



**Okiro v Multimedia University of Kenya (Cause E606 of 2023)
[2024] KEELRC 2115 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E606 OF 2023
SC RUTTO, J
JULY 26, 2024**

BETWEEN

ABRAHAM OBWOCHA OKIRO CLAIMANT

AND

MULTIMEDIA UNIVERSITY OF KENYA RESPONDENT

RULING

1. Perhaps I should start by tracing the genesis of this matter. The Claimant herein filed a Statement of Claim dated 21st July 2023 through which he sought to be awarded the sum of Kshs 1,424,000/= being salary arrears in respect of 2021 and 2022.
2. The record bears that the Respondent/Applicant failed to enter appearance despite being served with the Summons and Statement of Claim as evidenced by the Affidavit of Service sworn on 18th August 2023 by Jacob Ouma Okello. Annexed to the Affidavit of Service was a copy of the Summons bearing the Applicant's receiving stamp.
3. Through a Notice of Motion Application dated 15th September 2023, the Claimant sought to have the matter proceed for formal proof hearing. The said Application which came up for hearing on 2nd October 2023 was allowed as the Court was satisfied with the return of service having noted that the Applicant had not entered appearance and filed a Response to the Claim.
4. Accordingly, the matter was set down for formal proof hearing on 17th October 2023. From the record, the Applicant was served with the Notice of the formal proof hearing despite not having entered appearance in the matter. An Affidavit of Service was filed to that effect and annexed to it, was the Hearing Notice bearing the Applicant's receiving stamp.
5. On 17th October 2023, the matter proceeded for formal proof hearing, and thereafter, the Claimant was granted 7 days within which to file written submissions. On 31st October 2023, the matter came



up for mention and the Claimant confirmed having filed his written submissions. As such, Judgment was reserved for 18th December 2023.

6. Before Judgment could be rendered, the Applicant's Advocate filed a Notice of Appointment dated 23rd October 2023. Subsequently, the Applicant filed an Application dated 30th October 2023 seeking to set aside an "interlocutory judgment" entered against it with all the consequential orders.
7. When the said Application came up for hearing on 23rd November 2023, the Court noted that there was no interlocutory judgment on record and the Applicant's Advocate was notified as much. This being the case, the Application was marked as spent.
8. The Applicant subsequently filed another Application dated 4th December 2023 through which it asked the Court to suspend the Judgment scheduled for 18th December 2023. The Applicant further sought leave to reopen the Claimant's case and to file a Statement of Defence.
9. The Application was scheduled to come up for directions on 18th December 2023, and upon hearing both parties, the Court deferred delivery of the Judgment essentially allowing prayer 1 of the Application. Worthy to mention is that the Applicant's Counsel, Mr. Moturi, told the Court that the Claimant had been meeting the Applicant's Legal Officer and that the Applicant was willing to settle the Claimant's salary arrears save that he (Claimant) had failed to submit all the requisite documents for purposes of processing his payments. This position was refuted by the Claimant who maintained that he had submitted all the requisite documents.
10. In view of the sentiments expressed by the Applicant's Advocates and the Claimant, the Court allowed the parties to attempt an amicable settlement of the matter. As such, the matter was scheduled to come up for mention on 9th February 2024 for further directions.
11. On 9th February 2024, when the matter came up for mention, the Claimant was present in Court while there was no appearance on the part of the Applicant. The Claimant informed the Court that the Applicant was yet to reach out to him for purposes of settling the matter amicably as had been directed by the Court on 18th December 2023. He further stated that he had submitted all the documents required by the Applicant for purposes of processing his salary arrears. Accordingly, he asked the Court to allocate a Judgment date for the matter.
12. Noting the Claimant's sentiments and the fact that the Applicant's Advocate was not present in Court despite the date having been taken by consent and his assurance that the Applicant was desirous of settling the matter amicably and further bearing in mind that the matter had already proceeded for formal proof hearing and was pending Judgment, in the interest of justice, the Court directed that Judgment in the matter would be delivered on 23rd February 2024.
13. On 23rd February 2024, Judgment was delivered in favour of the Claimant for the sum of Kshs 1,424,000/= together with interest at court rates from the date of filing the suit until payment in full. The Claimant was further awarded costs limited to the actual expenses incurred for purposes of filling.
14. The matter did not settle there. Through an Application dated 18th March 2024, the Applicant moved the Court seeking the following orders:
 - 1 Spent
 - 2 Spent
 3. That the Honourable Court do issue order of stay of execution of judgment delivered on 23rd February 2024 after the hearing and determination of this application.



