



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 93 OF 2013

JAPHETH MOGAKA ONYARU CLAIMANT

=VERSUS=

ALPHA DAIRY PRODUCTS LIMITED RESPONDENT

RULING

INTRODUCTION

On 30th August 2013, this court delivered an ex parte judgement following Respondent's default in filing a defence and attending hearing despite service of summons and hearing notice. The gist of the said judgement was the declaration that the summary dismissal of the Claimant from service was unfair and that he was entitled to Kshs.815,458.80 as accrued employment benefits and compensation for unfair dismissal.

The Applicant has brought a Motion dated 5th December 2013 seeking setting aside of the whole judgement and consequential orders, and leave to defend the suit. The motion is supported by the affidavit of Fahim Fiaz Kurji, the General Manager for the Respondent. The Claimant has on the other hand opposed the motion by filing his own affidavit dated 10th December 2013. The motion was disposed of by written submissions which were highlighted on 27th February 2014.

Applicant's submissions

The Applicant has admitted service of summons but blames the failure to file defence and the ex parte judgement on her own advocate Mr. Alex Masika who did not execute her instructions after engagement. He prayed the court not to visit the mistake of her counsel on her. According to her, she did not know the progress of the proceedings until the auctioneers went to execute the impugned judgement.

The Applicants contends that she has a defence which raises triable issues and indeed attached a draft copy for consideration by the court. She has taken issue with the execution which she submitted that it was improper because it was done prematurely before taxation of costs. To that extent she submitted that the execution should be set aside, the money deposited be released to her and the Claimant be ordered to meet the costs of the Auctioneer.

As regards the terms of setting aside the ex parte judgement, the Applicant has offered Kshs.10,000/- as throw away costs to the Claimant. She cited **Shah vs. Mbogo & Another [1967] EA page 116** among other precedents.

Claimant's reply

The Claimant has submitted that service of summons has been admitted and as such the default to file defence was deliberate.

Secondly the Claimant has demonstrated that hearing notice was served upon the Applicant but she deliberately defaulted to attend the hearing of the case on 22nd July 2013 either personally or through her lawyer. Lastly the Claimant has demonstrated that he notified the Applicant of the judgement on 3rd September 2013 and served her with copy of the decree on 18th September 2013 but took no action until execution was sought on 25th November 2013 after the Claimant's counsel got a wind of the Respondents' Director's intention to sell the company.

According to the Claimant the Applicant was aware of the progress of the proceedings in court and deliberately waited to act after execution was done in order to delay justice.

In addition the Claimant took issue with the form of the supporting affidavit contending that it was commissioned by a Firm of Advocates instead of particular Commissioner for Oath. He also rubbished the draft defence annexed to the said affidavit contending that the same was not dated and signed.

It was denied that the alleged counsel by the name Alex Masika was in existence and that any instructions had actually been given to him. He submitted that the mistake of the alleged Alex Masika Advocate was not excusable. He concluded by observing that the facts of the present case are similar to that in **Shah vs. Mbogo and another** which was dismissed.

ANALYSIS AND DETERMINATION

After perusing the Motion and affidavits and submission filed in support and in opposition to the motion and upon considering the oral submissions made by the learned counsel for the two parties, the following issues arise for determination:

- a. **Whether the motion has merits and warrants the exercise of the courts discretion.**
- b. **Whether the orders sought should issue.**

Merits of the Motion

There is no dispute that service of summons and hearing notice was served upon the Respondent just as there is no dispute that notice of entry of judgement was served upon the Applicant before the execution. To that extent the court finds that the failure by the Respondent to defend the suit or to attend the hearing after service as deliberate if not negligent or recklessness. No evidence was produced to prove that there exists a counsel by the name Alex Masika and that he was instructed and failed to act. The burden of proof of such allegation lay squarely upon the Applicant.

Even if the court were to give the benefit of doubt to the Applicant regarding instruction to the said counsel, the question that follows is whether the Respondent was relieved of the duty to follow up the progress of the matter from the said Advocate. The answer to that query is in the negative and especially considering that several correspondences or notices were served on the Applicant directly even after instructing the alleged Mr. Masika advocate.

To that extent the court is of the view that the Motion lacks merits. The Applicant acted negligently and recklessly in the circumstances and as such she does not deserve to benefit from the discretion of this court. Discretion should be exercised fairly and judiciously.

The principle of setting aside an ex parte judgement laid down by **Shah vs. Mbogo** and cited with approval even by the Court of Appeal, is that the discretion of the court is intended 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. As already observed above, there was no accident, inadvertence or excusable mistake that has been demonstrated on the part of the Respondent. He was served with all the necessary summons and notices before the judgement was entered but slept on his right to defend the suit.

Even if the court was treated with evidence that the default of defence and attendance to hearing was due to the alleged counsel,, the court would still not have set aside the judgement because, the Applicant has not demonstrated that he has a good defence with triable issues. Upon considering the annexed draft defence, the same does not show that the court is likely to arrive at any different decision from the impugned judgement. For example the basis of the said judgement was that the employer did not comply with Section 41 of the Employment Act which provide for mandatory disciplinary hearing before an employee is dismissed for misconduct under Section 44 of the Act. In view of that fact, the court would be acting in vain because the same decision will be repeated after inter parte hearing.

As regards the objection as to the attestation of the supporting affidavit, the court finds that to be as a fatal professional error which is not excusable. There is no indication as to which officer of the firm of Wangari Muchemi & Company Advocates and Commissioner for Oaths administered the oath on the Deponent. The result of the said fatal defect is that, even of the Motion had merit, the same would remain incompetent for want of a supporting affidavit.

Orders sought

For the reasons cited above the motion is found to be devoid of merits and it is dismissed. The court has been urged to set aside the execution proceedings because the same was done prematurely before taxation of costs. That has not been denied by the Claimant. Perusal of the court proceedings shows that taxation was done on 15th November 2013 and ruling delivered on 24th January 2014. That was done after execution had been done and the decretal sum deposited in court.

The court finds that such execution without the leave of the court was unlawful. Even if the Claimant was apprehensive that the judgement debtor was about to sell his assets, he should not have executed without seeking the leave of the court. The said execution is therefore set aside and the Advocate for the Claimant personally ordered to pay the auctioneer charges to be agreed or taxed. The reason for such order is that the counsel deliberately or negligently failed to follow the law while instructing the auctioneer.

Lastly in view of the fact that the judgement remains in force the request for the release to the Applicant of the judgement debt deposited in court is declined. The money shall be released to the Claimant as judgement debt pending the payment of the taxed costs.

DISPOSITION

The Notice of Motion dated 5th December 2013 is dismissed with costs to the Claimant. The claimant's counsel to personally pay the auctioneer's costs.

Signed dated and delivered this 25th day of April 2014.

ONESMUS MAKAU

JUDGE