. The proviso captures the Court’s discretion to entertain an Application to meet the ends of justice and the power inherent to meet the ends of justice. In casting the provisions of law in perspective, it is imperative that sight is not lost of the need to meet the constitutional safeguards availed in Article 159 of the Constitution.
5. There is deposition and submissions that the Respondent failed to attend Court due to an error in diarizing the case. What is not controverted is that the matter had been fixed for hearing and a Hearing Notice dated 31st January 2013 served for the hearing fixed for 18th September 2013. It was duly received on 4th February 2013 by the Respondent’s Advocates as evinced by the date stamp. What is not clear and of critical importance is the glaring silence as to what transpired thereafter. There is no deposition that the Respondent was notified. It is only stated that there was failure to diarise the matter. No indication is made as to whether there is a master diary into which all matters for the firm are entered and whether the Clerk of the law firm maintains a diary. Be that as it may, the matter was listed for hearing on 18th September 2013 before me. There was no appearance for the Respondent when the matter was called out and a time indication given. The case was heard from 9.40 am and the Claimant testified. A judgment was subsequently rendered hence the instant application.
6. In support of their submissions, the parties cited various authorities. The Respondent cited the case of **John Ojwang Atieno & 13 Others v. Migori County Government & Anor [2013] eKLR** a decision by my sister the Hon. Lady Justice Hellen Wasilwa. The decision was on the application of Rule 32 of the Industrial Court Rules. The Claimant cited the case of **Southern Credit Banking Corporation v. Jonah Stephen Ndegwa [2006] eKLR** on the distinction between regular and irregular judgments and the case of **Erastus Adero Gogo v. Nicodemus Waite Muraguri & 2 Others [2006] eKLR**. The decisions all were relevant but suffice to say the case cited by the Respondent quoted the decision in **Patel v EA Cargo Handling Services Ltd [1974] EA 75**. The case of **Patel v EA Cargo** is instructive as 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. It is amply clear that there are no fetters to the wide discretion by this Court to reopen the case. However, that principle holds good only to the extent that a judgment has been pronounced on the merits or by consent. The Court heard the case on the merits and pronounced its judgment on 1st November 2013.
8. When a Court is invited to exercise its discretion and reopen proceedings, it is imperative that the circumstances of the case be evaluated. In the case before me the circumstances of the case are not exceptional. In **Omwoyo v African Highlands & Produce Co. Limited [2002] 1 KLR 700**, Ringera J. as he then was held:-

“Even if the matter involved an exercise of discretion I would have declined to exercise the courts discretion in favour of the Applicant on the grounds that he found himself in a predicament as a result of his advocates alleged mistake”

9. In the case before me, I have evaluated the reasons advanced and nothing hinges on the explanations given. I therefore decline to exercise my discretion in favour of the Respondent/Applicant. Application dismissed with costs to the Claimant/Respondent.

It is so ordered.

Dated and delivered at Nairobi this 13th day of January 2014

Nzioki wa Makau

JUDGE