Construction House Company Ltd v Ocholla & 4 others (Employment and Labour Relations Cause E665 of 2022) [2025] KEELRC 3145 (KLR) (12 November 2025) (Ruling)

Neutral citation: [2025] KEELRC 3145 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E665 OF 2022

HS WASILWA, J

NOVEMBER 12, 2025

BETWEEN

THE CONSTRUCTION HOUSE COMPANY LTD .... CLAIMANT

AND

BRIAN OUMA OCHOLLA .... 1ST RESPONDENT

JEFF NYAMORI OCHIENG .... 2ND RESPONDENT

GERALD KIOKO .... 3RD RESPONDENT

NELSON MANDELA OKUMU .... 4TH RESPONDENT

MESHACK DULANI .... 5TH RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 24th July 2025 seeking orders that: -
   1. Spent.
   2. This Honourable Court be pleased to set aside the Ex parte judgment delivered on 4th June 2025 in favour of the Plaintiffs/Respondents.
   3. This Honourable Court be pleased to grant the Defendant leave to file a defence and be heard on merit
   4. Pending the inter partes hearing and determination of this application, this honourable Court do issue an order of stay of execution of its judgment given on the 25th June 2025
   5. The costs of this application be provided for.
2. The Application is based on the grounds expressed on the face of the application and the supporting affidavit sworn by ROSE NGAIYWA, a director of the applicant, sworn on the 24th July 2025.

Claimant/Applicant's Case

3. The Applicant avers that the Respondent filed a suit against the Applicant claiming unpaid salaries and allowances.

4. The Applicant avers that the matter was fixed for hearing, but the applicant's advocate at the time failed to attend court due to an inadvertent mistake which the applicant became aware of after judgment had been entered on the 4th July 2025.

5. The Applicant states that non-attendance was not deliberate or intended to delay the proceedings, but was occasioned by circumstances beyond his control and urges the court to indulge him and set aside the judgment and grant the applicant an opportunity to be heard.

6. The Applicant states that the application is brought without undue delay and in good faith.

Respondent's case

7. In response to the application, the Respondents filed a replying affidavit sworn by Gerald Kioko, the 3rd Respondent herein, dated 8th August 2025 on his behalf and on behalf of the other Respondents.

8. The Respondents opposed the application on the grounds that the advocates are improperly on record as per Order 9 Rule 9 of the Civil Procedure Rules, as they did not seek leave to come on record as judgment was entered on 4th June 2025.

9. The Respondents contend that the application has been filed after an unreasonable delay as their advocates had already filed their party-to-party bill of costs and had written to the court requesting for a taxation date.

10. The Respondents aver that the Applicant's attendance to court was deliberate with an intention to delay and frustrate the proceedings in the suit.

11. The Respondents aver that the Applicant had been granted numerous opportunities and was severally indulged by the court but failed to prosecute their defence. They stated that the Applicants also frustrated the arbitration process by failing to attend the arbitration process which forced the matter to be referred back to court.

12. The Respondents aver that the Applicant's conduct since the inception of the suit is to frustrate the court process and deny the fruits of their judgment.

13. The Respondents urge the court to dismiss the application as the intention of the application is to halt the wheels of justice, and it is trite law that litigation must come to an end.

Claimant/Applicant's submissions

14. The Applicant submitted on three issues: whether the mistake of counsel should be visited upon a litigant; whether the applicant's defence raises triable issues; and who should bear the costs of this application.

15. On the first issue, the Applicant submitted that they have been desirous of having the matter determined on its merit and that the unfortunate event leading to the ex-parte judgment was occasioned by the inadvertence of the applicants' previous advocates. It's submitted that it would be unjust to visit the consequences of counsel's lapse upon the applicants who have demonstrated readiness to prosecute their defence once granted an opportunity.

16. The Applicant placed its reliance in the decision in Belinda Murai & 9 others v Amos Wainaina [1979] KECA 25 (KLR) wherein the court held: "A mistake is a mistake. It is no less mistake because it is unfortunate slip. It is not less pardonable because its committed by senior counsel. Though in the case of a junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been done by a lawyer of experience who ought to have known better. The court may not forgive or condone it but certainly do whatever is necessary to rectify it if the interest of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule"

17. It further submitted that courts are enjoined to administer substantive justice without undue regard to technicalities as elucidated in Article 159(2)(d) of *the Constitution* of Kenya, 2010.

