



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 476 OF 2012

JOHN OGUTU RAGAMACLAIMANT

VERSUS

ELIMU CO-OPERATIVE SAVINGS & CREDIT

SOCIETY LIMITEDRESPONDENT

RULING

The applicant, John Ogutu Ragama, filed this application dated 5th August 2013 by Notice of Motion seeking for orders that this court should set aside the orders made on 31st May 2013 where the court dismissed the claimant's claim and entered judgment and that the proceeding of 4th May 2013 and the subsequent orders be set aside so that the claim can be reinstated for hearing inter parties. This application is based on the annexed affidavits of Fred Adhoch and John Ogutu Ragama, the Advocate and Claimants respectively. The respondent, through their advocates Leila Abdul Latif filed the Replying Affidavit dated 19th August 2013 in opposition to the application in its entirety. The claimant/applicant filed a Further Affidavit dated 20th August 2013.

The application herein is based on the grounds that the claimant's claim was dismissed on the 12th February 2013 an judgementm entered for the respondent as against the claimant on 31st May 2013 that the claimant and his advocates were not aware of the hearing date as no notice of hearing was served upon them. The proceedings of 4th may 2013 culminating to a judgement delivered on 31st May 2013 were done ex parte, no notice having been served upon the claimant and the dismissal of the claimant claim was irregular and done without due process as his right to be heard was infringed. The claimant is now greatly prejudiced by the order issued on 12th February 2013 and the consequential judgement on 31st may 2013 against him as he has a meritorious claim and defence against the respondent's counter-claim and it is only fair and just that the application be grante3d.

In support of the application, Fred Adhoch states that, as the advocate for the claimant, he was instructed in August 2012 to appear in this matter for the claimant where he filed the necessary pleadings and on 16th October 2012 the matter was adjourned to allow the claimant file a supplementary list of documents and take fresh hearing dates at the registry and thereafter his clerk David Odialo tried to trace the file at the registry for purposes of filing a hearing date but could not be traced. On 17th July 2013 he received a letter from the respondent's advocates notifying him that judgment had been entered in favour of the respondent in terms of the decree and annexed to the letter was a draft decree for their approval.

The letter dated 27th July 2013 was sent by post and received in their offices on 17th July 2013 and Alex Inyangu Advocate was asked to peruse the court file to ascertain as to what happened and he found that a

mention notice dated 12th February 2013 had allegedly been sent to the claimant and as a result of non-attendance of court his claim was dismissed and hearing proceeded on 4th May 2013 on the counter-claim and judgement delivered on 31st May 2013. The claimant was never served with the Mention Notice for 12th February 2013 or 4th May 2013 when the matter came for mention and hearing and thus the hearing was ex-parte, prejudiced the claimant as to his right to be heard.

He further stated that, the ex-parte proceedings of 12th February 2013 and 4th May 2013 and the consequential judgement of 31st May 2013 are irregular and same should be set aside noting that the claimant has a meritorious claim and should be heard and no prejudice will be suffered by the respondent.

In the affidavit of John Ogutu Ragama, he states that his claim is based on a labour dispute with the respondent and he thus instructed his advocates to file this claim and in March 2012 when he asked his advocates about his matter, he was told that they had attempted to get the court file at the registry but could not trace the file and in July 2013 his advocates informed him that his matter had been dismissed and judgement entered for the respondent as in the counter-claim. He is greatly prejudiced by the orders made herein as he was not heard and his claim considered on merit and the circumstances resulting to the dismissal of his claim for non-attendance of court was not deliberate. That the application should be allowed.

In the Replying Affidavit, the respondent Advocates states that the application before court is by an indolent applicant, made in bad faith, an abuse of the court process and without merit as it is an effort to open trial after failing and neglecting to attend court where the claim was dismissed on 11th February 2013, the same having been brought outside the limitation period as per the Employment Act. That what the claimant should have done was to apply to file his claim out of time but opted to file the current claim to afflict the respondent with hardship who being a small entity with a mandate to care for its members cannot afford to have financial deficits.

The applicant has not given reason as to why the application is not brought under the Industrial Court Procedure Rules and instead relied on the Civil Procedure Act and Rules. The provisions relied upon under Order 12 Rule 7 of the Civil Procedure Rules has no relevance or link to the orders made by this Court as the judgement herein was made in accordance to Rule 27 of the Industrial Court procedure Rules where the practice of the court is to begin trial or listen to mentions after first confirming that all parties to the suit are present before it and where a party is absent or is not in attendance then proceeds upon proof of service. The court record herein does indicate this procedure as having been followed.

The claimant was served with a mention notice and a hearing notice by registered post after the claimant failed to set down the claim for hearing and in the interests of justice there must be an end to litigation and once the claim was dismissed, the court proceeded to hear the counter-claim and the assertion by the claimant that any prejudice suffered by the respondent will be cured by compensation is not right as what he should offer is a deposit of security of costs with the court should the court set aside its orders made herein. That from the affidavits to the application, the claimant received the registered mail with the drat decree but not the registered mail with the mention notice and the hearing notice and there is no evidence that these mails were not received and in the circumstances the application should be dismissed.

In the Further Affidavit, Fred Adhoch states that there was no application to have the claim dismissed for being outside the limitation period and by that, then the counter-claim from the respondent should not stand if this rule applies to the claim. that on 12th February 2013 was by the respondent to take directions but since the claimant was not in court as he never received the mention notice, the claimant in not aware what direction were given but judgement was entered and matter set for formal proof of the counter-claim, but the court failed to consider the response to the counter-claim as filed by the claimant. That the Civil Procedure Act and the Rules are incorporated into the Rules of the Industrial Court

Article 165 (5) of the Constitution provides for the establishment of this Court (the Labour Relations Court) to hear and determine employment and labour relations disputes. The Employment Act sets out the fundamental rights at work, the Labour Relations Act set out the Court as the entity with the original

mandate to resolve labour disputes and the Industrial Court Act set out the conceptual framework for the Court. Under these provisions, there are established the Industrial Court (Procedure) Rules (the Rules) to facilitate access to justice for all persons and corporate desirous of employing the mandate of the Court as individual litigants, Unions, employers or associations for employees or employers or any party aggrieved in a labour dispute. These Rules are formulated under the mandate given to this Court, not as an auxiliary matter but a core and central functioning of this Court. Otherwise the Rules would have been ignored had the intentions of Parliament in establishing the Court found it necessary that those attending at the Court would be well served by the Civil Procedure Act and the Rules thereto. These Rules for the Industrial Court are therefore not in futility. They have a core function and must be used by all parties appearing before this Court. In the absence of any clear provisions from the Rules as regards any matter, then a party is then allowed to rely on any other written law for purposes of meeting the ends of justice, otherwise, the Rules are the primary procedure provisions for this Court.

On the substantive issues raised by the applicant, I note where a party is seeking to set aside orders of the Court, they must have good grounds the basis of which the Court can determine the same and use its discretion as requested by the Applicant. The Court discretion must be based on fair reason and for purposes of meeting the ends of justice.

Parties come to court to assert their rights. a party who files a claim and does not pursue it for hearing or for purposes of having it concluded, cannot be said to be a party keen to assert his rights.

From the proceedings herein, I note that the claimant on 21st March 2012 filed this claim in Court. On 12th June 2012, the respondent filed their defence and counter-claim. Hearing was scheduled for the 16th October 2012 when Ingangu noting that the respondent in their counter-claim were raising a preliminary objection on the issue of limitations of the claim, sought for more time to put in supplementary documents, where the court gave leave and time for the claimant to do so and directed that the parties take hearing dates at the registry.

No further documents to this end were filed. The preliminary issue raised by the respondent had no response until this point.

The respondent moved the court by setting this matter for mention on 12th February 2013 for directions where the court noted that the claimant had not used the leave granted to file further documents and there was no appearance for purposes of taking directions. The court was satisfied from the affidavit of Mark Okinda sworn on 8th February 2013 that service of the mention notice had been served upon the claimant's advocates and thus proceeded to give directions by dismissing the claimant's suit and set the hearing date for the respondent's counter-claim. Further to the Court directions, the respondent further gave hearing notice upon the claimant and the court being satisfied with the averments in the affidavit of Mark Okinda dated 10th May 2013, proceeded to take the evidence of the respondent with regard to the counter-claim against the claimant.

Was the claimant served with the mention Notice and the hearing Notice? It has not been denied that the registered mail to the claimant was to the wrong address nor has it been challenged that this is indeed their address for purposes of effecting service. Service by registered mail and or post is an accepted mode of service. This was indeed confirmed by the claimant and their advocate when they acknowledged that they deed receive the draft decree but asserted that for some strange reasons, they never received the two previous notices for mention and hearing though served through the same mode and certificates of posting attached to the respondent affidavit shown in evidence. It has not been denied that this was a wrong address, only that the mails never reached the claimant.

As much as the mistakes of an advocate should not be visited upon their clients, advocates attend court upon instructions from their clients. I take it then, when the claimant in his affidavit in support of the application notes at paragraph 4 that in March 2012 he instructed his advocates to file this matter and he also followed up only to learn that the file could not be traced at the registry is a farfetched averment. This was in March 2012, the same time when this claim was filed. It therefore goes that since the claimant

filed this claim, he has never bothered to pursue it for hearing or for anything else, he filed, sat back and waited since he was told the file could not be traced at the court registry. This is not what a party keen on pursuing his rights does. A party keen on getting his rights protected acts vigilantly, will seek advice from his advocates, write to the Court to have their file traced and even where a file is lost, misplaced or cannot be traced for whatever reasons, a party is allow to reconstruct that file and have the same placed for directions, mention or hearing. This is not what the claimant did. Since March 2012, he did nothing even when he knew or ought to know that there was a counter-claim against him and the respondent would not rest until their counter-claim was heard.

Not surprising then, even after the claimant was granted leave to put in supplementary document on 16th October 2012, there was no action until this application was filed. The claimant did not pursue his claim since March 2012. He does not indicate that he sought the advice of his advocates after this time. They could therefore not proceed as the claimant did nothing in this case since March 2012.

To grant the orders sought herein will be a travesty of justice. No good basis has been laid out as to why this court should come to the aid of an indolent litigant and re-start the hearing.

I will therefore dismiss the application dated 5th August 2013. Costs will be awarded to the respondent.

Delivered in open court, this 3rd day of September 2013.

M. Mbaru

Judge