REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1013 OF 2013

JULIUS WAFULA CHEBI…… ……..CLAIMANT

VERSUS

GIBON AKIFUMA ……..……1ST RESPONDENT

EGAP SOLUTIONS LIMITED ……...2ND RESPONDENT

RULING

The Applicant/Respondent herein filed the application before me by way of Notice of Motion dated 8th and filed on 9th April, 2014. The application was filed together with the supporting affidavit of Emmanuel Mwagambo under certificate of urgency. The application is made under Section 16 of Industrial Court Act, Rules 22, 27(1) and 32 of Industrial Court (Procedure) Rules and al enabling provisions of the law. The Applicant seeks the following orders:

1. This Honourable Court be pleased to re-open the case and set a fresh a hearing date for the matter inter-partes.

2. This Honourable Court do set aside the judgment of 14th March 2014 and all consequential orders thereto

3. This Honourable Court be pleased to stay execution of this matter.

4. The Costs of this application be provided for.

The application is grounded on the following:

1. Due to an inadvertent mistake in the offices of the Counsel for the Respondents, Counsel for the Respondents erroneously listed the matter as coming up for hearing on 28th February instead of 28th Janaury, 2014.

2. As a result Counsel for the Respondents failed to attend the hearing of the said application on the said date of 28th Janaury, 2014.

3. The Respondents moved the court on 12th March before delivery of judgment and the court declined to hear the application.

4. The Court ordered the matter to proceed ex parte and judgment was delivered on 14th March

2014.

5. The failure to attend was not deliberate on the part of the Respondents nor was it intended to delay the course of justice herein and was inadvertent.

6. The Respondents are still fully desirous of pursuing this matter and have only been held back by the unfortunate and inadvertent mistake of their advocates, full responsibility of which must lie with the advocates and not the Respondents.

7. The Respondents have a very strong an arguable defence against the Claimant herein as evidenced by the Memorandum of Reply dated 22nd July 2013. Specifically, the substance of the Memorandum of Reply is that the Claimant was engaged as an independent contractor and is therefore not entitled to redundancy dues as he was not an employee. Therefore, in order for the Court to reach a fair and correct decision between the parties, it would be prudent to have the matter heard inter partes so that the parties may present their evidence.

8. It is just and fair in the circumstances that the Respondents should not be adversely prejudiced by the honest and inadvertent misstate.

9. It is therefore necessary in the interests of justice and so as to bring out the real issues for determination herein that this Honourable Court does stay execution and set aside its judgment of 14th March 2014 and fix a fresh hearing date inter partes.

10. Accordingly there is sufficient reason to stay execution, review and set aside the said judgment of 14th March 2014 and order a fresh hearing inter partes.

The affidavit in support of the application substantially expounds on the grounds in support of the application.

The Claimant opposed the application and filed a replying affidavit of Betty Rashid Advocates, Counsel for the Claimant. She states that the claimant was served with hearing notice and acknowledged service, that it was incumbent upon Applicants Counsel to note the hearing date and attend court and that negligence of Respondent's Counsel should not be used to make the Claimant suffer. She depones that the Respondent's remedy lies in a claim against its lawyer for professional negligence. She further depones that litigation should be brought to an end, that negligence of the lawyer is not sufficient reason to set aside a judgment that was properly entered, that the Respondent has not offered to deposit the decretal sum in court and to pay thrown away costs. She urges the court to dismiss the application.

The application was initially heard by the duty Judge who certified it as urgent and granted temporary stay of execution. When the application came up for hearing inter-parties on 20th May 2014 the parties agreed to proceed by way of written submissions.

I have considered the submissions filed by the parties together with the pleadings and the appendices thereto as well as authorities that the court has been referred to.

The Applicant referred the court to the following authorities:

1. Yamko Yadpaz Industries Limited V Kalka flowers Limited (2013) eKLR

2. Didovsky Igor & 11 others v International Bulk Carrier Spa & 2 others (2013) eKLR

3. Maina v Mugiria (1983) KLR 78

4. Patel versus E.A Cargo Handling Services (1974) EA 75

5. Jesse Kimani versus McConnel (1966) EA 547

6. Shah – Vs-Mbogo (1967) EA 116

7. CMC Holdings Ltd – vs- Nzioki (2004) eKLR

8. Adolf Gitonga – VS- Mwangi Thiongo (1982-1988) 1 KAR 1027

9. K-Rep Bank Limited v Inclusive Agencies Msa Ltd & 2 others (2013) eKLR

10. Baraka Apparel EPZ (K) Ltd – vs- Rose Mbula Ojwang T/A Faida 2002 Caterers (2007) eKLR

11. Didovsky Igor & 11 others v International Bulk Carrier Spa & 2 others (2013) eKLR

12. CFC Stanbic Limited v John Maina Githaiga & another (2013) eKLR

13. Ahmed V commission of Customs & Excise, (2000) 2 EA 93

14. Housing Finance Company of Kenya V Richard Ndere Johnson, (2010) eKLR

15. Chmwolo & another V Kubendi, (1986) KLR 492

16. Lee G. Muthoga V Habib Zurich Finance (K) Ltd & another, civil application No. Nai 236 of 2009

17. Julius Kamau Kithaka v Waruguru Kithaka Nyaga & Another & 2 others (2013) eKLR

18. Shabir din v Ram Parkash Anand (1955) 22 EACA 48

19. Kanji Naran v Vemji (1954) 21 EACA 20)

20. Jesse Kimani versus McConnel (1966) EA 547

My comment on the list is that it is what I would term as overkill. The Respondent did not have to refer to all the authorities cited.