4. That the Respondent/Applicant Notice of Motion dated 4th December 2023 be allowed as prayed.
5. That this Honourable Court do hereby set aside, vary or review the Judgment of 23rd February 2024.
6. That this Honourable Court do issue order to re-open the hearing of this matter.
- 7 That the costs of this Application be provided for.
15. It is that Application that now comes up for determination. The Application is premised on the averments contained in the Supporting Affidavit sworn on 18th March 2024, by Mr. Wilson Kagwe, who describes himself as the Applicant's Legal Counsel.
16. Mr. Kagwe deposes that the Applicant's Notice of Motion Application dated 4th December 2023 has neither been heard nor determined by this Honourable Court. He further avers that if the orders sought in the Application are granted (sic) their right to defend the suit will be infringed as they have a viable defense which raises triable issues.
17. According to Mr. Kagwe, unless the orders sought in the Application are granted, the Claimant threatens to enforce the Decree made and had already instructed an Auctioneer who had served the Applicant with the Proclaimed Notice.
18. Mr. Kagwe further averred that the Applicant had paid the Claimant a total of Kshs. 1,346,000/= and the only balance from their accounts department is Kshs. 616,000/= whereas the decretal sum is Kshs. 1,533,921/=.
19. In his view, if the orders sought in the Application are not granted the Claimant stands to unjustly enrich himself to the detriment of the Applicant.
20. That he is further advised by the Applicant's Counsel on record, that the Claimant failed to disclose to this Honourable Court that he had received part payment from the Applicant and the balance was only Kshs.616,000/=.
21. The Claimant opposed the Motion Application through his Replying Affidavit sworn on 2nd April 2024.
22. In his Affidavit, the Claimant deposes that the Application dated 4th December 2023 has since been overtaken by events as the same was compromised on the Applicant's own admission on 18th December 2023 that they had not refused to pay him his dues.
23. He further deposed that the Applicant is estopped from invoking the argument that its right to be heard will be infringed upon when it was in Court and stated on record that it was desirous of paying the claim, only to turn back on its word. That it is thus superfluous for the Applicant to allege being condemned unheard yet it was granted audience of Court, but squandered the chance to make amends as far as the claim is concerned.
24. The Claimant further stated that the mere filing of an Appeal does not automatically operate as a stay of execution.
25. It was the Claimant's contention that the proclamation notice was issued in strict compliance with the law and it cannot merely be faulted on the strength of the Applicant's indolence.



