



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 622 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

NIRAJ DHARMADHIKARI.....CLAIMANT

VERSUS

PROFESSIONAL MEDIA AFRICA LIMITED.....RESPONDENT

RULING

The application before me for determination is dated 9th October 2017. It is premised on Order 12 Rules 1, 3 and 7, Order 9 Rules 9 and 10, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1, 1A and 3A of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks the following orders –

1. That this application be certified as urgent and heard ex parte at first.
2. That this court be pleased to set aside the ex parte orders issued herein on 3rd October 2017 dismissing this case for nonattendance by the claimant/applicant, and thereafter reinstate the case.
3. That the costs of this application be paid by the respondent.

The application is supported by the grounds on the face thereof and the affidavit of PERMINUS OMBABA, counsel for the claimant.

The respondent opposes the application and has filed the following grounds of opposition –

1. That the application does not satisfy the requisite criteria for setting aside court orders.
2. That the court record clearly indicates that the date was given in court in the presence of the claimant/applicant’s counsel and therefore the alleged mistake on dates is inexcusable.
3. That the court record clearly indicates that the claimant was not ready to prosecute the matter on the hearing date as he had not filed his witness statements, list and bundle of documents as required under the law and the non-attendance of court on the hearing date corroborates this position.
4. That application herein is an abuse of court and is for dismissal with costs.

The application was disposed of by way of written submission.

Applicant's Case

In the affidavit supporting the application, counsel for the applicant who is the claimant in the suit states that he was in court on 12th June 2017 when the hearing date was taken. He however recorded the hearing date as 30th October 2017 instead of 3rd October 2017. He has produced a copy of the relevant pages of his diary. He states that the claimant has a good case and should be allowed to present the case on the merits, that an error of counsel should not be visited on the client, that the respondent does not stand to suffer any harm or prejudice and any inconveniences can be compensated with costs. That on the other hand, the claimant stands to suffer immeasurably if the orders sought herein are not granted.

It is further deposed that the parties held discussions and agreed on key issues with only a few issues outstanding for determination by the court.

In the submissions the applicant relies on the case of **PROFESSOR MWANGI S. KIMENYI -V- THE ATTORNEY GENERAL & ANOTHER** in which Gikonyo J. set out guidelines for reinstatement of a suit as follows –

"Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following principles;

- 1) *Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
- 2) *whether the delay is been intentional and contumelious;*
- 3) *what prejudice will the dismissal occasion to the plaintiff;"*

He submits that this application was brought without delay, that counsel for the applicant learned about the dismissal of the suit on 7th October 2017 when counsel for the respondent went to the claimant's premises to execute the court orders.

The applicant further submits that the failure to attend court was a mistake of counsel, which should not be visited on his client, relying on the case of **PITHON WAWERU MAINA -V- THUKA MUGIRIA** and the case of **SHAH -V- MBOGO** in which the court stated –

"It is unfortunate that advocates' sins and omissions are sometimes visited on their clients, who are left without the remedy they sought, but to sue the advocate for professional negligence, but where a litigant shows that his default has been due to the party's advocate's mistake, in an application of this nature unless injustice would be occasioned to the other party the court should consider the applicant's case with broad understanding."

The applicant further urged the court to apply the principles outlined in the case of **PITHON WAWERU MAINA -V- THUKA MUGIRIA** as follows–

"The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are: [...], this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

It is submitted that the applicant has shown interest in pursuing this case by bringing this application without delay, that the claimant cooperated with the respondent at the time of execution and handed over to the respondent all the equipment and appliances as ordered without resistance.

Respondent's Case

The respondent submits that at the time of dismissal of the suit for nonattendance the applicant was not ready to prosecute the suit as he had not filed his list and bundle of documents as well as witness statement and this application is intended to delay justice to the respondent, that Article 159(2)(a) and (b) of the Constitution provide that justice be done to all irrespective of status and without delay. That the overriding principle in Section 1A of the Civil Procedure Act is to facilitate the fast and expedient resolution of disputes. It is the respondent's submission that granting the application will delay justice. It is further submitted that on the date the hearing date was taken the applicant was present in court and was aware of the hearing date, that mistake of counsel did not prevent the applicant from attending court.

Determination

I have considered the application together with the grounds and affidavit in support thereof. I have further considered the grounds of opposition and the submissions filed by the parties together with the authorities cited.

The principles for reinstatement of a suit dismissed for nonattendance are well settled in judicial precedents as was stated by the Court of Appeal in **MAINA -V- MUGIRIA** as follows –

- a) 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.
- b) 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.
- c) The discretion is intended to be exercised judiciously to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
- d) To deny the subject a hearing should be the last resort of a court.
- e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily or idiosyncratically
- f) Whether a litigant showed that his default has been due to the advocate's mistake, the court should consider the applicant's case with broad understanding.

The counsel for the applicant has deposed that he made a mistake by recording 30th October instead of 3rd October as the hearing date. He has presented copies of his diary for both 3rd and 30th October 2017.

I have further noticed from the record that in the further affidavit of MANISH CHANDRAKANT KANJI (GALAIYA) sworn on 25th May 2017 and filed on the same day, he deposes at paragraph 7 as follows –

“That contrary to the said affidavit the Respondent/Applicant's Company has always been willing to pay the Claimant/Respondent's dues of Kshs.467,500/- but the Claimant/Applicant has refused to take the same.”

Should I not grant the applicant's application, he stands to lose money that has been admitted by the respondent. I have further noted that the application was brought without delay only seven days after dismissal of the suit and three days after the claimant's counsel learnt about the same.

I find that this is a good case for the exercise of the unfettered jurisdiction of this court with the result that the application succeeds.

Orders

Consequently, the ex parte orders of this court issued on 3rd October 2017 dismissing this case for nonattendance by the claimant/applicant are hereby set aside and the suit is reinstated. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE



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