The claimant did not refer to any authorities.

The principles of setting aside ex-parte judgments are not expressly provided for in the Industrial Court Act or Industrial Court (Procedure) Rules. However, the provisions of Section 16 of the Act and Rule 32 of the Rules indirectly provide for setting aside by way of review. The Civil Procedure Act however provides for setting aside of judgments entered as a consequence of non attendance of the defendant on the hearing date at Order 12 Rule 7 which reads as follows:

> **"Where under this order judgment has been entered or the suit has been dismissed, the court on application may set aside or vary the judgment or order upon such terms as may be just".**

Courts have expounded on the provisions of the law by setting principles for setting aside ex-parte judgments. In the case of **REMCO LIMITED V. MISTRY JADVA PARBAT & CO. LTD & 2 others Milimani HCCC No. 171 of 2001,** Justice Ringera (as he then was) had this to say:

"First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside <u>ex-debito justitiae</u> (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process

itself. Secondly, if the default judgment is a regular one, the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA Rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the court is to do justice between the parties: PATEL V. E.A. CARGO HANDLING SERVICES LTD (1974) E.A. 75. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: SHAH V. MBOGO (1967) E.A. 116 and PITHON WAWERU MAINA V. THUKU MUGIRIA (1982-18) IKAR 171. In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective merits of the parties. The question as to whether the affected party can reasonably be compensated buy costs for any delay occasioned by the setting aside of the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court: SEBEI DISTRICT ADMINISTRATION V.S GASYALI (1968) E.A. 200".

In the case of **PHILLIP CHEMWOLO & ANOTHER V. AUGUSTINE KUBENDE (1982-88 1 KAR 1036**, Apaloo, J.A. enunciated the broad equitable approach in these sort of cases as follows:

> **" I think a distinguished equity Judge has said: 'Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits'.**
>
> **I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".**

Again in the case of **MAINA V. MURIUKI (1984) KLR 407**, Justice O'Kubasu stated as follows:

"the court has a very wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. I would add that before the court can set aside the judgment it must be satisfied there is a valid defence. In the present suit a defence was filed and even third party notice issued and a defence filed by the third party. This discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".

From the facts of this case, it is clear that there were serious lapses in the Respondent's Advocates office not once, but twice, if we have to believe what is deponed in the affidavit filed in support of the application. It is admitted that the counsel's office misdiarized the date of hearing of the case as 28th February 2014 instead of 28th Janaury 2014. It is further deponed in the affidavit that a hearing notice was served on counsel and again out of inadvertence, filed in a different file. Such was indeed extreme negligence on the part of the Advocate.

However as stated in PATEL V E.A. CARGO HANDLING SERVICES (1974) A 75, *" 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 to fetter the wide discretion given it by the rules".*

Again as stated in Shah v. Mbogo, the discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. The only time the courts will not exercise this discretion is where three is deliberate intention to obstruct or delay the course of justice.

However, the courts will only set aside ex-parte judgment where there is a defence which raises bona fide

triable issues. This was the decision of the court in **BARAKA APPAREL EPZ (K) LTD V. ROSE OJWANG T/A FAIDA 2002 CATERER (2007) eKLR.**

I have looked at the defence herein and I am satisfied that it raises triable issues such that the Respondents would be prejudiced if they are not allowed to present their defence.

Mrs. Rashid on behalf of the claimant stated that the Respondent has not offered to deposit the decretal sum in court. With due respect to counsel, where an application is to set aside judgment, there cannot be an order for deposit of decretal sum as there will be no decretal sum to be deposited once the judgment is set aside.

I however agree with Mrs. Rashid on payment of thrown away costs. The Claimant's expenses utilized in the prosecution of the case proposed to be set aside by the Respondent must be borne by the person who caused the circumstances leading to the setting aside. The claimant did not contribute to these circumstances and should not suffer the burden of thrown away expenses.

For the foregoing reasons, the Respondent's application is allowed and the judgment entered against the Respondents herein on 14th March 2013 is set aside together with consequential orders if any. The Respondent is granted leave to recall and cross examine the claimant. The Respondents will however pay to the Claimant thrown away costs in the sum of Kshs.20,000/= within 30 days from the date of this ruling failing which these orders will automatically lapse.

Before I leave this matter, I must express my disappointment in the Advocates for the Respondent at the level of negligence demonstrated in this case. Not only did they cause the present circumstances through negligence, but have even in the pleadings herein referred to me as Justice Maureen Odero. Such level of recklessness must be condemned in the strongest possible terms. The Advocates are directed to apologize to me herein in writing as well as to Justice Maureen Odero with a copy to the Chief Justice and the Chairman of the Law Society of Kenya within 14 days from the date of this ruling.

Orders accordingly.

Dated in open court this 16th day of October, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE