REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 939 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 31st May, 2017)

PAUL ODHIAMBO OSWAGO……CLAIMANT

VERSUS

MOLYN CREDIT LIMITED …… RESPONDENT

RULING

1. The Application before Court is dated 7th June 2016, where the Respondent/Applicant seeks for Orders:

1. That this Application be certified urgent and fit to be heard forthwith.

2. That service of this Application on the Claimant be dispensed with in the first instance.

3. That the exparte proceedings of 20th April, 2016, and consequential orders thereof be set aside and/or vacated and the suit herein be heard interparties.

4. The costs of this application be provided for.

2. The Application is premised on the grounds that:

1. This matter was supposed to come up for hearing on 20th April, 2016, but the same did not proceed following a notice that the Employment & Labour Relations Court was conducting a service week and only a few listed matter would be heard to the exclusion of this matter.

2. On 20th April, 2016, without the knowledge of the Respondent, the file was taken before the Court and orders given that the parties file their respective submissions without a hearing.

3. The Claimant filed and served their submissions, but the Respondent is unable to do so without hearing of the suit as the same will be prejudicial to the Respondent's case.

4. The matter is coming upon 9th June, 2016, to confirm whether the Respondent has filed its submissions and unless this Honorable court stay proceedings and Orders of 20th April, 2016,

and order that the matter be set down for hearing, the case will be determined without the Respondent being accorded the opportunity to present their case diligently.

5. It is in the interest of justice and fairness that this Honourable court grants the Orders as prayed.

3. The Application is supported by the Affidavit of Mutundu Wallace Chege wherein he restates the grounds on the face of the application and adds that they do not know how the matter was listed on 20.4.2016 having been advised by the Court that the matter would not be proceeding.

4. That the matter was mentioned on 18.5.2016, to confirm filing of written submissions which the Respondent had not done and as such for more time to do so. That they have been unable to file written submissions as it has become apparent that they would not be able to do so without having a hearing.

5. The Respondent state that there are issues they would need to cross-examine the Claimant on before they can file written submissions. That if the Application is not allowed the Applicant stands to suffer irreparable damage.

6. The Claimant has opposed the application through his Advocate who has filed a Replying Affidavit and states that the matter had been listed by the Court *suo moto for* accelerated hearing and closure. That the Claimant had notice of the said service week but failed to attend on the scheduled date and are therefore making a mockery of the Court.

7. The matter was duly listed before Honourable D.K.N. Marete on 20.4.2016 on which date the Claimant was ready to proceed and close his case. That the Respondent did not attend to cross examine the Claimant nor did they avail any witnesses despite having been served with the hearing notices.

8. That at the said hearing the Claimant adopted the substance of the case as contained in the Amended Memorandum of claim and directions were given that the Claimant files closing submissions with leave also being granted to the Respondent to file closing submissions, if so minded.

9. That the Respondent/Applicant were served with Court Order thirty four (34) days prior to filing this application and therefore there is inordinate delay on the Applicant's part in bringing this application.

10. Further that when the matter came before Hon. D.K.N.Marete on 18.5.2016 the Respondent did not raise any objection to the directions of filing submissions and as such the Application is an afterthought. The Claimant prays for the application to be dismissed with costs.

11. The Applicant in submissions states that the issues in the suit cannot be canvassed in submissions and requires cross-examination of witnesses so as to allow the Court to deliver justice. They state that without a hearing the Applicant will be greatly prejudiced as the Respondent will not be able to recover money that was inappropriately managed by the Respondent.

12. They state that there is sufficient cause for the Orders sought to be granted. They rely on the case of **Wachira Karani vs. Bildad Wachira (2016) eKLR** ; where it was held:

"Once the Defendant satisfies the Court on whether, the Court is under a duty to grant the application and make the Order setting aside the ex parte decree, subject to any conditions the Court may deem fit. However, what constitutes 'sufficient cause' to prevent a Defendant from appearing in Court and what would be 'fit conditions' for the Court to impose when granting

such an Order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant to give the advocate due instructions."

