



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 864 OF 2013

1. PETERLIS JUMA
2. RONALD OSIEMO OGEA.....CLAIMANT

VERSUS

SHREE SAI INDUSTRIES LTD.....RESPONDENT

RULING

1. The Respondent/Applicant seeks reopening of the case for defence hearing and filed a Notice of Motion Application on 9th July 2014. In the Application the Respondent seeks the Court orders of 30th June set aside. The Respondent stated that the advocate for the Respondent arrived in Court but went to another Court for the hearing of an adoption matter Cause No. 79 of 2014 which was in an addendum on that day and upon return at 10.30 am found that the matter had been heard. The said application was supported by the affidavit of Ruth K. Ayunga. Counsel submitted that she was seeking a setting aside of the orders and leave to file submissions and documents. She submitted that mistakes of counsel should not deter the Respondent from being heard. The Respondent sought the reopening of the case as it intended to call 3 witnesses. She relied on Article 50 and 159 of the Constitution. She submitted that it was in the interest of justice that the application be allowed. She finally submitted that she be allowed to file a Replying Affidavit in response to the Replying Affidavit filed by the advocate for the Claimant.
2. The Claimants/Respondents were opposed to the Application and filed a Replying Affidavit. In the Replying Affidavit counsel deposed that the Respondent/Applicant's application was incompetent as there was no notice of change of advocates filed. During the hearing of the application counsel submitted that the Court was *functus* as far as hearing was concerned as the case had proceeded and all that remained was submissions. He submitted that there was no cause list annexed to the Application to show that indeed there was an addendum on that day. He further submitted that the if the Advocate was otherwise engaged the witnesses for the Respondent would have been available and that when the matter was called out there was no attendance. Finally, he submitted that the submission to permit the filing of a Replying Affidavit was a half hearted attempt to seek an adjournment of the Notice of Motion.
3. In her reprise Counsel for the Respondent/Applicant submitted that the addendum is not included in the main cause list and she did not have a copy of the cause list. She stated that she perused the Court file on 3rd July 2014 and thus urged the Court to allow the application so that the Respondent/Applicant can bring its witnesses.

4. In an Application to set aside certain principles are to be considered. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the Court of Appeal per Duffus President of the Court stated thus:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given it by the rules.....the principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any of the rules of procedure” (emphasis mine)

5. Further in the case of **CMC Holdings v Nzioki [2004] 1 KLR 173** 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. (underline mine)
6. These decisions are relevant though they relate to setting aside of judgments of the Court. The principles are the same on setting aside.
7. The Respondent/Applicant’s Notice of Motion Application seeks setting aside the orders of 30th June. On that day the Respondent’s Counsel was not in Court and neither was the Respondent’s representative or its witnesses. The matter proceeded to hearing. Counsel admits that she perused the Court file on 3rd July 2014. That seems to contradict her assertions that she was in another court and came back to this Court at 10.30am only to find that the matter had proceeded. In the exercise of my discretion in setting aside as enunciated in cases cited above, the Court has to consider the reasons why the advocate failed to attend Court or why the Applicant was not in Court. No cogent reason has been given why the advocate was absent. Having a matter in an addendum means that the relevant Court would go through its cause list first then deal with matters in the addendum. It was stated that the advocate was in court but stepped out to attend to the matter on the addendum before my brother Musyoka J. When the matter was called during the settling of the cause list and for hearing there was no response by the Respondent’s representative. The counsel and the witnesses were absent. This was not an excusable mistake or error. The Court

therefore declines to exercise discretion in favour of the Respondent. Application is dismissed with costs to the Respondent.

Orders accordingly.

Dated and Delivered at Nairobi this 31st day of July 2014

NZIOKI WA MAKAU

JUDGE