26. He further averred that the Applicant is estopped from re-opening the case from the backdoor by availing fresh evidence at the execution stage yet it had all the time prior to the close of pleadings to tender its Defence.
27. The Claimant further averred without prejudice that the alleged payments alluded to by the Applicant have nothing to do with the instant claim given the fact that whereas they relate to the period between 2016 to 2022, his claim is in respect to unpaid salary arrears for the period 2021 to 2022.
28. In the Claimant's view, the Applicant's Notice of Motion is unmerited, frivolous, vexatious and an outright abuse of this Honourable Court's process. He contends that this is an afterthought meant to delay the execution of the Judgment in his favour.
29. In response to the Claimant's Replying Affidavit, the Applicant filed a Further Affidavit sworn by Mr. Wilson Kagwe on 29th May 2024. He avers that the Claimant ought to know that they have not been allowed to file a Defence and/or documents and it is a well-known principle that the acts and or omission of an advocate should not be revisited upon the client.
30. He further avers that the Applicant has not been given the opportunity to examine the veracity of the Claimant's claim and hence will be condemned unheard if the orders sought in the Respondent's/ Applicant's Notice of Motion application dated 18th March 2024 are not granted.
31. That further, the Vice Chancellor and the Legal Officer of the Applicant herein have tried to reach out to the Claimant in an effort to settle this matter but he has failed to provide the claim supporting documents for the accounts department to confirm what is truly outstanding.
32. Mr. Wilson deposes that the Applicant herein is a public body which is audited and as such, unable to process payments without the Claimant's claim supporting document.
33. That further, the Claimant is still a Lecturer of the Applicant to date and it's important that the claim supporting documents are availed for the Applicant to differentiate what is outstanding and what they have already paid considering the Applicant has continually been paying him.
34. According to Mr. Kagwe, the Claimant is guilty of material non-disclosure as it is evident from his Replying Affidavit that he confirms receiving payments from 2016 to 2022, information which was in his possession and he cleverly failed to disclose to this Honorable Court.
35. When the Application came up for interpartes hearing on 4th April 2024, the parties were once again granted time to attempt negotiations with a view to settling the matter amicably. The matter was scheduled for mention on 29th April 2024 to confirm settlement and or take directions on the disposal of the Application.
36. On 29th April 2024, the parties reported back that they had failed to settle the matter amicably. Subsequently, the Court directed that the Application be canvassed by way of written submissions.

Submissions

37. Placing reliance on the case of *Mandeep Chauhan v Kenyatta National Hospital & 2 Others* (2013) eKLR, the Applicant posited that it is trite law that no one should be condemned unheard. The Applicant further submitted that it was not afforded an opportunity to examine the veracity of the Claimant's claim and file a Defence.
38. It was the Respondent's further submission that it has a formidable Memorandum of Response against the Claimant's claim that raises serious triable issues.



39. That further, the Claimant has failed to provide supporting documents to support his claim for the outstanding amount purported. That this failure has rendered the efforts to settle the purported outstanding amount futile.
40. On his part, the Claimant submitted that the Application has not met the legal threshold and does not justify the grant of the orders sought by the Applicant in the circumstances. According to the Claimant, this was purely an afterthought meant to deny him the fruits of his judgment. He urged that litigation must come to an end.
41. The Claimant further submitted that the Applicant is estopped from approbating and reprobating at the same time as it is on record that the Applicant's Counsel on record admitted that they needed time to organize payment on 18th December 2023.
42. On this score, the Claimant contended that it cannot be available for the Applicant on one hand to acknowledge the claim and on the other hand purport to dispute the same by introducing evidence after the fact.

Analysis and Determination

43. I have considered the Application, the grounds in support thereof, the Claimant's Replying Affidavit together with the rival submissions and in my considered view, the Court is being called to determine whether; it should set aside its Judgment delivered on 23rd February 2024; grant leave to the Applicant to file a Statement of Defence; and allow reopening of the matter. I will address all the foregoing issues concurrently.
44. In the case of *Pitbon Waweru Maina v Tbuka Mugiria* (1982-88) 1 KAR 171 Bosire J [as he then was] held that the power to set aside judgment is discretionary; the discretion is unlimited provided it is properly exercised; it being judicial discretion must be exercised on the basis of evidence and sound legal principles; the Court has powers to set aside on terms as are just; the Court is obliged to look at the defence the Applicant /Defendant may be having to the claim; if a party establishes a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined towards setting aside.
45. In the case of *Shah v Mbogo & Anor* (1967) E.A 470 Court of Appeal for Eastern African held: -

“applying the principle that the Court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”
46. It is also trite that the Court retains discretion to allow re-opening of a case and such discretion must be exercised judiciously. Further, in exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party.
47. As stated herein and at the risk of sounding repetitive, the matter was set down for formal proof hearing on 17th October 2023 as the Court was satisfied that the Respondent had been duly served with the Notice of Summons together with the Statement of Claim but failed to enter appearance or file a Defence.



