



Alyas Living Limited v Trident Architects International Limited (Miscellaneous Application 247 of 2019) [2022] KEHC 513 (KLR) (Commercial and Tax) (19 May 2022) (Ruling)

Neutral citation: [2022] KEHC 513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 247 OF 2019**

WA OKWANY, J

MAY 19, 2022

BETWEEN

ALYAS LIVING LIMITED APPLICANT

AND

TRIDENT ARCHITECTS INTERNATIONAL LIMITED RESPONDENT

RULING

1. Through the application dated November 13, 2020 and amended on September 30, 2021, the applicant seeks orders that: -
 - a. Spent.
 - b. THAT this Honourable Court be pleased to set aside the orders made herein on October 6, 2020 pending the hearing and determination of this Application interpartes.
 - c. THAT in the alternative to 2 above, this Honourable Court be pleased to stay the order made herein on October 6, 2020 pending the hearing and determination of this Application interpartes.
 - d. THAT this Honourable Court be pleased to grant the Applicant leave to file its Response to the Respondent's Application dated August 20, 2020 out of time.
 - e. THAT this Honourable Court be pleased to summon the process server who served the Respondent's Application dated August 20, 2020 upon the Applicant to be cross-examined by the Applicant's Advocates on his Affidavit of Service.
 - f. THAT the hearing of the Respondent's Application dated August 20, 2020 do start de novo.
 - g. THAT the costs of this Application be awarded to the Applicant.



2. The application is supported by the affidavit of the applicant's advocate Mr. Ramzan Alyas, and is premised on the grounds that:
 - a. THAT the Respondent herein used conniving tactics to serve the Applicants former Advocates on record with the Application dated August 20, 2020.
 - b. THAT whereas the arbitration proceedings were ongoing, the Respondent knowingly and mischievously slid the pleadings relating to the Application dated August 20, 2020 between other documents relating to the arbitration case and therefore all the documents were taken by the Applicant's former Advocates on record to be arbitration documents.
 - c. THAT due to this mischievous act, the Application proceeded undefended and led to the order dated October 6, 2020 hence the Applicant was condemned unheard.
 - d. THAT the Court lacked jurisdiction to entertain the Application dated August 20, 2020 by the Respondent since the dispute herein arose as a result of a contract dated May 3, 2017 and the parties agreed therein disputes were to be resolved in Arbitration.
 - e. THAT as per the order issued by this Honourable Court on July 16, 2020 but dated August 2, 2019, the parties herein had already commenced the Arbitration proceedings and the matter had been set down for hearing by the Arbitrator.
 - f. THAT the issues raised in the Respondent's Application dated 20th August 2020 by the Respondent had already been dealt with in the arbitration proceedings and the Arbitrator had made a ruling in regards to the issues raised therein hence the Application was Res Judicata.
 - g. THAT the Respondent is bound by the decision of the Arbitrator and the same has not been set aside by this Honourable Court.
 - h. THAT advocate purporting to be on record for the Respondent who filed the Application dated August 20, 2020 on behalf of the Respondent were not properly on record as they did not file a Notice of Change of Advocates and if they did, it was not served upon the Applicant herein.
 - i. THAT it is in the interest of justice that the said orders be set aside and the parties be allowed to pursue and continue with Arbitration to its logical conclusion.
 - j. THAT the Applicant will suffer grave prejudice and harm if it is not granted leave to defend the Respondent's Application dated August 20, 2020 as it will have been condemned unheard.
 - k. THAT even if the Respondent properly served the Application dated August 20, 2020 on the Applicant's former Advocates, which is denied, still it is the position of the law that a mistake of an advocate should not be visited on an innocent litigant. This position was acknowledged by the Court in the case of *Lucy Bosire v Kebanacha Division Land Dispute Tribunal & 2 others* [2013] eKLR wherein the Court noted thus: -
3. In this case the blame is placed at the doorsteps of the applicant's erstwhile advocates. It is true that where justice of the case mandates. mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.
4. The respondent opposed the application through the replying affidavit of its Director Mr. Godfrey Okoth Oluoch who avers that the Applicant's current Advocates are improperly on record as they did



not obtain the consent of the applicant's former advocates or the leave of the court to come on record after the delivery of the impugned ruling. He states that the applicant and their advocates were duly served with the Application dated August 20, 2020 but did not file any response.

5. The respondent's case is that the Application is an afterthought and the change of advocates, a misleading and futile attempt to cure the applicant's failure to file a response to the aforementioned Application. It is the respondent's case that there is no just cause to warrant the exercise of court's discretion to set aside the orders issued on October 6, 2020.
6. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.
7. The applicant's case is that the application dated 20th August 2020 was heard in its absence due to an alleged mischief on the part of the respondent. According to the applicant, the respondent mischievously sneaked in/hid the said application among the ongoing arbitration documents served on the applicant's former advocates thus making it difficult for the said advocates to identify them on time or at all.
8. The respondent, on the other hand, maintained that the pleadings in respect to the subject application were duly served on both the applicant and its advocate on record and that the applicant could therefore not attribute their failure to attend court on any fault on the part of the respondent.
9. A perusal of the court record reveals that indeed, the application dated 20th August 2020 was not opposed/defended and that on 6th October 2020, this court, differently constituted, allowed the said application as prayed upon satisfying itself that the applicant herein had been duly served with both the application and the hearing notice. I note that the applicant herein does not deny that its advocates were served with the said application. Indeed, the applicant concedes that its advocates were served with the application but goes ahead to claim that said application was hidden among the ongoing arbitration documents. It is clear that the applicant's said advocates received the subject application. This court is therefore at a loss as to how the applicant can claim that the said documents were hidden among other documents. To my mind, advocates are expected to peruse and act on all the documents served on them. In the instant case, the applicant's previous advocates on record have not explained why they did not respond to the application.
10. Be that as it may, and considering the cardinal principle of natural justice which dictates that no man should be condemned unheard, coupled with the adage that the mistakes of counsel should not be visited on the client, I find that this is a proper case for the court to exercise its discretion in favour of the applicant. I also note, with concern, the applicant's uncontroverted claim that the respondent has not taken any steps to resolve their dispute after the issuance of the orders of October 6, 2020 in its favour. It is also noteworthy that arbitral award is yet to be delivered. In sum, it would appear that the impugned orders of October 6, 2020 have had the effect of holding both the arbitral process and the applicant's construction project in limbo.
11. Having regard to the observations that I have made in this ruling, I find that it will serve the interest of justice to allow the amended application dated 30th September 2020 in the following terms: -
 - a. THAT this court's orders of October 6, 2020 are hereby set aside.
 - b. The Applicant is granted leave to file and serve its Response to the Respondent's Application dated August 20, 2020 within 7 days from the date of this ruling. The respondent is granted



corresponding leave to file and serve its further affidavit, if need be, within 3 days from the date of service with the replying affidavit.

- c. The application dated August 20, 2020 shall be canvassed by way of written submissions to be filed and exchanged before the next mention date.
- d. The costs of this application are awarded to the respondent.
- e. Mention on September 19, 2022 for further directions.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY 2022.

W. A. OKWANY

JUDGE

In the presence of:-

Mr. Shisanya Edwin for Applicant.

Ms Ndugire for Respondent.

Court Assistant- Sylvia

