



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1800 OF 2011

ABEL MARCEL OKOTH OKELLO.....CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....RESPONDENT

RULING

Before me for determination is a Notice of Motion dated 19th July, 2013 and filed in court the same day by the Respondent seeking the following orders.

1. That this application be certified urgent and fit to be heard ex parte in the first instance.
2. That this Honourable Court be pleased to set aside and vacate the exparte judgment entered herein on 19 March, 2013 and grant the Respondent unconditional leave to defend this suit.
3. That there be interim stay of execution of the decree/order of court issued on 19th March, 2013 pending hearing and determination of the application herein inter parties.
4. That cost of this application be in the cause.

The application is supported by an affidavit of **CAROLINE KAMENDE** sworn on 19th July, 2013 and on the following grounds:

- a. A decree has been issued by this Honourable court against the Respondent pursuant to the ex parte judgment granted on 19th March, 2013.
- b. That ex parte judgment was entered herein ostensibly on the ground that there was non-attendance by the Respondent herein at the hearing scheduled for 7th November, 2012.
- c. To the contrary, on the material day, counsel for the Respondent attended court at 9.00 am and found the matter not listed. Since counsel for the Claimant had not arrived, she decided to leave the matter as it was and await the fixing of another date at the registry.
- d. Counsel for the Claimant despite being aware of the fact that the matter was not on the cause list came to court later and proceeded with the matter and the pretext that there was non-attendance by Counsel for the Respondent.
- e. At a subsequent mention on 7.12.2012, the Claimant was directed by this Honourable court to serve a mention notice, but none was served upon the Respondent.
- f. The Respondent has a watertight defence to the claim herein and it ought to be afforded an opportunity to ventilate the same at a hearing on merits.
- g. That it is contrary to the rules of natural justice for a party to be condemned without the due process of law, especially where from the record of the court they have always attended court.
- h. That the Respondent/Applicant is ready and willing to pay the thrown away costs occasioned by

this application in order to secure the order of court herein.

The claimant opposed the application and filed a replying affidavit sworn by the claimant on 25th July, 2013. The main grounds of opposition as deponed in the replying affidavit are that the averments in the supporting affidavit of Carolyne Kamende are not true as the claimant and his advocate were in court from 9.00 am having travelled from Kisumu to Nairobi for the hearing of the case, that the case was called out and allocated time for hearing at 11.00 am or thereabouts, that the court proceeded with the hearing after confirming that the hearing date was taken inter-parties in court, that the Respondent does not have any meritorious defence, that should the application by the respondent be allowed the respondent should be ordered to deposit the decretal sum in court.

The respondent's application was heard ex-parte on 19th July 2013 and granted stay of execution pending the hearing and determination of the application.

The parties appeared before me on 26th July, 2013 for hearing of the present application when they agreed to file written submissions and attend court on 15th September to highlight their submissions. The application was not heard on 15th September 2013 or on 29th October 2013 when it was fixed for hearing. On 5th February, 2014 the parties abandoned the highlighting of submissions and agreed to proceed by way of written submissions.

The Respondent applicant's main argument is that the court has wide discretion to set aside ex-parte judgments as provided in **Order 10 Rule 11 of the Civil Procedure Rules, 2010**. The Respondent relies on the decision in **Shah vs Mbogu [1967] E.A 116** where the court at page 123 stated

"I have carefully considered, in relation to the present application, the principles governing the court's discretion to set aside judgment obtained ex-parte. This discretion is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately, whether by evasion or otherwise, to obstruct or delay the course of justice".

It is submitted for the respondent that on the material day counsel for the respondent attended court but left after about 30 minutes having confirmed that the case was not listed and the Claimant Counsel was not present in court, that Counsel for the Claimant came later, called for the file and proceeded with the hearing of the matter ex-parte, that the court ought to set aside the ex-parte judgment to avoid injustice to the applicant, that the applicant has a viable defence on record, that the Claimant's Counsel was in default for failing to serve mention notice for highlighting of submissions on the Respondent and that it is **"not beyond the Respondent to mislead this honourable court on such a fundamental matter as the service of court process"**. It is further submitted for the Respondent that Counsel for the Respondent had unconditionally tendered her apology to court for the lapse of judgment on her part as she probably ought to have stayed longer in court to avert the current situation, and that mistake of Counsel ought not to be visited upon as innocent litigant.