18. The Applicant submitted that the right to be heard is the cornerstone of the rule of law and is well protected under Article 50 of *the Constitution* and urged the court to invoke its discretion and grant them an opportunity to be heard and the matter determined on its merit. It placed reliance in Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR) where the court held: "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter......"

19. On the second issue the Applicant submitted that they have a cogent defence that clearly raises triable issues and relies in the holding in Patel v E. A. Cargo Handling Services Ltd [1974] E.A. 75 Duffus P. held as follows:- "The main concern of the court is to do justice to the parties and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where there is a regular judgment the as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean in my view, a defence that must succeed, it means as Sheridan J. put it 'a triable issue' that is an issue which raises a prima facie defence and should go to trial for adjudication."

20. The Applicant submitted that the defence that will be filed should the court grant the application raises triable issues that warrant full consideration of the court.

21. The Applicant further submitted that the costs of the application follow events as per section 27 of the *civil procedure Act*.

Respondents' Submissions

22. The Respondents submitted on four issues: whether the Applicant's current advocates are properly on record; whether the ex-parte Judgement entered on 4th June, 2025 against the Applicant should be set aside as prayed; whether execution of the ex-parte Judgement should be stayed; and whether the Applicant should be granted leave to defend this suit.

23. The Respondents submitted that Applicant was represented pre-judgement and at the time of delivery of the Judgement by the firm of Eshuchi and Associates Advocates. Subsequently, on filing this subject post- judgement application the current firm of advocates Abantu & Kariuki Advocates, filed a notice of change of advocates but to date they have not sought leave or filed a consent with the previous advocates to come on record for the Applicants as required by law.

24. The Respondent cited Serah Wanjiru Kung'u v Peter Munyua Kimani [2021] KEELC 1417 (KLR) stated that; "It therefore emerge that the respondent elected to take a casual approach to the issue of change of advocates post-judgment, notwithstanding the fact that the application he was initiating focused on the diligence of his legal representatives. It does also emerge that the respondent did not

and has not up to this point, bothered to comply with the mandatory requirements of Order 9 rule 9 of the Civil Procedure Rules. The purpose of the above mandatory framework is to ensure orderly administration of justice. In the absence of prior leave or consent, the respondent's application dated 21/9/2021 was filed by a law firm that was not properly on record. The result is that the said application is incurably defective and stands to be struck out without venturing into its merits. Consequently, the appellant's objection is valid and is upheld without venturing into the merits of the application."

25. The Respondents submitted that the application is frivolous, fatally defective, vexatious and ought to be struck out; The application is brought without leave of the court by a non-entity, and a stranger to these proceedings. Further, the Applicant's counsel has no legal basis to bring this application without leave of the Court as such the applicants current advocates are not properly on record hence the application is defective and an abuse of the court process and urges the court to strike out the application with costs.

26. The Respondents submitted that the court entered an ex-parte judgment on the 4th June 2025 and the Applicant was notified of the outcome, thus, there has been unreasonable delay in filling the instant application since the delivery of the judgment.

27. The Respondents further submitted that the Claimant's claim that they have a strong defence that raises triable issues but have not attached any document in support.

28. It is the Respondent's submission that the Applicant has not committed itself to provide any security for stay of execution to be granted and cited Amoke Otieno Pascal v Melvin Anyango Owuor [2022] KEHC 687 (KLR): "In the case of Butt V Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal held that

> " "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
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> 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
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> 4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
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> 5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

29. The Respondents submitted that the applicant was granted numerous opportunities to be heard but failed to make good of the same. They cited Mureithi Charles & another v Jacob Atina Nyagesuka [2022] KEHC 1805 (KLR) the court noted at paragraph 28 that "In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both

prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication."

30. It is the Respondents' submission that the Applicant is not keen on prosecuting its defence and a grant of the orders prayed for will further delay the matter. Additionally, the application does not meet the threshold for warranting setting aside of the judgment therefore they urge the court to dismiss the application with costs.

31. I have considered the averments and submissions of the parties herein. The judgment in the matter was delivered 4th June 2025. The application herein was filed on 24th July 2025. Counsel on record for the respondents at the time judgment was delivered was Eshuchi and Associates. No application was filed for another counsel to come on record after delivery of judgment as required under Order 9 rule 9 of the Civil Procedure Rules. The counsel who has filed the application is not properly on record and therefore the application fails and is dismissed accordingly. Cost in the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF NOVEMBER 2025.

HELLEN WASILWA.

JUDGE