



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1278 OF 2011

SIMON KIURA NGURARI.....CLAIMANT

VERSUS

WELLS FARGO LTD.....RESPONDENT

RULING

1. Before me is a Notice of Motion Application dated 23rd May 2013 filed under certificate of urgency. The Application seeks the Court to set aside and/or review the Court's order issued on 30th April 2013 dismissing the Claimant's suit for non-attendance. The Application was supported by grounds on the face of the Motion as well as the affidavit of the Claimant's advocate sworn in support. In brief the affidavit deposed that the Claimant's counsel went to Court 2 instead of Court 4 where the case was listed for hearing as a result of "handwritten notes" on the cause list exhibited at the notice board. The Respondent was opposed to the Application and filed a Replying Affidavit on 19th May 2014. In the Replying Affidavit sworn by counsel for the Respondent it was deposed that the Claimant and his advocate were not in Court on 30th April 2013 when the matter came up for hearing. It was also deposed that the Claimant's counsel had not annexed the alleged Cause List with the handwritten notes to show the cause was in Court 2 and had that been the case even the Defendant's advocates would have been in Court 2 other than Court 4 where the matter was listed.
2. The Application was urged on 16th July 2014. Miss Ooko urged the Application and submitted that counsel for the Claimant was misled by handwritten notes on the cause list which stated that the case would be heard in Court no. 2 and on inquiry from the Clerk in Court 2 was told that the case was due to be heard in Court 4. She submitted that failure to attend Court on that day was not intentional but was a great oversight beyond the control of counsel as he had relied on the handwritten notes on the cause list. She stated that the Claimant is interested in pursuing the Claim and that it was not in the interest of justice were he to be punished for mistake or error on part of counsel. She relied on the case of **Lucy Bosire v Kehancha Division Land Dispute Tribunal [2013] eKLR** for the proposition that the discretion which the Court has in whether to set aside *ex parte* order is meant to ensure there is no hardship on account of excusable mistake or error.
3. Mr. Kimani for the Respondent was opposed and urged that the Court would be unwilling to punish a party for the innocent or inadvertent mistake. That must be proved. He submitted that the Claimant was not in Court whether in Court 2 or Court 4 and he has not sworn an affidavit to say so. Secondly that the said cause list containing the handwritten note had not been displayed to show the document misled either the advocate or the Claimant and no official of the Court had

written a letter or swore an affidavit that they altered the cause list and put in their own handwriting. He submitted that the advocate who held his brief went to the correct Court and if there was confusion it would have been to both not just one advocate.

4. Miss Ooko in her response stated that she agreed the failure to attend was a grave mistake and the advocate should have been diligent but mistake of counsel should not be meted out and if that is allowed it will affect the course of justice.
5. 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 it’s coercive power where that has obtained only by a failure to follow any of the rules of procedure” (emphasis mine)

6. 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 (as they then were) 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.
7. Clearly the law is not meant to shut out a party who commits an inadvertent mistake or error. In the case before the Court it is amply clear that the Claimant was neither in Court 2 or Court 4. No deposition has been made that he was present in any Court on that day ready for the case. It is stated that the advocate was misled by written notes on the cause list yet no cause list was attached to show the mistake. The Court is in agreement with submissions that if there was a mistake then it would have affected both parties and not just one. It is apparent that the failure to attend to the case was deliberate and not merely a mistake.
8. On the strength of the case of **Lucy Bosire v Kehancha Division Land Dispute Tribunal [2013]**

eKLR the discretion which the Court has in whether to set aside *ex parte* order or not is meant to ensure there is no hardship on account of excusable mistake or error. The justice of this case does not demonstrate any excusable mistake or error. In the premises the Court cannot exercise any discretion in favour of the Claimant. The Application dated 23rd May 2013 lacks merit and is dismissed with costs to the Respondent.

Orders accordingly.

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

NZIOKI WA MAKAU

JUDGE