



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1224 OF 2012**

**JOSEPHAT MUTHUI MULI.....CLAIMANT**

**VERSUS**

**EZEETEC LTD.....RESPONDENT**

**RULING**

1. The application before the Court is dated 8<sup>th</sup> November 2013. It is anchored on Section 1(A),(B) and 3A of Civil Procedure Act and Order 12(7) of Civil Procedure Rules. The application seeks for reinstatement of the claim dismissed by the court on 29<sup>th</sup> October 2013 for non-attendance by the parties. Mr. Maingi urged the Application and stated that it is premised on the Grounds appearing on face of the Motion and the annexed supporting affidavit of Paul Maingi Musyimi sworn on 8<sup>th</sup> November 2013. He urged the Court to set aside the order on grounds that non attendance by the advocate was an inadvertent mistake was not in any way by design. He submitted that the Claimant has been willing to prosecute the suit and in the interest of justice sought the exercise of the Court's discretion which is unfettered and aimed at curing excusable mistake or error by a party to avoid injustice or hardship. He stated that the affidavit annexed to the Application explains the circumstances under which the advocate did not attend court in time when they matter was called out. The advocate on material day, it was said, had 2 matters before Court 4 and another before Justice Marete and though Justice Marete was not sitting, the advocate did not have prior knowledge of this. The advocate went before the court only to find the Judge was not sitting and it was only upon return to this court that he found the suit dismissed for non attendance. He thus urged the Court to allow the Application and reinstates the suit and allows parties to urge their respective suits. He relied on the authorities of **Giro Commercial Bank v. Herongate Limited & 8 Others [2005] eKLR** and **Elisha Mbaabu v. Eusebion Kwiriga & Another [2005] eKLR** and **Lucy Bosire v. Kehancha Divisional Land Dispute Tribunal [2013] eKLR**.
2. Miss Kinyua for the Respondent opposed the Application and relied on the Replying Affidavit sworn by Tina Gikoo Kinyua dated 19<sup>th</sup> November 2013. In opposition to the application she submitted that the Claimant in the case is not keen in prosecuting this claim as it came up 2 times firstly on 22<sup>nd</sup> January 2013 in which there was not attendance by the Claimant and secondly on 29<sup>th</sup> October 2013. In both cases the Claimant had served the Respondent with a hearing notice. She submitted further that counsel for Claimant failed to give reasonable explanation for non-attendance since on 29<sup>th</sup> October 2013 when the matter was called out the Claimant together with his advocate were not present in Court. She stated that she remembered the Claimant was repeatedly called out by the Court to confirm if he was around but he did not respond. To further

stress on that point, on the same date she was before Marete J. in Industrial Cause No. 1217 of 2012 in which she appears for the Respondent. However, Justice Marete was not sitting and she too did not have knowledge of that fact. She argued that it was therefore, misleading for counsel to state he was before Justice Marete as the Judge was not sitting on that day. She relied on the case of **Shah v. Mugo [1967] EA 116**. She stated that the discretion was solely intended to avoid injustice for accident, inadvertence or mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay cause of justice. She opined that the Application is frivolous, vexatious and an abuse of the court process and meant to obstruct justice and delay expeditious disposal of the matter.

3. In a brief reprise Mr. Maingi stated that the record bears witness that Claimant has endeavoured to fix matter for hearing on 2 occasions and on 22<sup>nd</sup> January 2013 even the Respondent did not appear in Court which necessitated the Court giving another date. He submitted that it is unfair and it would not make sense to bring a matter to court against Respondent then seek to obstruct it and Order 12 is for the situations that arise such as in this case. He stated that case of **Shah v. Mbogo** cited by his opponent vindicates his case since on issue of obstruction of course of justice, it has not been demonstrated by the Respondent. The mistake should not be visited on the Claimant and if the Application is granted the Respondent will not suffer any prejudice that cannot be compensated by way of costs.
4. From the submissions of parties, it can be discerned that the issue is whether the alleged mistake of counsel can be excused. It is common ground that on the material day, Justice Marete was not sitting though matters were indicated to be on the list for that day before him. It is equally not in dispute that I was sitting and the cases before me included this one fixed for hearing. On the material day, as pointed out by the Respondent's Counsel Miss Kinyua, the matter was called out and when there was no response by the Claimant's counsel, I called out the name of the Claimant twice. There was no response. If counsel is to be believed that there was intention to proceed, his client would have been in Court waiting for Mr. Maingi's arrival. He exhibited an extract of his diary for the day clearly demonstrating that the matter was properly diarized. It is therefore clear he was aware of the suit. In any event, the date was taken *ex-parte* by the Claimant's advocate.
5. The cases cited in support by the Claimant's advocate do not aid the Claimant's case as far as his explanations go. The case of **Giro Commercial Bank v. Heronsgate Limited & 8 Others** (supra) was one of the cases cited. In it Kasango J. considered the objector's explanation for failing to attend Court in time and stated as follows:-

*I have considered the objector's explanation for failing to attend court in time and I think counsel's explanation can only surprise those who are strangers to the manner in which counsel's are under extreme pressure to attend to many matters and are left with no option but to request either their pupils or their clerks to get another counsel to hold their brief. This is a common occurrence. The objectors brought their application to set aside the dismissal without delay and I accordingly in exercise of my discretion do accede to the same.*

6. The case is clearly different from the scenario before me. No explanation has been given to the effect that counsel sought to have someone hold his brief. He only states that he attended to a court that was not sitting and pursued the clerk, for what I don't know, and then came to this Court after the matter had been called out and dismissed.

The other cases cited can be distinguished from the scenario at play in the case before this Court as the explanations given demonstrate a keenness to prosecute the matters before the Court. To their credit, the cases however demonstrate that courts are unfettered in exercise of the discretion to set aside orders of dismissal for non-attendance.

7. In the case of **Shah v. Mbogo** (supra) In my considered view, I consider whether the Counsel for the Applicant has adduced sufficient evidence as to why he as well as the Claimant did not appear on the hearing date. I have a free hand in the exercise of my discretion in favour of the Applicant

should I be so minded. However, in doing so I must ensure that I do not aid a party who is undeserving of the exercise of that discretion. In the case of **Shah v. Mbogo** (supra) the principles to be applied before setting aside a judgment were enunciated as follows per Duffus P:-

*“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.”*

8. In the Application, there is no discernible reason why the advocate did not send his client to this Court as he checked on the matter before Justice Marete. His colleague had a matter which was on the same cause list and she was able to attend to that Court and this Court. She was not absent. The case has been fixed for hearing on 2 occasions by the Claimant's counsel. On both occasions the Claimant has not attended Court. The inference one can draw is that there is a pattern to deliberately or otherwise delay the expeditious disposal of the suit. Is the advocate fixing the case for hearing just to ensure the cause is not dismissed for want of prosecution? We cannot discern this but it is clear the Claimant has been absent on 2 occasions. As has been his lawyer. Justice cuts both ways. There are rights that have accrued to the Respondent and on the basis of **Shah v. Mbogo** I would be misplaced to exercise my discretion as there was no excusable mistake or error. Counsel was well aware of the matter and failed to attend or obtain representation.
9. The upshot of the foregoing is that the Claimant's Notice of Motion Application lacks merit and is not fit for grant. It is dismissed with costs to the Respondent.

Orders accordingly.

**Delivered at Nairobi this 19<sup>th</sup> day of March 2014**

**NZIOKI WA MAKAU**

**JUDGE**