



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 41 OF 2018

MARK BUSHURU ANGALIA.....CLAIMANT

VERSUS

FRODAK KENYA LIMITED.....RESPONDENT

RULING

1. Through a Notice of Motion dated 21st December, 2019 the respondent/applicant sought orders among others that the Court grant leave to the respondent's incoming Counsel Mr. Okong'o Wandago & Company to serve notice to change of advocate on M/s S.O Madialo & Company advocates. The applicant further sought stay of execution of the judgment and decree of the Court and that the judgment of the Court passed against the respondent on 29th June, 2018 and consequential orders be set aside.

2. The application was brought on the grounds that the matter proceeded for hearing without the participation of the respondent and judgment period. The respondent was therefore condemned unheard. In support of the application the respondent further stated that the applicant was ready and willing to abide by the terms and conditions which the Court may impose for the grant of the orders sought.

3. The application was further supported by the affidavit of Fredrick Otieno Onyango who deponed on the main that

(i) THAT I am the applicant's managing director well conversant with the facts herein and duly authorized by the Board of directors of the applicant hence competent to swear this affidavit, my true place of abode is Migosi Estate in Kisumu City.

(ii) THAT I know of my own knowledge that, Summons so enter appearance together with statement of claim in this suit were served upon the Respondent/applicant which summons were duly forwarded to the firm of M/s Madialo and Company advocates with instructions to defendant the Respondent/applicant.

(iii) THAT I know of my own knowledge that M/s S.O Madialo Advocate entered appearance by filing a Memorandum of appearance and response to the statement of claim.

(iv) THAT I know of my own knowledge that the only documents and/or correspondence we ever received from the firm of S.O Madialo and Company Advocates were copies of reply to statement of claim and memorandum of appearance. One effort to have the said advocate advice and keep us posted on the progress of the matter were in vain.

(v) THAT I know of my own knowledge that due to failure to communicate the applicant made a resolution to seek legal representation from another lawyer who could handle her court matters while keeping her informed on the progress. We then settled on M/s Okong'o Wandago and Company Advocates

(vi) THAT been informed by our Advocate which information I verily believe that they sent a representative to Eldoret Employment and Labour relation Court registry to file notice of change of Advocate taking up the conduct of this matter from M/s Madialo and Company Advocates the notice was accepted by the registry as duly filed. They did serve the same upon the firm of Madialo and Claimant's counsel who subsequently served them with a taxation notice.

(vii) THAT upon inquiry from the Claimant /Respondent 's counsel my advocate was informed that the matter had proceeded without representation from the firm of M/s Madialo and Company Advocates formerly on record and judgement delivered. I wish to state that I was never notified of the same until sometime in October,2019 when the firm of m/s Okong'o Wandago and Company Advocates did a letter informing me the judgement had been passed against the applicant way back in June,2018 for Kshs. 183,591/= plus costs and interest.

(viii) The applicant has been condemned unheard despite having a strong defence in rebuttal of the claimant's allegations. Unfortunately, such defence was never presented to this court due to a mistake not of the applicant.

4. In opposition to the application Counsel for the Claimant deponed in the main that: -

(i) THAT the application is not urgent in anyway, is incompetent, misadvised, misconceived, bad in law, baseless, frivolous, scandalous and an outright abuse of the due process of the Court generally tainted with dishonesty and does not entitle the Applicant to the reliefs sought.

(ii) THAT the judgement that was entered herein against the Applicant on 29.06.2008 is proper, regular and meritorious.

(iii) THAT the Applicant's action of feigning ignorance of the proceedings herein is self-defeating and indeed underscores its dishonesty on the application herein and the same ought to be disallowed as the Applicant had a counsel on record.

(iv) THAT the applicant is guilty of material non-disclosure and has breached section 1A 1B and 3A of the Civil procedure Act and in particular the Applicant has failed to disclose to this honourable court that there is a consent on costs of the claim herein dated 24.10.2019 between the Applicant's advocates on record and the Claimant's advocates which consent has not been disputed a clear indication that the Applicant was satisfied with the proper judgement herein.

(v) THAT to demonstrate abuse of the process of this Honorable court and/or lack of seriousness on the part of the Applicant filed a similar application dated 28.11.2019 through the firm of KEN OMOLLO AND CO. ADVOCATES no set aside judgement which application was dismissed with cost on 28.01.2020.

