



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI

Cause No. 2142 Of 2012

Margaret Ayuma Katungu.....Claimant/Respondent

Versus

The Hon. Attorney General.....Respondent/Applicant

RULING

1. What is before the Court is the Respondent/Applicant's Notice of Motion dated 14th October 2013. The Application was filed under certificate of urgency. It seeks mainly the following orders:-
 - a. That pending the hearing and determination of the Application the Honourable Court be pleased to grant a temporary stay of execution of the Order given on 27th June 2013.
- b. That the *ex parte* Order granted on 27th June 2013 by the Honourable Justice Nzioki wa Makau be set aside and/or vacated.
2. The Application is supported by Grounds on the face of the Motion and the annexed affidavit of Lawrence Muriithi Waweru. The gist of the same are that the Claimant/Respondent was interdicted on 30th October 2010 on account of gross misconduct for having committed fraud, forgery and theft by servant. It was further averred in the pleadings that through misrepresentation of facts the Claimant/Respondent obtained the orders sought to be varied and/or vacated.
3. The Application is opposed by the Claimant/Respondent who filed a Replying Affidavit on 30th October 2013. She deposed that the Respondent/Applicant was duly served with the Application of 12th June 2013 on 17th June 2013 for hearing *inter partes* on 27th June 2013. She deposed that the Respondent neither replied to the Application of 12th June 2013 nor attended Court and the hearing proceeded *inter partes* as ordered on 12th June 2013. No explanation was given for the failure by the Respondent/Applicant.
4. The Respondent/Applicant was represented by Mrs. Okwara who argued the application thus:-
The Applicant sought that the orders granted on 27th June 2013 be vacated or set aside on grounds on the face of the Application in that the Claimant was interdicted on allegations of fraud. The Claimant sought the lifting of interdiction and reinstatement in her Application and the main suit also sought the same orders. Mrs. Okwara argued that the orders reinstated the Claimant yet investigations show she committed the offence. Counsel submitted that the orders granted were obtained by misrepresentation and compromised the suit and they are prejudicial to the

Respondent. Regarding the failure to attend Court, she deposed that she was on annual leave and the reason for failing to attend was an excusable mistake and that the mistake of counsel should not be visited on the Respondent.

5. Mr. Kitonga opposed the Application on behalf of the Claimant/Respondent. He submitted that the Application as conceived was misconceived as it was an application to set aside an order occasioned by the Respondent/Applicant's failure to attend the hearing of the Application.
6. The Respondent/Applicant premised the Application on Sections 3 and 16 of the Industrial Court Act as well as Rules 16 and 27 of the Industrial Court (Procedure) Rules 2010. The Respondent/Applicant was properly before Court and had to satisfy the Court that the error, mistake or inadvertence was due to circumstances that would enable the Court exercise discretion in favour of the Respondent/Applicant. In *Shah v. Mbogo and Another* (1967) EA 116, the Court held as follows:-

“Applying the principles that the 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.”

7. The reasons advanced for the failure to attend Court on 27th June 2013 were prompted by the Claimant/Respondent's Replying Affidavit filed in opposition to the Respondent/Applicant's Notice of Motion Application dated 14th October 2013. To my mind, this shows clearly that the Respondent/Applicant did not advance reasons until it was thrust upon them. The reasons are captured in the Further Affidavit of the Counsel on record Culent Simiyu Lunyolo. It is deposed that the said counsel was on leave thus the failure to attend. I on my part am not persuaded that was a sufficient reason for the failure to attend Court. The Attorney Generals' Chambers have very many State Counsel and the fact that one State Counsel goes on leave does not mean there would be no one to attend a case. I would cite the words of Lord Griffith in ***Ketterman vs Hansel Properties [1988] 1 All ER 38:***

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.”

8. The leisure pace of doing things as evinced in the matter before will not fly. If sufficient cause is shown during the hearing to follow that the suspension was merited, consequences will follow. That inquiry will proceed even though the Claimant/Respondent is on the payroll of the Government of Kenya. The upshot of the foregoing is that the Application to set aside and/or vacate my orders is not merited and the same is dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 10th day of January 2014

Nzioki wa Makau

JUDGE