



Bukura Agricultural College & another v Okeno & Sons Building Contractors (Miscellaneous Civil Application E014 of 2022) [2023] KEHC 23418 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E014 OF 2022
PJO OTIENO, J
OCTOBER 6, 2023**

BETWEEN

BUKURA AGRICULTURAL COLLEGE 1ST APPLICANT

ATTORNEY GENERAL 2ND APPLICANT

AND

OKENO & SONS BUILDING CONTRACTORS RESPONDENT

RULING

1. By a Notice of Motion dated September 6, 2022, the Respondents pray in the main that the Court be pleased to set aside its decision and Judgment made on July 19, 2023 together with the consequential orders arising therefrom, unconditionally, so that leave is granted to them to defend the application dated February 4, 2022 to which Replying Affidavits had been filed and annexed to the said application.
2. The reasons advanced to merit setting aside, the default fault to attend Court on the date set, is given to be that on that date Counsel had a hearing of another matter at Busia High Court being HC.ELRC No 4 of 2022 (sic!!) which he opted to prioritise over this matter which was only due for Mention to confirm the progress made at negotiations. It is therefore contended that the decree holder/ Respondent had a duty to report to Court the progress made at negotiations but opted to seek and obtain a false and exaggerated Judgment against the Judgment debtors/Applicants hence it is their request and prayer that the Judgment be set aside and the application heard on the merits.
3. Those same facts are reiterated in the Affidavit of Stafford Nyauma which also exhibit a Replying Affidavit in opposition to the application sought to be reinstated for hearing on the merits.
4. In the Affidavit exhibited to be the basis of resisting the application to adopt the arbitral award, the Respondent contends that the because part of the award had been set aside and part payment made, the only sum due as justly payable to the Respondent/decree holder is Kshs. 4,711,429.33. It was however not explicit on when that sum was due and if it takes care of interests accruing.



5. There was exhibited a second Replying Affidavit sworn by Gilbert Wafula Nyongesa, the Secretary to the Board, who concedes that the Respondent is indeed owed; that the College is prepared to pay and have been attempting settlement but parties have disagreed on method of calculation had been in contention. The Respondent is then accused of obtaining ex parte orders on July 19, 2022 in the sum of Kshs 12,803,249.20 which the Applicants dispute as the Respondents keep adjusting the sums due. It would appear that the opinion of the Solicitor General was sought and he did give an opinion by a letter dated 15.8.2022, exhibited in the Further Affidavit of Mr. Stafford Nyauma Advocate. That Affidavit therefore changes tune on the sum due and asserts that only the sum of Kshs. 325,576.22 is due to the Decree holder. Little is said of what the Advocate and officers of the 1st Respondent had said on oath
6. When served the Respondent filed a Replying Affidavit sworn by Paul Okeno in which it is contended that the application is an afterthought, that the date was duly served upon the Applicants despite the fact that the same was taken by the Applicants and at their instance but in the absence of the Respondent.
7. In addition it is contended that an authoritative advice had been obtained from the Solicitor General by a letter of 31.5.2021 in which the Applicants were advised to pay to them a sum of Kshs 11,075,706, as parties awaited determination of party and party costs, hence there was no triable or arguable question to merit setting aside.
8. The assertion that parties have been negotiating was dismissed as no basis to set aside because as early as March 10, 2022, because parties had earlier appeared before the Court when directions were given to the effect that the Respondent files and serve response to the application within 21 days from that date but that had not been complied with and that there was no attendance at all by the Respondent.
9. Both parties have filed respective Submissions and the Court has had the invaluable benefit of reading those Submissions. For the Applicants, a concession is made that the Solicitor General had indeed calculated the sum due and advised settlement but the Respondent has taken out a decree and warrants which is higher than the sum recommended. In addition, it is clarified that the letter of 31.5.2021 had been revoked by that of 15.8.2022. It was added that one arguable point is enough to set aside.
10. The principles of setting aside are then delved into and the decisions in *Esther Wamaita Njibia -vs- Safaricom Ltd*, *Patel -vs- E.A. Cargo Handling Service Ltd.*, *Shah -vs- Mbogo, Sebei District Administrator -vs- Gasyali, Ongom -vs- Owota* and *Phillip Chemwolo & Augustine Kubede*. The thread of jurisprudence in the decision even though no citations or copies were provided, is that the discretion to set aside is made and unfettered and purposed to do justice where all excusable and explained default is the only reason for an otherwise unmerit judgment has been made. It is also the law following from these decisions that it is the duty of the party in default to give an explanation to the satisfaction of the Court for delay with a demonstration that there is an arguable point to be advance once the default order is set aside.
11. The last decision is that every mistake ought to be remedied by not denying the party who has made a mistake his day in Court but there is no resort to seek setting aside where one has sought to delay and defeat justice by overreach or evasion.
12. On its part the Respondent in the written Submissions stress the fact that the Applicants have been evasive and less candid by failure to attend Court or come up with a reasonable proposal or broached settlement. It adds that as at the date the default judgment was entered, the Applicant had failed to comply with direction to file responses to the application and was undeserving of the discretionary order of setting aside. It was then added that the Solicitor General could not revoke his own letter



