



**REPUBLIC OF KENYA**

**THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 208 OF 2012**

**GIBSON NJOROGE WARURU.....CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED.....RESPONDENT**

**RULING**

1. The Claim herein was dismissed on 16<sup>th</sup> September 2013 when the matter was set for hearing. The date had been taken *ex parte* by the Claimant's advocates on 12<sup>th</sup> February 2013 and a Hearing Notice duly served on the Respondent. The Claimant was absent as was his counsel. The Claimant thereafter filed an application seeking to reinstate the suit but the Claimant's counsel was absent to prosecute the Application and the Application was dismissed for non attendance.
2. That precipitated the filing of the Claimant's Notice of Motion application dated 4<sup>th</sup> December 2013. The Court directed parties to file submissions and the Claimant filed submissions on 28<sup>th</sup> February 2014. The Respondent filed submissions on 25<sup>th</sup> March 2014. The Notice of Motion application seeks the following main prayer:
  1. This Honourable Court be pleased to set aside its orders made on 4<sup>th</sup> November 2013 and all consequential Orders and reinstate the Claimant's Application dated 16<sup>th</sup> September 2013 for hearing on merit.
  2. The costs of this application be in the cause.

The Application was supported by grounds on the face of the Motion and the Affidavit of Moses Odawa Owuor. In the Supporting Affidavit sworn on 4<sup>th</sup> December 2013, the deponent stated that he was engaged in two other Courts and did not deliberately fail to attend Court. No formal cause list was attached except a text document which was on same type font as the pleadings filed by the Claimant/Applicant's counsel. He also attached a copy of the Diary for 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> December 2013.

3. The Claimant submitted that the advocate on record was before Ombija J. and Gitumbi J. at the High Court on the material date. The advocate submitted that he waited patiently and did not dare interrupt his seniors. It was submitted that the Court should observe the unwritten rule on seniority

of both for Advocates and members of the Bench where Judges and Judicial officials and Senior Advocates are accorded priority and respect as such. The Court was urged to be predisposed towards the inclusive, exhaustive and resolving approach to disputes filed by parties upon hearing rather than locking them out and/or denying them a chance to be heard by dismissing the Application when the Claimant was present. The Claimant submitted that mistakes of counsel ought not be visited on the parties who are innocent bystanders. Reliance was placed on the case of **Republic v. The Disciplinary Committee ex parte Karimi C. Njau Nairobi JR. Misc. Application No. 303 of 2009** (unreported) where the court set out in great detail the principles to be considered. He relied on the case of **CMC Holdings Ltd. v. Nzioki [2004] 1 KLR 173** and also called in aid Section 3A and 3B of the Civil Procedure Act and the oxygen principle of overriding objective of the Court to do justice.

4. The Respondent was opposed and had filed Grounds of Opposition on 9<sup>th</sup> January 2014. In the Grounds the Respondent placed one ground:
  1. That the orders sought are to aid in abusing the court process and should be dismissed with costs.
5. In the Submissions filed the Respondent urged the Court to consider that the cause was time barred as it was filed 31 years after the cause of action accrued. Reliance was placed on the case of **Divecon Limited v. Samani (1997) LLR 585 (CAK)** and a decision of this Court in **Josephat Ndirangu v. Henkel Chemicals (EA) Ltd [2013] eKLR** on the issue of limitation. Also cited was the case of **Thuranira Karauri v. Agnes Ndeche [1997] eKLR, Thuo v Njuru (1998) LLR 2846 (CAK)** among others. The Respondent submitted that the Claimant has no *prima facie* case and as such the oxygen principle called in aid by the Claimant does not lie.
6. The Claimant's Application was dismissed for non-attendance. This is the background within which this Ruling is to be appreciated. At the time set for the matter which was on request of Mr. Owour for the Claimant set at 10.00 am, there was no one to prosecute the Application. The Claimant was in Court and though there is a plethora of cases relating to mistake on part of counsel, the principles to guide a Court is setting aside orders such as the ones challenged in the Notice of Motion are settled.
7. In the case of **CMC Holdings v Nzioki** supra the Court of Appeal considered the grant of discretionary orders to set aside the learned judges of appeal Tunoi, O'kubasu JJA, Onyango Otieno Ag. JA held as follows:
  1. In an application before a court to set aside an *ex parte* judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.
  2. On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.
  3. In law, the discretion on whether or not to set aside an *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.
  4. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.
  5. In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.
  6. In an application for setting aside *ex parte* judgment, the Court must consider not only the reason

why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raised triable issues.

8. In the case before me, the Respondent submits that the oxygen principle should be applied in favour of the Respondent. The holding in **CMC Holdings v. Nzioki** supra is clear. The principles to be applied are well set out. The last one is that the Court should consider the defence filed or the draft defence so as to ascertain if there are triable issues. As the Claim was dismissed, I have to assess whether the Claim raise triable issues as the shoe is now on the other foot. In an application for setting aside orders dismissing the Application to set aside orders of the Court, the Court must consider not only the reason why the advocate was failed to turn up for the hearing of the application, but also whether the Claimant/Applicant has a reasonable cause of action or whether the claim raises triable issues. In setting aside or declining to set aside I must do so on the basis of reasons and my discretion must be exercised judiciously. This discretion will not be interfered with on appeal unless I exercise the discretion on wrong principles or I act perversely on the facts. In the case before me the Claimant was present on the material date I dismissed the application seeking reinstatement of the suit. He could not urge the Application and his chosen legal representative was absent in spite of procuring the time allocation for 10.00am during the cause callover held at 9.00am by this Court. The final matter that portends doom for the Claim is the fact that the substratum of the Claimant's case was his summary dismissal on 12<sup>th</sup> November 1981 and later this was reduced to termination in 1984. Quite telling is his undated letter to the Respondent delivered to the Public Complaints Standing Committee on 28<sup>th</sup> April 2011 where he readily admits he was dismissed from the Respondent. That he came to Court in 2012 well over 3 decades after the fact can only suggest that there was no cause of action that could lie so far down the road. The oxygen principle should be applied irrespective of the party before the Court. the overriding objective encapsulated in Section 3A and 3B of the Civil Procedure are that the overriding objective of the acts and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The court shall in the exercise of its powers under the acts or the interpretation of any of their provisions, seek to give effect to the overriding objective. Advocates must assist the court to further the overriding objective. For the purpose of furthering the overriding objective, the court shall handle all matters presented before it to achieve the just determination of the proceedings; the efficient use of the available and administrative resources; the timely disposal of proceedings before the court at a cost affordable by the respective parties; and the use of suitable technology.
9. As there is no reasonable cause of action, the application would fail if I apply the filter of the holding by the Court of Appeal in the **CMC Holdings** case. Even if I reinstate the Claim it will merely clog the judicial system as it is hopelessly out of time and any hearing that would ensue would be a mere academic exercise and whose result would be the position the matter is at – it would be dismissed as no claim on employment can lie 31 years after the fact. I would be opening a can of worms if I permitted such a travesty to occur. The Application is from the foregoing thus not fit for grant and it is dismissed with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of June 2014**

**Nzioki wa Makau**

**JUDGE**