



**Universal Engineering Systems Limited v Tulsi Construction Company Limited (Civil Appeal E535 of 2021) [2023] KEHC 26014 (KLR) (Civ) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E535 OF 2021**

**DAS MAJANJA, J**

**NOVEMBER 30, 2023**

**BETWEEN**

**UNIVERSAL ENGINEERING SYSTEMS LIMITED ..... APPELLANT**

**AND**

**TULSI CONSTRUCTION COMPANY LIMITED ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order of the Chief Magistrate's Court, Nairobi, Hon. P. N. Gesora, CM dated 6th March 2020 in Nairobi CMCC No. 1384 of 2017)*

**JUDGMENT**

1. This is an appeal from the Ruling and Order of the Subordinate Court dated 06.03.2020 allowing the Respondent's application dated 29.08.2019 seeking to set aside the Judgment dated 03.04.2019 and that the hearing start de novo.
2. By way of background, the Appellant, as Plaintiff, filed suit against the Respondent seeking Kshs. 15,589,948.00, interest and costs for breach of contract. The Court heard the matter and by the Judgment ordered the Respondent to pay the Kshs. 15,589,948.00, costs and interest.
3. The Respondent moved the Court by an application dated 26.08.2019 under Order 12 Rule 7 and Order 45 Rule 1 of the *Civil Procedure Rules* seeking to set aside the Judgment. The grounds upon which the Respondent relied upon were set out in the affidavit of its Managing Director, Suryakant B. Patel, sworn on 26.03.2019. He stated that he had not been alerted of the hearing date on the day the hearing proceeded. That the Respondent had been assured that the parties were negotiating settlement hence the matter ought not have proceeded for hearing. That it had a good defence as it had even paid a substantial part of the Appellant's claim.



4. In response to the application, the Appellant relied on the replying affidavit of its Managing Director, Naureen Alam, sworn on 02.09.2019. It contended that the application was heard in the presence of both parties on 29.11.2018. The Appellant stated that prior to the hearing the parties attended the pre-trial case management conference and mentions for directions. Despite the attendances, the Respondent failed to file its documents. That failure to attend court was the Respondent's own fault hence therefore no basis to set aside the judgment.
5. In the Ruling dated 06.03.2020, the trial magistrate considered the evidence on record and proceeded to review and set aside the Judgment under Order 45(1) of the *Civil Procedure Rules* on the grounds of sufficient cause. It relied on the decision by the Court of Appeal of Tanzania in *Registered Trustees of Arch Diocese of Dar-es-Salaam & the Chairman Bunju Village Government & Others* Civil Appeal No. 147 of 2006 (UR) where the court stated that, "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant.
6. The trial magistrate allowed the application and concluded that, "It is clear that the applicant's previous counsel on record played a peripheral role in terms of defending this suit. Counsel never led evidence even in light of the facts that parties were negotiating and in fact there were monies that had been paid by the applicant to the respondent. That the same ought to be discounted ..... The defendant was under the honest belief that his counsel had protected its interest".
7. It is not disputed that this suit proceeded for hearing on 29.11.2018. On that day, the Appellant and the Respondent were duly represented by counsel. The Appellant's Managing Director testified and was cross-examined by counsel for the Respondent. The Respondent's counsel did not call its witness and closed its case. Thereafter, both the Appellant and Respondent filed their written submissions whereupon the court delivered the Judgment.
8. The question for consideration in this Appeal is whether the Subordinate Court exercised its discretion judicially. The appellate court will not interfere with the decision of the trial court unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been an injustice (see *Mbogo v Shab* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters* (Kenya) Ltd NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).
9. The issue is whether the trial court erred by holding that the fact that the parties were negotiating settlement and that the Respondent had made part payment which the Appellant had not disclosed amounted to sufficient cause to warrant review. It must be recalled that an Advocate on record is an agent for the client and has full instructions to deal with the matter. At the time of filing and prosecuting the suit, the firm of Waithaka & Associates Advocates had been acting for the Respondent hence there was no basis to conclude that the, "previous counsel on record played a peripheral role in terms of defending the suit .....". Mr. Waithaka attended the hearing and had the opportunity to put the Respondent's case including seeking an adjournment.
10. On the issue of part payment, I hold that the Respondent had an opportunity to call evidence on this issue. The Respondent raised the issue of part payment in its written submissions where at paragraph 25, it stated, "The Defendant has already made part payment of Ksh. 4,210,000/= which amount should be considered in the event the Court does not agree with the Defendant that the suit should be dismissed."



11. I hold that the judgment was regular and none of the issues raised by the Respondent implicated the trial. The issues raised by the Respondent were within its control and are not issues that would constitute sufficient cause under Order 45 Rule 1 of the *Civil Procedure Rules*.
12. I therefore allow the Appeal, set aside the Ruling dated 06.03.2020 and substitute it with an order dismissing the Respondent's application dated 26.08.2019 with costs. For avoidance of doubt, the Judgment dated 03.04.2019 is reinstated.
13. The Respondent shall pay costs of Kshs. 60,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**D. S. MAJANJA**

**JUDGE**

Mr Mwaniki instructed by Kisilu Wandati and Company Advocates for the Appellant.

Mr Miruka instructed by Muthoni, Miruka and Ochola Advocates for the Respondent.