- without recourse to the Respondent as Decree holder and to do so after long lapse of time and well after the execution had issued.
13. Every application to set aside a default order by the Court demands of the Applicant to explain the default to the satisfaction of the Court and put forth prospects of success in the event that his request to set aside be granted.
 14. In the instant case, the only reason put forth for failure to attend is that Counsel was engaged in Busia HC. ELRC No. 4 of 2022 and did not prioritise this because it was merely listed to confirm the progress in negotiation. It is very doubtful that any file can be registered as High Court Environment and Land Court Case No. 4 of 2022
 15. Two questions arise from this reason for failure to attend Court; Was the Counsel genuinely engaged in Busia HC. ELRC No. 4 of 2022? Was it in order for the office of the titular head of the bar to unilaterally grant itself the leave not to attend Court on a date he had himself sought to report to Court on the progress of negotiations?
 16. On the first issue, it is a matter of judicial notice, and thus well known, that there has never been gazetted an Employment and Labour Relations Court Registry in Busia and no Judge sits in that station. Even a physical verification would reveal that no matter has been filed in that Registry. That may explain the paucity of information the Applicant has elected by avoiding to give the names of the parties to the dispute.
 17. It is thus the founding of the Court that there being no ELRC Registry nor Judge of the Court sitting in Busia, it is not candid nor true that the Counsel was engaged before that Court to justify his failure to attend Court. On that basis, the reason advanced is not plausible but one that is clearly evasive, calculated to mislead and to set aside the Judgment on that basis would be to reward evasion by the Applicant.
 18. In the words of the Court of Appeal in Shah –vs- Mbogo (1968) EA the remedy in setting aside 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’.
 19. In this matter the arbitral award having been made on the 23.8.2023, an application to enforce the award was filed in Court on February 4, 2023 and fixed for hearing on the 10.3.2022. The Motion was served upon the 1st Respondent on the same day and upon the 2nd Respondent on the 9.2.2022.
 20. On the date fixed, the Applicants now, were duly represented in Court by the Counsel who has sworn the Affidavits on record and in his presence Court issued directions to move the matter forward by obligating him to file a response within twenty one (21) days.
 21. When the matter was next in Court more than sixty (60) days later, no response had been filed. It was the same Counsel who appeared for the Respondents, did not offer any explanation for failure to comply with the Court’s directions but requested the Court for time to enable negotiations be concluded. Having attended without the other side, the Court takes the view that it was his obligation to Court to inform the other side of the orders he had obtained from Court and to appear and inform the Court what he had done to progress the negotiations. He chose to avoid attending Court. The Court considers that conduct when coupled with the divergent and contradictory positions taken in his Affidavit in support sworn on the 6.9.2022 admitting the sum of Kshs. 4,711,429.33 as due and payable, only to swear a subsequent Supplementary Affidavit barely thirteen (13) days later and assert that only Kshs. 325,526.22 is due, to demonstrate nothing but evasion. That must be discouraged against all and more compellingly against the office of the Attorney General, a State office bound by the articles 3 and 10 of the Constitution. As the titular head of the bar, the 2nd Respondent must, in the



matter of administration justice, be the Caesar's wife for all to emulate, aspire to and be envied. That office must walk away from the practice of the yore when it mattered not to the officers in the office whether pleadings were filed on time or not and whether an attendance was made in Court. It must now ring in their minds all the time that when the office is a party to the proceedings, the Constitution demands that the office is treated like any other litigant without any favours of preference.

22. It still baffles that in this time and age a public officer serving in the Attorney General's office and a duly admitted Advocate sits in Court, a matter in which the office is sued, and has even filed pleadings, is called out and there exists temerity for such an Advocate to decline addressing the Court on the matter, when prompted by Court, on the flimsy reason that he has no instructions. Such practice derail ends of justice and unduly delay conclusion of cases and paint the Court as lackluster and unable in the discharge of its duty to expeditiously and proportionately determine legal disputes. Once again such must be discouraged by the State law office properly instructing its officers but to Court must equally remind itself that it has a mandate and duty to the sovereign to administer justice without delay.
23. There is clearly a design to obstruct and delay a matter in which parties opted to avoid litigation for arbitration. One and a half years is to Court too long and defeats the intendment of the Arbitration Act.
24. That said, the Court is still expected to pose and answer the question if there is a triable issue. The Court sees no triable issue. An application to adopt an arbitral award may only be refused if there be allegation of misconduct of lack of jurisdiction in the arbitrator or where it is demonstrated to be inconsistent with the Constitution or other Laws of Kenya, inimical to national interest of Kenya or when contrary to justice and morality (*Kenya Shell Ltd -vs- Kobil Petroleum Ltd* [2006] eKLR)
25. In this case to set aside the Judgment would be to upset the award. There is no opposition to the award as known in law. All questions raised by the Applicant are matters of accounts on a decree. They not affect the Judgment itself but the mode of execution. Such are due for determination by the Deputy Registrar.
26. In conclusion, therefore, it is the finding of the Court that the application lacks merit and the same is thus dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 6TH DAY OF OCTOBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Obiero for Respondent/Decree holder

No appearance for the Applicant/Judgment debtor

Court Assistant: Polycap Mukabwa