(vi) THAT the Applicant has come to this Court with unclean hands since it has perfected the art of changing advocates on record for purposes of filing numerous applications and shifting blame to frustrate the Claimant herein and therefore does merit equitable Orders sought.

(vii) THAT the delay in filing this instant application dated 21.12.2019 is inordinate and inexcusable because the Applicant application herein is dated 21.12.2019 and the Applicant only waited when this matter came up for taxation to file this instant application as an afterthought despite the bill of costs having been within the knowledge of the Applicant and its current advocates on record.

(viii) THAT the reason advanced by the Applicant for the inordinate delay in filing this instant application for over two years down the line from the time when judgement was entered herein on the ground that her former advocate on record never notified the Applicant about the matter is a lame excuse not satisfactory, is inexcusable, self-defeating and I urge this honourable Court to find so.

(ix) THAT notwithstanding there is no evidence by the Applicant on the action taken as a litigant and it is not enough for the Applicant to blame his former advocate for all manner of transgressions in the conduct of litigant since it is the duty of the litigant /Applicant to show interest in and follow up their cases when they are represented by advocates

5. Setting aside a judgement is a matter of discretion of the Court. Like all discretionary powers, a party seeking to benefit from that discretion must come to Court with clean hands, must move the Court diligently and must be ready and willing to abide by the preconditions the Court may impose prior to exercise of such discretion in his former.

6. Further setting aside a judgement of the Court validly entered after a hearing and a hearing de novo amounts to double work for the Court. A party seeking the setting aside of a judgement must therefore put forward sufficient and reasonable cause why the judgement should be set aside

7. The applicant herein was initially represented by Ms S.O Madialo who entered appearance and filed a response to the claim. The said law firm never attended Court when the matter came for hearing on 26th March, 2018 and the learned judge being convinced there was proper service proceeded to hear the Claimant ex parte and delivered her judgement on 29th June, 2018.

8. By a Motion dated 28th November, 2019 filed by the firm of Ken Omollo and Company Advocates, the respondent /Applicant sought to set aside the judgement of the Court delivered on 29th June, 2018. This application was on 28th January, 2020 dismissed for non-attendance.

9. The present application dated 21st December, 2019 was filed on 20th July, 2020 some six months after it ready for filing and after the earlier application dated 28th November, 2019 had been dismissed for non-attendance.

10. It is therefore not correct that the respondent/applicant became aware of the judgement herein on 21st December, 2019 when the present drafted the present application and eventually filed the same on 20th January, 2020. The respondent became aware of the Judgement herein at least by 21st December, 2019 when it instructed Ken Omollo Advocate to set aside the same.

11. Curiously the respondent in the instant application makes no mention of the earlier instruction to Ken Omollo advocate. The present application seems to focus more on the firm of S.O. Madialo Advocates and how the said firm failed to communicate about the case before the Court leading to ex parte judgement.

12. By filing the application dated 28th November, 2019 through Ken Omollo advocate technically meant Ms S.O Madialo had been removed from the proceedings hence blaming the said law firm for not keeping the respondent informed of the case was therefore misrepresentation of facts.

13. Second by consent note dated 24th October, 2019 the law firm of Okong'o Wandago & Company, the movers of the present application entered into consent on party and party costs with the Claimant's advocate at Kshs. 130,000/=. The question that begs to be answered by the respondent and its Counsel is how was it possible to enter into a consent on party and party costs with regard to a judgement they considered unfairly obtained and wanted set aside.

14. The sum total of all these inconsistencies makes believable the submission by Counsel for the Claimant that the present application is frivolous, abuse of the Court process and not brought in good faith.

15. As observed earlier in the ruling, a party seeking to benefit from discretionary power of the Court must approach the Court with clean hands. The applicant before me in this application is dishonest and has suppressed material facts hence cannot benefit from the discretionary powers of the Court.

16. The application is therefore found unmerited and is hereby dismissed with costs.

17. It is so ordered.

Dated at Eldoret this 6th day of November 2020

Abuodha Jorum Nelson

Judge

Delivered this 6th day of November 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge