Esteem Surveyors & Associates Limited v Tysons Limited & another (Civil Case E002 of 2024) [2025] KEHC 24 (KLR) (10 January 2025) (Ruling)

Neutral citation: [2025] KEHC 24 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E002 OF 2024

FR OLEL, J

JANUARY 10, 2025

BETWEEN

ESTEEM SURVEYORS & ASSOCIATES LIMITED ..... PLAINTIFF

AND

TYSONS LIMITED ..... 1ST DEFENDANT

KCB BANK LIMITED ..... 2ND DEFENDANT

RULING

A. Introduction

1. The Application for determination, before this court is a Notice of Motion application dated 04.09.2024 brought pursuant to the provisions of Section 3A of the *Civil Procedure Act*, & Order 10 rule 11, Order 51 (1) of the Civil Procedure Rules and seeks for the following orders;

    a. Spent

    b. Spent

    c. Spent

    d. That the Honourble court be pleased to set aside interlocutory judgment entered on 5th August 2024.

    e. That costs be provided for.

2. The Application is supported by the grounds stated on the face of the said Application and the Supporting Affidavit of one Lillian Sogo the head counsel-litigation of the 2nd Defendant/Applicant who deponed that on 2nd August 2024, the plaintiff's counsel requested for interlocutory judgment to be entered against them, and the same was irregularly endorsed on 5th August 2024. Prior to the said request being filed, the 1st defendant had filed an application dated 15th May 2024 seeking to have the

matter referred to Negotiations/Arbitration pursuant to clause 3.5 and 16.1 of the mutual contract signed between the parties.

3. The said application was yet to be heard and determined and thus it was irregular for the request for judgment to be endorsed contrary to provisions of section 6(1) of the *Arbitration Act*, which precluded the defendant from filing their statement of defence as that would amount to acknowledging the claim. Unless the said interlocutory judgment was set aside, they stood the risk of being condemned unheard and thus urged the court to exercise its unfettered discretion to grant the prayers sought.

4. The plaintiff opposed this Application, through the replying affidavit dated 21st September 2024, wherein he deponed that the said application was incompetent and constituted an abuse of the court process for the reason that the defendants were unreasonably and deliberately delaying the conclusion of this matter to frustrate him, despite acknowledging the fact that he had rendered his profession services and had not been paid, not even the initial deposit expressly agreed upon under the signed contract.

5. The defendants subsequently without notice proceeded to terminate the said contract and despite billing for the work already carried out valued at Kshs.120,000,000/=, they had stalled negotiations on settling him claim, forcing him to file this claim, which had been served upon the defendants on 19th April 2024. Despite both defendants entering appearance, they had failed to file their statement of defence with the time statutorily prescribed and thus they were justified to request for interlocutory judgment on 02.08.2024, which was subsequently endorsed on 05.08.2024.

6. The plaintiff further averred that the 2nd defendant could not hide their failure to file their statement of defense on the pending application dated 15.05.2024 for the reason that;

    a. They had failed to set down the said Application for hearing and/or directions within time and no supervening impossibility was advanced as to why they had slept on their rights.

    b. Both defendants had filed memorandum of Appearance on 24.04.2024 and 09.05.2024 respectively and failed to file the said application simultaneously as provided for in law, which was a fatal error.

    c. The issue raised in the suit was not one, which fell within the ambit of the arbitral clause, and even after submitting his profession bill for payment, which amount was to be determined by KCB's Auditors within 15 days, the defendant's had refused to make a determination on the same, and was still pending 730 days from the date of termination, which was proof of bad faith on their end.

7. For the above reasons and also due to the fact that the 2nd defendant had been indolent in their actions, the plaintiff urged the court to find that the said application constituted an abuse of the process of the court, was prejudicial to them and urged the court to find that the same was not merited.

8. The 1st defendant did not file any response to this Application and their counsel submitted orally before court that they were not opposed to the orders sought being granted.

Analysis & Determination

9. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and both set of submissions filed. The only issue which arise for determination is whether this court should set aside the interlocutory judgment entered against both defendants on 5th August 2024.

10. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In Shah v Mbogo and Another [1967] EA 116 the Court of Appeal of East Africa held that:

> " This discretion (to set aside ex parte proceedings or decision) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice." (emphasis added)

11. The Court's power to set aside judgment is exercised with a view of doing justice between the parties as stated in the case of, Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR, where the Court held:

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties"

12. What the court considers is the legal threshold before exercising the said discretion; that is whether the applicant has demonstrated sufficient cause warranting setting aside of the ex-parte decision or proceedings. In Wachira Karani v Bildad Wachira [2016] eKLR Mativo J held that:

> " Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

13. The Supreme Court of India in Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011) also observed that:

> " Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently ..."

14. In the case Mohamed & Another -v- Shoka (1990) KLR 463 the Court also further set out the tenets it should consider in entering interlocutory judgment to include:

    i) Whether there is a regular judgment;

    ii) Whether there is a defence on merit;

    iii) Whether there is a reasonable explanation for any delay;

    iv) Whether there would be any prejudice.

15. The issue of regular and/or irregular judgment was also addressed in the case Mwala -v- Kenya Bureau of Standards EA LR (2001) 1 EA 148, where the court stated that ;

> " to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service

at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justice for a court should never countenance an irregular judgment on its record."

16. Section 6 of the *Arbitration Act*, Cap 49 of the Laws of Kenya provides that;

Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

17. Section 6(2) of the *Arbitration Act*, is crystal clear that, all proceedings that are pending before court shall not be continued after the application under subsection (1) has been made and the matter (application) remains undetermined. To that extent, the deputy registrar erred in endorsing the request for judgment notice on 5th August 2024, when all proceedings had been automatically stayed upon filing of the said application. As stated in the case of (Mwala Supra) , where entry of judgment is irregular, it must be set aside Ex dibito Justitiae and bila maneno. Also see; Kenya Broadcasting Corporation Vrs National Authority for the Campaign Against Alcohol and Drugs Abuse (NACADA) (2015) eKlr.

Disposition

18. Taking all relevant factors into consideration I do find that;

a. The Application dated 4th September 2024 has merit and the same is allowed in terms of prayer (d).

b. The costs of this Application is awarded to the 2nd Defendant.

19. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 10TH DAY OF JANUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 10TH DAY OF JANUARY, 2025.

In the presence of: -

No appearance for Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

Susan/Sam Court Assistant