Construction House Company Ltd v Ocholla & 4 others (Employment and Labour Relations Cause E665 of 2022) [2026] KEELRC 498 (KLR) (24 February 2026) (Ruling)

Neutral citation: [2026] KEELRC 498 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E665 OF 2022

HS WASILWA, J

FEBRUARY 24, 2026

BETWEEN

THE CONSTRUCTION HOUSE COMPANY LTD ..... APPLICANT

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 12th November 2025 seeking orders that: -
    1. Spent
    2. This Honourable Court be please to grant leave to Abantu & Kariuki Advocates to come on record for the Applicant post judgment.
    3. This Honourable Court be pleased to set aside the ex parte judgment delivered on 4th of June 2025 in favour of the Plaintiffs/Respondents.
    4. This Honourable Court be pleased to grant the Defendant leave to file a defence and be heard on merit.
    5. Pending the inter partes hearing and determination of this application, this Honourable Court do issue an Order of stay of execution of its Judgement given on 4th of June 2025.

6. Costs of this application be provided for the warrants to M/s Ruol Auctioneers by this Court on 9th December 2024 be set aside.

Applicant's Case

2. The Applicant avers that the Respondents filed a suit against the Applicant claiming unpaid salaries and allowances. The matter was fixed for hearing but the Applicant's duly retained advocate at the time failed to attend court due to an inadvertent mistake, which only became apparent after judgment given on 4th June 2025 had been entered.

3. It is the Applicant's case that the judgment was obtained as a result of non-attendance occasioned by an honest mistake of counsel which should not be visited upon it.

4. The Applicant avers that Courts have in numerous decisions declined to visit the mistake of advocates upon their client where it is sufficiently demonstrated that non-compliance with procedural requirements was attributable to the advocate's fault.

5. The Applicant contend that the Plaintiffs/Respondents wilfully concealed and/or suppressed material facts which go to the root of the dispute.

6. The Applicant avers that it has good and arguable defence that raises triable issues deserving to be heard on merit; and no prejudice will be suffered by the Respondents if the orders sought are granted, whereas grave injustice will be visited upon it if the judgment is not set aside.

7. The Applicant contends that it has fully complied with Order 9 Rule 9 of the Civil Procedure Rules by properly regularising the change of advocates after judgment. It states that a duly executed consent between its former advocates, Eshuchi & Associates Advocates, and its current advocates, Abantu & Kariuki Advocates, has been filed, thereby lawfully placing the new advocates on record.

8. The Applicant maintains that the issues raised in the present application are not res judicata, as the earlier application was dismissed solely on a technical ground namely, that counsel was not properly on record. According to the Applicant, the Court has never substantively heard or determined the merits of the application seeking to set aside the ex parte judgment.

9. The Applicant further asserts that its failure to attend court was neither deliberate nor intended to delay or frustrate the proceedings. It attributes the non-attendance entirely to the inadvertence and lapse of its former advocate, emphasizing that it was at all times ready and willing to prosecute its defence.

10. The Applicant states that it was never directly informed or warned that its advocate had failed to attend court or that there was any need for follow-up, and that it reasonably relied on professional representation without being negligent.

11. It is also the Applicant's position that it did not engage in delay tactics. The present application, it argues, was filed promptly upon discovery that judgment had been entered.

12. The Applicant contends that its failure to proceed arose from procedural challenges and miscommunication attributable to counsel, and not from any refusal or unwillingness on its part to participate.

13. It is the Applicant's case that the application is neither vexatious nor an abuse of the court process; it is brought in good faith to safeguard the Applicant's constitutional right to a fair hearing under Article 50 of *the Constitution*, and to ensure that the dispute is determined on its merits rather than on technical lapses attributable to counsel.

Respondents' Case

14. In opposition to the Application, the Respondents filed a replying affidavit dated 24th November 2025, sworn by the 3rd Respondent.

