



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 130 OF 2013

SHLOMO JEROMEAPPLICANT

VERSUS

HACIENDA DEVELOPMENT HOLDINGS LTDRESPONDENT

RULING

INTRODUCTION

This is a ruling on the Notice of Motion dated 24/2/2014 by the respondent in the main suit hereinafter called the applicant. The Motion seeks to set aside this court's *ex parte* judgment dated 14/2/2014. The Motion is supported by the affidavits of Mohammed Faki Khatib counsel for the applicant's sworn on 24/2/2014 and 9/4/2014. The gist of applicant's Motion is that although she had her counsel knew that the suit was scheduled for hearing on 26/11/2013, they did not have notice that the same was listed for hearing before this court.

The claimant has opposed the Motion by filing his replying affidavit sworn on 18/3/2014 and 5/5/2014. The gist of his affidavit is that the applicant's counsel acted negligently by failing to confirm where suit was listed from the cause list at the court's notice board. The Motion was argued on 14/5/2014 by Mr. Khatib learned counsel for the applicant and the claimant in person.

APPLICANT'S SUBMISSION

Mr. Khatib submitted that on 6/11/2013 the suit was listed before justice Radido in court No. 1 for directions whereby the court fixed the suit for hearing on 26/11/2013. he further submitted that the said 26/11/2013. He attended court but found that justice Radido was absent. He has proved the absence of justice Radido from court by annexing court proceedings to his supplementary affidavit sworn on 9/4/2014. He learnt that the suit proceeded *ex parte* only when the court delivered judgment on 14/2/2014. He admitted that the failure to attend court on 26/11/2013 was his failure to check the cause list of that particular day.

He submitted that the applicant had filed defence in good time and ought to be heard since the defence raised triable issues. In particular he submitted that as at the time of employment, the claimant lacked a valid work permit and as such the whole substraction of the claim will collapse once that defence is proved. He submitted further that the Motion was filed without undue delay and it is not intended to delay the proceedings.

He relied on **HCC 313 of 2000 PETER KINUTHIA MWANIKI AND 2 OTHS VS PETER NJUGUNA GICHEKA AND 30 OTHS** where the court cited **SHEH vs MBOGO** in setting aside exparte orders. He admitted that he was aware of the hearing date only that he attended the wrong court and left without first checking the cause list. According to Mr. Khatib the claimant will suffer no prejudice because the claim is liquidated and will accrue interest if it succeeds after inter partes hearing.

He urged that the applicant should not be prejudiced on account of his advocate failure. He further contended that he could not have applied for the arrest of the judgment before delivery because he was not aware of the exparte hearing. He contradicted himself however when he admitted that he received notice of the intended judgment on 7/2/2014.

CLAIMANT'S REPLY

The claimant contended that the suit was old and the delay was cause by applicant changing lawyers severally. He submitted that although he was a layman, he checked the cause list at the notice board and confirmed the court before which the suit was listed. According to him, the applicant's counsel was negligent for failing to check the case listing at the causelist. He maintained that he had a valid work permit of which the applicant knew about. He concluded by arguing that it was only just that he was paid the dues for which he worked.

ANALYSIS AND DETERMINATION

Upon perusing the pleadings, judgment, Motion affidavits and the submissions by the two sides the following issues arise for determination

- a. **whether the Motion meets the threshold for exercise of court's discretion to set aside the exparte judgment.**
- b. **Whether the defence rises triable issues**

Threshold for setting aside exparte judgment

The basis of the discretion for setting aside an exparte judgment 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 (**Shah Vs Mbogo**)

The question to be answered is whether the applicant has demonstrated that her failure to attend the hearing was through an accident, inadvertence or excusable mistake. A brief background may help in answering the foregoing question.

This suit was filed at Nairobi in November 2009 and a defence was filed in January 2010. The first hearing was scheduled for 8/2/2010 when it was adjourned followed by several other adjournments until 20/8/2013 when it was transferred to this court. On 29/8/2013, 19/9/2013, and 6/11/2013 the case was mentioned before this court and not before Radido J. On the said 6/11/2013 the respondent's counsel and the claimant appeared before this court and fixed a consent hearing date being 26/11/2013. On 26/6/2013, the claimant appeared before this court and prosecuted his case but the respondent and her counsel failed to attend. It is factual therefore that the hearing date was given by this court and it was listed for hearing before the same court.

From the foregoing background, it is obvious that the counsel for the applicant is not truthful when he alleges in his affidavit and submissions that the suit was mentioned before Radido J in court 1 on 6/11/2013 when the hearing date was given. There is nothing at to suggest all that there was any slightest reason for the respondent to have mistaken the court before which the suit was scheduled for hearing. There is also no justification why the learned counsel and his client failed to peruse the cause list at the court's notice board or even e-causelist from the courts official website. The counsel should have exercised due diligence to ensure that his clients interests were secured before leaving the court, if at all

he attended court 1 as alleged.

On a balance of probability the court finds that no accident, inadvertence or excusable mistake has been demonstrated by the applicant to warrant this court's discretion to set aside the exparte judgment. Rule 22(b) of this court's procedure rules (2010) empowers the court to proceed with the case before it in the absence of any party thereto if that party fails to appear for the hearing without providing any reason. Consequently the court was right in entertain the exparte hearing and entering the impugned judgment. On the other hand, the applicant acted negligently by failing to verify where the case was listed and recklessly went away and did no follow up until the judgment was delivered.

Defence with triable issues

whether the defence raises triable issues the court views that, that issue was answered by the judgment when the court held that there is no dispute as to the period of service and the total due as salary to the claimant. There is also no documentary evidence annexed by the respondent to prove that the claimant had accepted a reduced salary for any other period than March-September 2009 which was factored in the judgment.

As regards the issues of work permit, that was not pleaded in defence and it is only a new issue of which the claimant denied by contending that he always had the work permit. The court has noted that the applicant did not swear any affidavit to support the Motion. Her counsel was not competent to swear affidavit on matters of fact like lack of work permit. Consequently, the court is not persuaded that the judgment should be set aside to allow fresh hearing.

DISPOSITION

The Motion is without merits and is dismissed for the above stated reasons. Costs to the claimant.

Dated, Signed and delivered this 20th June 2014

O. N. Makau

Judge