48. Indeed, the Applicant admits at paragraph 4 of the Motion Application dated 4th December 2023, that it was served with the Notice of Summons together with the annexed Statement of Claim and the accompanying documents.
49. According to the Applicant, the delay in coming on record and defending the suit was on account of the negotiations it had held with the Claimant.
50. On this note, it is worth mentioning that from the record, the parties were engaged in negotiations sometimes in March 2023 prior to the institution of the suit herein. As it is, there is no evidence that the parties engaged in further consultations seeing that in a letter dated 6th June 2023, the Claimant threatened to institute legal proceedings stating that the Applicant had failed to honour its commitment by paying him the outstanding salary arrears.
51. To this end, the Applicant's argument that it did not enter appearance and file a defence as it was engaged in negotiations with the Claimant does not sound plausible. This is further noting that the Claim was filed on 2nd August 2023 close to two months after the Claimant had threatened legal action. There is no evidence that the Applicant attempted to settle the matter amicably during the intervening period.
52. Further to the foregoing and as stated herein, the Court allowed the parties to engage in negotiations with a view to settling the matter out of court. However, there was no headway and at the time the Court delivered its Judgment on 23rd February 2024, there were no signs of settlement.
53. In addition to the foregoing and as stated herein, the Claimant served the Respondent with the Notice of the formal proof hearing. It is apparent from the said Hearing Notice annexed to the Affidavit of Service of Jacob Ouma Okello sworn on 5th October 2023, that the Applicant was served on 3rd October 2023 while the matter was coming up for formal proof hearing on 17th October 2023. Therefore, the Applicant had close to 14 days to move the Court as appropriate. Be that as it may, the Applicant was not moved hence the matter proceeded without any intervention from its end.
54. The record further bears that when the matter came up for mention on 9th February 2024 to confirm settlement and or take further directions, the Applicant's Advocate was not present in Court. It is also noteworthy that in the intervening period between 9th February 2024 and 23rd February 2024, when the Court delivered its Judgment, the Applicant did not take any steps to have the Court set aside the directions issued on 9th February 2024 and to have its Application dated 4th December 2023 prosecuted.
55. If I may say, the Applicant has not explained their absence from Court on 9th February 2024 and moreso, has not persuaded the Court that the non-attendance was an act which is accidental, excusable, inadvertent or an error. This is noting that the date was taken by consent by both parties.
56. What I can deduce from the circumstances herein is that from 18th December 2023, the Applicant went to slumber and was only jolted to move the Court through the instant Motion Application upon being threatened with execution. I say so because, following the delivery of Judgment on 23rd February 2024, the Applicant did not move the Court until 20th March 2024 when there was a threat of execution. In between, it seemed unbothered by the events that had transpired beyond 9th February 2024.
57. It has been said that equity aids the vigilant and not the indolent. In my respectful view, the Applicant's conduct in this matter depicts an indolent litigant and taking into account its conduct in the matter herein, it would be a travesty justice for the Court to exercise its discretion in favour of such a litigant.
58. In as much as the Applicant may have a Defence that raises triable issues, I cannot help but find that no plausible explanation has been tendered for its failure to file a Defence when it was served with the



Notice of Summons and Statement of Claim and to attend Court as appropriate. By its own conduct, the Applicant has disentitled itself of the Court's discretion.

59. In arriving at this finding, I am cognizant of the fact that the Constitution guarantees the right to be heard before an adverse decision is taken against a person. Be that as it may, in this case, the Applicant was granted an opportunity to be heard but it squandered the same by failing to file a Defence and attending Court when so required.
60. All in all, it is my respectful view that the Applicant is underserving of this Court's discretion.
61. It is for the foregoing reasons that this Court finds that the Application dated 18th March 2024 has no merit and is consequently dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of July, 2024

STELLA RUTTO

JUDGE

In the presence of:

Mr. Moturi for the Respondent/Applicant

In person the Claimant/Respondent

Millicent Kibet Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