15. The Respondents aver that the Applicant has not complied with Order 9 rule 9 of the Civil Procedure Rules. Order 9 rule 9 (a) provides that notice should be effected to all parties while it is clear that the former advocates, Eshuchi & Associates Advocates, have still not been served with the application.

16. The Respondents oppose the application on the ground that it is res judicata, having raised the same issues as those contained in the Applicants' earlier application dated 24th July 2025. They contend that the application was fully argued by both parties through submissions, and the Court rendered a ruling on 12th November 2025, thus, the instant application merely reintroduces issues that have already been conclusively determined.

17. The Respondents contend that the Applicant had a duty to be vigilant and to follow up on their matter but instead exhibited indolence, therefore, its failure to attend court was deliberate and intended to delay and frustrate the proceedings, notwithstanding the numerous opportunities accorded to them to defend the suit.

18. It is also the Respondents' case that the prayer seeking leave for the Applicants' advocates to come on record post-judgment is untenable. The application raises matters that were extensively considered before judgment was delivered, and the Court is therefore functus officio. The Respondents argue that the post-judgment application is part of a calculated strategy to delay the matter, waste judicial time, and deny them the right to enjoy the fruits of their judgment.

19. The Respondents deny that they concealed or suppressed material facts, maintaining that they placed sufficient evidence before the Court to justify the award. They reiterate that the Applicants were given multiple opportunities to defend themselves but chose instead to frustrate the process.

20. They further assert that court orders must be obeyed, that equity demands clean hands, and that litigation must come to an end. In their view, the application is deliberately timed to prevent execution of the judgment and mirrors previous tactics by the Applicants, including frustrating an attempted referral to arbitration.

21. The Respondents contend that the application is vexatious, unreasonable, and fails to meet the legal threshold for setting aside orders of a competent court. They urge the Court to dismiss and/or strike out the application with costs.

Applicant's Submissions

22. The Applicant submitted that several issues arose for determination, including whether its new advocates were properly on record; whether the mistake of counsel should be visited upon an innocent litigant; whether it had disclosed a good and arguable defence with triable issues; whether the interests of justice and balance of convenience favoured setting aside the ex-parte judgment and granting a stay of execution; whether the delay in filing the application was satisfactorily explained; and whether the application was res judicata.

23. It was submitted that the jurisdiction to set aside an ex-parte judgment is remedial and discretionary, and is intended to advance substantive justice rather than punish procedural lapses.

24. The Applicant submitted that this discretion is guided by the overriding objective under sections 1A and 1B of the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution*, which obligate the Court

to prioritise justice over technicality. It was further submitted that the Court's task was not merely to determine whether a rule had been breached, but whether, in the interests of justice, the Applicant deserved an opportunity to be heard on the merits.

25. On the issue of representation, it was submitted that the Applicant had fully complied with Order 9 Rule 9 of the Civil Procedure Rules by filing a duly executed consent between the outgoing advocates, Eshuchi & Associates Advocates, and the incoming advocates, Abantu & Kariuki Advocates.

26. The Applicant submitted that the purpose of Order 9 Rule 9 is to ensure orderly proceedings and protect the interests of the outgoing advocate, both of which had been satisfied, and that no prejudice had been occasioned to the Respondents. Therefore, denying the Applicant a hearing on the basis of representation would amount to elevating form over substance, contrary to Article 159 of *the Constitution*.

27. The Applicant further submitted that its failure to attend court was occasioned solely by the inadvertent mistake of its former advocate and not by any indolence, deliberate default or intention to obstruct justice.

28. It was submitted that the Applicant had placed its trust in a professional advocate and was entitled to rely on that representation, and that punishing the Applicant for counsel's lapse would offend the principles of natural justice. The Applicant relied on Belinda Murai & 9 others v Amos Wainaina [1979] eKLR,Philip Chemowolo & Another v ... Augustine Kubede (1982) KAR 1036 at 1040, Shah v Mbogo & Another [1967] E.A. and Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, to submit that mistakes of counsel should not be visited upon an innocent litigant unless there is evidence of fraud, bad faith or intentional delay, none of which had been demonstrated.

