REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 151 OF 2010

BERNARD KURIA……..……1ST CLAIMANT

PETER GICHANGI WACHIRA ……..……2ND CLAIMANT

MICHAEL KAHARU WACHIRA…….……..…..…3RD CLAIMANT

VERSUS

KASTURI LIMITED……..….....….....RESPONDENT

RULING

This case was first mentioned in court on 24th March 2010. It was fixed for hearing on 10th July 2010. The case was thereafter mentioned and fixed for hearing severally when it did not take off.

On 7th March 2012 the case was mentioned before Hon. Justice P.K Kosgei (Rtd) when Mr. Thuku was present for the Claimant and there was no appearance for the Respondent. The case was fixed for hearing on 18th July 2011 and the court directed that the Respondent be served with a hearing notice.

On 18th July 2011 the case was heard by Justice Madzayo sitting with P.M. Osoro and M.A. Warrakah (members).

Mr. Thuku appeared for the Claimant but there was no appearance for the Respondent. The court reserved the award for 1st August 2011. The award was however not delivered on that date. Justice Madzayo (Rtd) had not delivered the award at the time the Court was reconstituted on 12th July 2012. The file was thereafter allocated to Justice B. Ongaya who prepared and delivered judgment on 9th November 2012 in the absence of both the Claimant and the Respondent.

It is in respect of this judgment that the Respondent has filed the present application dated 3rd Septembr 2013 and filed in court on the same date under certificate of urgency.

The applicant seeks the following orders:-

1. That this application be certified urgent and the same be heard exparte in the first instance and thereafter be listed for hearing inter partes.
2. That the firm of Mwaniki Gachoka & Co. Advocates be granted leave to come on record on behalf of the Defendant.

3. That there be a stay of execution of the Judgment and Decree of this court passed herein on 9th November 2012 pending the hearing and determination of this Application.
4. That the Judgment and Decree passed on 9th November 2012 and all consequential orders be set aside.

The application is supported by the affidavit of BIPINCHANDRA P. SHAH the Managing Director of the Respondent and on the following grounds:-

1. That the Respondent had no notice of the hearing date of 18th July, 2011.
2. That there was no hearing or taken 18th July, 2011 and no witness was called at all to prove the Claimant's averments.
3. That the Respondent is desirous of being heard and to test the Claimants' testimonies and documents by way of cross-examination.
4. That is unfair for the Respondent to be condemned unheard.
5. That there is danger that the Claimants will seek to execute the judgment and decree aforesaid if stay is not granted.
6. That the Respondent has a good Response to the claim which raises triable issues.
7. That the Respondent intends to make an application for leave to amend its defence.
8. That the Respondent has a plausible and meritorious defence which raises triable issues.
9. That the Claimants shall not suffer prejudice if the application is allowed and the suit heard on merit.
10. That the Respondent is ready to meet the costs of this application.

The Claimants filed a replying affidavit of Bernard Kuria Mwangi the 1st Claimant opposing the application. In response to the replying affidavit the Respondent's Managing Director swore a supplementary affidavit on 24th October and filed in Court on 25th October 2013.

The parties thereafter agreed to argue the application by way of written submissions.

In the applicant's submissions it is submitted that the applicant was not served with the hearing notice for 18th July 2011, that no hearing took place on 18th July 2011 as there were no witnesses called to prove the Claimant's avernments, and that the Respondent is desirous of being heard and to cross examine the Claimants, that on the alleged hearing date the court record does not indicate that the court inquired as to the effectiveness of the alleged service before proceeding with the hearing, that in the absence of the endorsement on the court record regarding that fact the Respondent ought to be given the benefit of doubt.

On the procedure adopted at the hearing the Applicant's counsel submitted that the court appears to have relied on the verifying affidavit contrary to rule 21 of the Industrial Court (Procedure) Rules 2010 which require the court to determine a suit on the basis of pleadings, affidavits, documents filed and submission made by the parties only with the consent of the parties, that no such consent was reached in the present case. The applicant submits that this is sufficient ground for the court to set aside the judgment and hear the case de novo.

The applicant submits that contrary to the averments in the replying affidavit that the decretal sum be deposited in court or in a joint interest earning account, its prayer is for setting aside the judgment so that there would be no decretal sum to be deposited either in court on in an interest earning account.

The applicant further submits that it has intimated in it's application that it intends to amend it's defence which it would do within the time frame directed by the court.

The Respondent prays that the application be granted in the interest of justice.

For the Claimants it has been submitted that the hearing notice was served on 10th March 2011 on the Respondent's Advocates Bali-Sharma & Bali -Sharma Advocates who stamped and signed on a copy of

the notice, that the applicant has not filed an affidavit from the said firm of advocates denying receipt of the hearing notice, that the trial judge exercised it's discretion and proceeded to rely on the statement of claim and the defence on record and that the Claimants ought to be allowed to enjoy the fruits of their judgment, having filed suit on 23rd February 2010 and the hearing having taken place on 18th July 2011. That the judgment was delivered on 9th November 2012 yet the application for setting aside was filed on 3rd September 2013. The Claimants relied on the case of **Janepher Asami & 3 others V Akamba Bus Services [1998] eKLR** in which the court set aside the exparte judgment on condition that the defendant deposited the entire decretal sum into a joint interest earning account in the joint names of counsels of both parties. The Claimants urged the court to dismiss the application with costs and vacate the interim orders.

The issues for determination in this application are whether there was proper service of hearing notice on the Respondent/Applicant, whether the proceedings were invalid for failure to hear evidence from the parties and whether there is justifiable grounds to set aside the ex-parte judgments is a discretion of the Court. The Discretion is a free one (**Patel V E A Cargo, Handling [1974] EA 75).** The discretion is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of Justice (**Shah v Mbogo [1967]EA 116).** The discretion being a judicial one must be exercised upon facts, not on the whims or caprice (**Shabir Din V Ram Parkash Anand 22 EACA 48) .**

In the present application the Respondent's reason for seeking the setting aside of exparte judgment is that it was not served with hearing notice, and that there was no proper hearing as no viva voce evidence was taken.

I have checked the record. The hearing notice returned to court together with the affidavit of service dated 7th March 2011 has a rubberstamp of Bali-Sharma & Bali-Sharma Advocates Nyeri showing that it was received on 10th March 2011. There is a signature against the stamp.

As pointed out by the Claimant's Counsel, no affidavit was filed by the said firm denying service. The person whose affidavit has been filed denying service is Bipinchandra P. Shah, the Respondent's Managing Director. In the affidavit at paragraph 4 he simply depones

"THAT I, state that the Respondent had no notice of the hearing date of 18th July, 2011."

He does not state that he detained this information from his advocates then on record.

In addition to the affidavit of service and hearing notice, there is a letter from the Registrar of the Industrial Court dated 8th March, 2011 addressed to Gachie Mwanza & Company Advocates (for Claimants) and Waiganjo Wachira & Co. Advocates (for Respondents) informing the parties of the hearing date. Waiganjo Wachira & Co. Advocates had filed a Notice of Appointment by the Defendant dated 24th March 2010 and filed in court on the same date. The Respondent's defence was however filed by Bali-Sharma & Bali-Sharma as Advocates for the Respondent on 15th July 2010.

From the foregoing the Respondent had two separate notices of the hearing date of 18th July 2011. The affidavit in support of the application does not make any reference to the two notices.

I therefore find that the Respondent had been properly served with hearing notice.

The second issue is that the procedure adopted by the court in this case offends rule 21 of the Industrial Court (Procedure) Rules, 2010. The applicant submitted that Rule 21 provides for the court to proceed to determine the case before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties. I have checked the record which apart from indicating that the Respondent was absent, indicates that Mr. Thuku addressed the court as follows:-

"**I wish to rely on the memorandum of claim in its entirety. We**

are praying for the orders to be granted as prayed."

In the absence of the Respondents it is my opinion that the court could only rely on the consent of the party in court. The court actually granted the prayer of the only party before it. The court could not seek consent of a party not before it by default.

I therefore find no merit on the argument.

The applicant has further stated in the application at paragraphs 6 and 8 as follows:-

6. That the Respondent has a good Response to the claim which raises triable issues.

8. That the Respondent has a plausible and meritorious defence which raises triable issues.

The Respondents filed a one page defence as follows:-

"MEMORANDUM OF DEFENCE

The Respondent in Answer to the Memorandum of claim filed by the three claimants in this cause reply to their claim as follows:-

1. Save that three Claimants were employed by the Respondent, the Respondent will state as follows; for each Claimant.

1. BERNARD KURIA MWANGI
2. MICHAEL KAHURU WACHIRA
3. PETER GICHANGI WACHIRA

All the Sundry claim for each are denied in toto and will put each of the Claimants to full proof each allegation.

REASONS WHEREFORE the Respondent denies each and every allegation and request that the claim be dismissed with costs and interest.

DATED AT NYERI THIS 15TH OF JUNE, 2010

Signed

For BALI-SHARMA & BALI-SHARMA

ADVOCATES FOR THE RESPONDENT"

This by any standards cannot be a meritorious defence that raises triable issues.

In the case of **Kenya Commercial Bank Ltd V Nyatiage & another [1990] KLR** Justice Bosire (as he then was) stated that "In an application of this nature, it is usual and essential to indicate a defence an applicant has to the claim against him. The applicant did not state the defence he has to the claim herein. I would have been inclined to dismiss his application but for the finding that he was probably not served with summons to enter appearance and the plaint."

In the present case even if the Respondent was in court, there would have been no defence for him to present to the court. Indeed the Respondent is aware of this fact and in both the supplementary affidavit and the written submissions it has stated that it intends to amend the defence should the court grant it's prayers and set aside the judgment.

I find that there is no meritorious defence on record worth any consideration.

The Claimants have raised the issue of delay in filing this application. The judgment was delivered on 9th November 2012. This application was filed on 3rd September 2013. The applicant has not given any reason for the inordinate delay of about 11 months.

I find that there was inordinate delay in filing this application and there is no explanation or justification for the delay.

The upshot is that I find no merit in the Respondent's application for setting aside the ex parte judgment on record and dismiss the application with costs.

Read in open Court this **9th** day of **April** 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Respondent

Mutembei for Applicant