The Respondent relies on the following authorities;

1. **BYARUHANGA AND ANOTHER VS THE UGANDA LAND COMMISSION [2012] UGHC 162** where the High Court stated that *"the facts as adduced in the affidavit evidence of the applicant which are neither denied nor rebutted are presumed to be admitted."*
2. **PHARMACEUTICAL MANUFACTURING CO. VS NOVELTY MANUFACTURING LIMITED [2001] 2 E.A 521** where the court held that *"the defendant had admitted the facts alleged by the plaintiff because the defendant had not sufficiently traversed he said facts."*
3. **WAWERU V NDIGA CACA [1983] KLR 236** where the court held that *"An application to set aside an ex-parte judgment made by a defendant may be allowed if the court is satisfied that the summons to enter appearance was not duly served or that he was prevented by sufficient cause from appearing when the suit was called for hearing."*
4. **SHAH VS. MBOGO [1967] EA 116.**

5. TRUST BANK LTD VS. PORTWAY STORES [1993] LTD. & OTHERS [2006]EKLR.
6. JOSEPH NJUGUA MUNIU VS MEDICINO GIOVANNI CACA NAI NO. 216 OF 1997 at page 6-8.

10.PATEL VS CARGO HANDLING SERVICES LTD 1974 EA 75 at 76.

For the Claimant it was submitted that the suit was fixed for hearing by mutual consent, that the Claimant travelled from Kisumu to attend court for the hearing at 9.00 am, that the case was allocated time for hearing around 11.00 am and that Respondent's advocate was absent. That the Respondent has not denied these facts. That there was no illegality. That there are no triable issues in the defence. That the reason for termination given in the defence being infringement by the Claimant of the Program Rules are not stated in the letter of termination. That the termination of the Claimant's employment was found to be unfair both for failure to give valid reason and to comply with procedure.

The Claimant urged the court to dismiss the application as the defence has no merit.

I have considered the application together with the grounds in support thereof and the supporting affidavit. I have also considered the Replying affidavit, the submissions by both Respondent and Claimant and the authorities cited by the Respondent.

In the present case, the Respondent does not deny that the hearing date was fixed in court by consent. The Respondent's counsel admits attending court and waiting for about 30 minutes. She then alleges to have left on the basis that the case was not listed and the Claimant's counsel was not in court. The Claimant on the other hand has sworn an affidavit in which he avers that he was with his advocate in court from 9.00 am, that the case was called out and allocated time for hearing at about 11.00 am when the case was heard in the absence of the Respondent.

What does a responsible counsel do when she goes to court and finds that her case whose hearing date was fixed in court has not been listed in the cause list? Wait for 30 minutes and then walk away as alleged by counsel for the Respondent? Would that amount to mistake for which counsel should be excused and the consequences not be visited upon his client? Where was the client on that day?

These questions have not been answered satisfactorily or at all by the Respondent. I believe that once counsel reaches the court and realizes that his case whose date of hearing was taken by consent in court is not listed, she would find out from the court clerk whether or not the file is in court. She would also find out whether or not the other counsel is in court. She would further confirm from the cause list in court or on the court notice board if indeed the case was not in the hard copy of the cause list that is with the Court Clerk in court.

In the present case I find that the Respondent's counsel, if indeed she was in court as deponed, which is denied by the Claimant, was extremely reckless. Infact, negligently so to the extent that she gave the impression of deliberately walking away from court without checking with the clerk on looking for Claimant's advocate. It appears that she wanted to avoid proceeding with the hearing and use the failure to list the case in the day's cause list as an excuse. It appears as if she deliberately walked away from court to cause delay in the hearing of the case.

In the case of **Shah V Mbogo** the court observed that principles governing the court's discretion to set aside judgment obtained exparte was to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, but not designed to assist a person who deliberately, whether by evasion or otherwise intends to obstruct or delay the course of justice.

In this case there was no accident, there was no inadvertence and there was no excusable mistake or error on the part of the counsel for the Respondent. She was aware of the date and attended court on the hearing date. However, noticing that the case was not on the cause list, she walked away from court without finding out if the file was in court from the court clerk.

The other situation when the court will set aside ex parte judgment is when there is a good defence. In the present case, I considered the defence of the Respondent. In the statement of defence the Respondent admitted the following paragraphs: 3,4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 2, 21 and 34. The paragraphs denied are 1 and 2 which are statements of the issues in dispute, 5 which is the term of the Claimant's contract of employment. The other paragraphs of the Memorandum of Claim are only partially denied. These are paragraphs 14,18, 19, 22, 23, 24, 25, 26 and 29, 30, 31, 32, 33 and 37. I considered the defence filed by the Respondent and found it to be spurious. I reproduced the letter of termination which on the face of it does not comply with Section 41 of the Employment Act or the Claimant's contract. The Claimant was never given a hearing. The letter of termination did not have a reason for termination.

Parties are bound by their submissions. Unless the Claimant intends to amend its defence and to produce a different letter of termination, on the face of it there is no valid defence to the claim. Setting aside the judgment and allowing the Claimant to defend itself would bring us full circle to the same conclusion as in the judgment sought to be set aside.

For these reasons I find that the Respondents application has no merit and dismiss the same with costs.

Orders accordingly.

Read in open court this 31st day of March, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO
JUDGE

Read in the presence of

Ms. Ahmed holding brief for Mr. Obok for Claimant

Wandaka holding brief for Ms Kanini for Respondent