13. The Applicant further submits that there is sufficient cause to allow the prayers sought. They rely on the case of **Savings & Loan Kenya Limited vs. Onyancha Bwomote (2014)eKLR** where it was stated:

"As for sufficient cause, in our view, sufficient cause means no more than reason enough that explains or excuses the applicant's default. The Applicant's counsel has candidly explained the blunders that caused him to miss the Court date, there is no dearth of authority on the approach taken by our Courts where a mistake is involved. In CMC Holdings Ltd Vs. James Mumo Nzioka (2004) KLR 173 this Court stated as follows regarding mistakes in the context of applications to set aside ex parte orders:

The discretion that a Court of law has, in deciding whether or not to set aside e parte order such as before us 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. It would in our mind not be a 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."

14. The Applicant prays for the application to be allowed as prayed.

15. The Claimant/Respondent on the other hand submits that the failure to attend Court on the date directions to file submissions were given is inexcusable. They state that the principles in determining whether due process was followed in listing a matter for determination in Judicial Service Week were articulated by Radido J in **Dennis Nyabenge vs. National Oil Corporation of Kenya Ltd ELRC No. 1379 of 2013** as:

a. Whether Deputy Registrar duly notified the public of the Judicial Service week;

b. Whether hearing notices were sent out to litigants or their advocates.

16. The above cited criterion was followed and as such the Respondent/Applicant cannot fall back on mistake as a reason for allowing the prayers sought.

17. The Claimant also submits that the right for the Respondent was satisfied the moment the Respondent were availed a reasonable opportunity to express themselves in regards to the allegations raised. Failure by a party to take up an opportunity to be heard does not lead to a finding that a party was not accorded the right to be heard. They cite the case of **Kahiro Kimani vs. Fatuma Abdalla, Malindi CA No. 83 of 2015** to buttress this position.

18. The Claimant submits that the Applicant has not established a reason why the application should be allowed and the same should be dismissed with costs.

19. I have considered submissions of the parties. On 20th April 2016, indeed this Court had its Service Week. The matters listed for hearing were set out in the Court's Cause List and posted on the Judiciary website. Cause No. 939/2012 – Paul Odhiambo vs. Molyn Credit Limited was listed before Hon. Justice Njagi D. K. Marete on 20th April 2016. The Cause List is attached as page 16 of this application.

20. On 20th April 2016, this file was placed before Hon. J. Marete as posted and he proceeded to hear the matter in the presence of the Claimant's Counsel one Okoth. There was no appearance for the Respondent. The Hon. Judge ordered the case to proceed through written submissions.

21. On 18/5/2016, the Claimant and Respondent's Counsel appeared before me and Respondent sought 7 days to put in his submissions. The matter was placed on 9.6.2016 to confirm compliance but the Respondent instead chose to file this application.

22. Whereas the Applicants have indicated in their affidavit (paragraph 2) that this matter was never listed for hearing on 20th April, 2016, this Court finds that this is not true as the case was listed for hearing as per their own Appendix MWC01, the week's cause list.

23. A right to be heard is a fundamental right under our Constitution and a rule of natural justice. This envisages that a man should not be condemned unheard. What then happens when a litigant deliberately fails to attend Court and proceeds to move the said Court on an averment laced with falsehoods".

24. The Applicants have submitted that they had sufficient reasons to miss the hearing of this cause and have cited various case law (see **Wachira Karani vs. Bildad Wachira (2016) eKLR, and CA'S Nchapai Leiyangu vs. IEBC & 2 others** where the CA stated as follows:

"we agree with the noble principles which go further to establish that the Court's discretion to set aside exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice".

25. In this case I note that this is an old case filed in Court in 2012. The Claimant's evidence was taken on 10th October 2012. Any other attempt to proceed with the hearing didn't bear any fruit until the Court decided to list this case for hearing during the service week of April 2016. The parties were duly notified and the same was posted on the Court's Cause List.

26. This case has taken a considerable length of time to be disposed off and the delay cannot be condoned by Court any further. Given the history of the case where, both parties contributed to its delay, I will indulge the Applicants and have the case proceed on merit on condition that the Applicants pay the Claimants Kshs.20,000/- as thrown away costs before the hearing of this case.

27. The case be set down for hearing within 60 days.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kanyiri holding brief for Chege for Applicant – Present

Okoth for Claimant Respondent – Present