



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 212 OF 2013

JACKLINE WAKESHOCLAIMANT

VERSUS

AROMA CAFERESPONDENT

RULING

INTRODUCTION

1. The Notice of Motion herein for consideration is dated 16/7/2014. It is brought by the respondent in the main suit (herein after called "the Applicant"). The Motion basically seeks for this courts direction to set aside, review or vary the judgment and the proceedings of this court and allow the respondent to defend the suit. It also seeks for the recalling of the claimant's witnesses for purposes of being cross-examined by the defence counsel. In exchange the respondent has offered to pay throw away costs to the claimant for the setting aside of the judgment. The Motion is supported by the affidavit sworn by Hanaerl Adini on 16/7/2014. The gist of the Motion and the support affidavit is that the applicants former counsel is to blame for the impugned judgment for failing to notify her about the hearing date and further for failing to attend the court to defend the applicants interest in the suit on 12/11/2013.
2. The claimant has opposed the Motion by her replying affidavit sworn on 22/7/2014. The gist of the reply is that the impugned judgment was properly and lawfully entered after the suit proceeded exparte on a date fixed by the counsel for the advocates for both parties. That after the exparte hearing the defence counsel filed written submissions urging the court to make final decision in favour of the applicant instead of applying for reopening of the case for defence case to be heard. The claimant deponed that there is no good ground for interfering with the impugned judgment because the applicants former counsel has not sworn any affidavit to justify the said interference with judgment, and also because there is no triable issue because there is no evidence that the applicant complied with Section 41 of the employment Act.
3. The Motion was disposed of by way of written submissions by the counsel on record for the two parties.

APPLICANT'S SUBMISSIONS

4. It is submitted for the applicant that she was not accorded an opportunity to cross examine the claimant and to tender her defence evidence to the court. It was further submitted that the applicant was never notified by her former counsel Merrs O.M. Robinson & Co. Advocates about the progress of the case or the hearing date. She further accuses her said counsel for not attending court personally but instead sending other counsel severally to hold his brief. She blames her said

- former counsel further for not being diligent defending the suit and not informing her of the hearing date or even the entry of judgment.
5. She cited Court of Appeal decision in **HAJI AHMED SHEIK H T/A HASA HAULIERS VS HIGHWAY CARRIES LTD** where the court held that in administration of justice, litigants should not suffer due to the mistakes and errors of his counsel. She also cited the case of **PAUL ASIN T/A ASIN SUPERMARKET VS PETER MUKEMBI [2013] e KLR** where the court cited with approval of the case of **PHILIP CHEMURUTO & ANOTHER vs AUGUSTINE KUBENDE (1982-88) KAR 103**, where Apolo J, held that a party should not be denied a chance of hearing his case heard on merits and unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs.
 6. The applicant has submitted that her defence raises a triable issue that is to say, that the claimant was never dismissed but she absconded work. According to the applicant the triable issue is the basis of the counter claim against the claimant.
 7. It is the applicant's further submissions that this court has an unfetted discretion to grant the orders sought in order to avoid hardship or injustice arising from adventure or mistake even through negligent provided the discretion is not used to aid in delaying the course of justice. According to the applicant, she is not delaying justice but praying for it . She believes that she will suffer substantial loss and prejudice unless the orders sought are granted.

CLAIMANT'S SUBMISSIONS

8. The claimant submitted that on 30/10/2013, the suit came up for hearing when the defence counsel sought adjournment and the suit was fixed for hearing on 12/11/2013 by consent of the counsel for the two parties. On the said hearing date, the claimant proceeded with her case in the absence of the applicant and her counsel and the trial was closed and parties directed to file written submissions. On 19/11/2013 the suit was mentioned to confirm filing of written submissions and a judgment date assigned to the case. According to the claimant the application is an afterthought because the respondent's counsel filed submissions after the exparte hearing without first challenging the exparte proceedings before the entry of judgment.
9. The claimant has further contended that the court struck out a similar application by the applicant on 27/7/2014 against which the applicant exercised her right of appeal by filing a Notice of Appeal which has not yet been disposed of. According to the claimant, after preferring an appeal against the ruling on the earlier application, the applicant ought not to have filed the present Motion until the conclusion of the appeal preferred. Consequently according to the claimant, the present Motion is incompetent and has the potential of causing conflicting decision from this court and the Court of Appeal with regard to the appeals. She cited Court of Appeal decision in **ORINGO & ANOTHER vs MUGALA [2005] e KLR 307** and **AFRICAN AIRLINES INTERNATIONAL LTD VS EASTERN & SOUTHERN AFRICAN TRADE& DEVELOPMENT BANK [PTA BANK] [2003] e KLR** where the court held that an application for review cannot be filed after an Appeal has been lodged, and even when it is filed before the appeal, once the appeal is heard, the review cannot proceed. In that respect, the claimant has submitted that the jurisdiction of this court to entertain review was automatically ousted by the filing of the appeal by the applicant before seeking review first.
10. As regards the negligence or mistake by the applicants former counsel, the claimant submitted that such cannot be visited on her. She cited several High Court decisions in which it was held that an advocate with instruction to act for his client has due authority to act as an agent in that matter and if he fails to carry out his principal's instructions, then the principal has to turn to the agent for remedy.
11. In addition the claimant submitted that when the former advocate filed submissions after the exparte hearing he did so with instructions because a counsel who appears for a client is presumed to be properly instructed by such client unless the contract is proved. No evidence was produced to prove that the advocate acted without instructions, according to the claimant. The claimant has also blamed the applicant for failing in his duty of following up his case with his former advocate to know its progress. She cited several decision of the high Court to support her contention including **HCCC 43 OF 1999 MICHAEL KAMAU GAKUNDI vs DAIMA BANK LTD and ANOTHER**

12. The claimant further argued that the applicant has not reached the threshold for reviewing a judgment. In addition, she submitted that there is no reasonable grounds shown to warrant setting aside of the judgment. According to the claimant, the applicant's case was presented by her counsel when he filed written submissions without challenging the *exparte* proceedings. She cited SHAH vs MBOGO (1969) EA to support her submissions that the applicant is required to prove that he was prevented to attend the trial by an accident, errors, inadvertence or mistake.
13. Lastly, the claimant submitted that the judgment should not be set aside because the defence on record does not raise any triable issue. According to the claimant, she was terminated without prior notice, and no disciplinary hearing was awarded to her. In addition, her salary was unilaterally reduced without her consent from ksh.15000 to ksh.10000 per month. She prayed for the Motion to be dismissed with costs.

ANALYSIS AND DETERMINATION

14. It is not in dispute that the suit was heard *exparte* on 12/11/2013 which date had been fixed by the consent of the counsel for the two parties. It is also not in dispute that after the said hearing the applicant's counsel filed written submissions urging the court to enter judgment in favour of the applicant. It is also not in dispute that it is the applicant's counsel who appeared in court without the claimant's counsel and fixed the date for judgment. It is also common knowledge that the applicant brought an earlier Notice of Motion dated 15/5/2014, seeking similar order to the ones in the present Motion, but the court struck it out for some legal incompetence on 27/6/2014. It is also factually correct that the applicant was dissatisfied with the said ruling and exercised her right of appeal by filing a Notice of Appeal on 7/7/2014. It is also not in dispute that after such exercise of the right to appeal, the applicant brought the present Motion on 17/7/2014.
15. The issues for determination in this ruling arising from the Motion, Applicants and submissions filed are:
 - (a) **whether the court lacks jurisdiction to determine the Motion.**
 - (b) **whether the Motion meets the threshold for review or setting aside a judgment.**
 - (c) **Whether the orders sought should issue.**

JURISDICTION

16. The claimant believes that this court lacks jurisdiction because first, the court made a decision in a similar Motion on 27/6/2014 against which the applicant has exercised her right to Appeal and as such the court is now *functus officio* on the present Motion. Secondly, the claimant believes that after preferring the said appeal, the applicant has no right to seek review or setting aside of the judgment because she is *estopped* from travelling the second road after filing appeal against the dismissal of the first application for review of the impugned judgment. The respondent has not responded to the said jurisdictional objection.
17. The court has carefully considered the submissions and the record and agrees with the claimant on the jurisdictional objection. It is true from the record that a Notice of Appeal was lodged on 7/7/2014 in respect of the ruling striking out the Motion dated 15/5/2014. It follows therefore that filing of such Notice of Appeal *per se* did bar the court from considering the present Motion for review and/or setting aside the judgment. The claimant is right in his contention that this court made a final decision on a similar Motion on 27/6/2014 and thereby became *functus officio* in that kind of Motion. The court's opinion on the foregoing proposition is that after it struck out the said similar Motion on 24/6/2014, the applicant had the option to file a fresh Motion or seek review of the said ruling and/or appeal against the ruling altogether. In this case the applicant chose the latter option.
18. The consequence of the said appeal was that it rendered any subsequent similar application preferred *resjudicata* over which this court lacked jurisdiction for being *functus officio*. The jurisdiction of the court can only therefore be revived if the appeal preferred against the ruling dated 27/6/2014 succeeds and this court directed by the appellate court to hear the Motion dated

15/5/2014 on the merits. Without that the court will only continue to sympathize with the respondent for the legal quagmire she has found herself in. It is not the duty of this court to apportion blame between the respondent and her advocates because that is not the dispute before the court.

19. In view of the foregoing finding that the court lacks jurisdiction, the court will not proceed to consider the merits of the present Motion.

DISPOSITION

20. For all the reasons stated above the notice of Motion dated 16/7/2014 is hereby struck out and all interim orders made thereunder recalled and set aside. Costs in the Motion to the claimant.

Orders accordingly.

Dated, signed and delivered this 17th October 2014

O.N. Makau

Judge