29. It was further submitted that the Applicant had demonstrated the existence of a good and arguable defence raising triable issues. The threshold at this stage was not proof of success, but whether the proposed defence was bona fide and not frivolous. It was submitted that the Applicant denied the existence of an employer-employee relationship with the 3rd and 5th Respondents, contending instead that the engagement, if any, was on a contract for service. The Applicant further denied engaging in unfair labour practices and challenged the absence of evidence of salary payments and statutory deductions such as NSSF, NHIF and PAYE.

30. It was submitted that these issues went to the root of the Respondents' claims under the *Employment Act* and could only be resolved through a full hearing. Reliance was placed on PATEL v E.A. CARGO HANDLING SERVICES LIMITED (1974) E.A. 75 and reaffirmed in Stephen Wanyee Roki v K-Rep Bank Limited & 2 others [2018] eKLR on the meaning of a triable defence.

31. On the balance of convenience and the interests of justice, it was submitted that granting the orders sought would occasion no prejudice to the Respondents that could not be compensated by an award of costs, as their claim would remain intact and simply proceed to hearing on the merits.

32. It was submitted that refusal to set aside the judgment would result in grave and irreversible prejudice to the Applicant, including execution, attachment of assets, freezing of bank accounts and disruption of business operations, all without the Applicant having been heard. This would amount to a violation of the audi alteram partem rule and render its constitutional right to a fair hearing under Article 50 illusory. Reliance was placed on Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014] eKLR on comparative prejudice.

33. With respect to delay, it was submitted that although judgment was delivered on 4th June 2025 and the application filed on 12th November 2025, the delay was fully, reasonably and credibly explained.

34. The Applicant submitted that time was taken to discover that judgment had been entered ex-parte, disengage from former counsel, engage new counsel, enable the new advocates to peruse the court file and advise, and prepare a comprehensive application together with a draft defence. It was submitted that this conduct demonstrated diligence rather than indolence. Applying the five-limb test in Utalii Transport Company Limited & 3 others v Nic Bank Limited [supra]

35. It was submitted that the delay was neither intentional nor contumelious, did not amount to an abuse of the court process, was not inordinate or inexcusable, did not prejudice a fair trial, and that dismissal would occasion far greater prejudice to the Applicant than any inconvenience to the Respondents.

36. It was submitted that the plea of res judicata was misconceived. The earlier application dated 24th July 2025 was dismissed purely on a technical ground relating to improper representation, and that the Court expressly declined to consider the substantive issues. While the parties and the court are the same, the crucial element, final determination on merits, was never satisfied.

37. The Applicant submitted that a dismissal on a technicality does not amount to a final determination on the merits within the meaning of section 7 of the *Civil Procedure Act*. Reliance was placed on Jituka Investments Limited v Lathia & 2 others [2025] KEHC 11588 (KLR).

38. It is the Applicant's submission that res judicata must not be used as a tool to shield injustice or to prevent a party from being heard where the earlier decision did not resolve any substantive issue. It cited the Supreme Court in John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR and submitted that it was emphasised that res judicata requires a conclusive determination on the merits, which is wholly absent in the current matter.

Respondents' Submissions

39. The Respondents submitted on three issues: whether the ex-parte judgment delivered on 4th June 2025 ought to be set aside; whether the Applicant should be granted leave to defend the suit; and whether there was a basis for stay of execution.

40. On the setting aside of the ex-parte judgment, the Respondents submitted that the judgment was regularly obtained, the Applicant having been duly served through its advocates on record, as demonstrated by affidavits of service on record.

41. It was submitted that the Court had exercised due patience with the Applicant, including granting a stay of proceedings to allow for arbitration, which the Applicant deliberately frustrated by failing to cooperate in the appointment of an arbitrator. The Respondents contend that the Applicant's conduct demonstrated indolence and a clear pattern of obstruction.

42. They cited Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR;

> " 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."

43. The Applicant submitted that subject judgement is a regular judgement that was obtained subject to following the due process including proper service, as evidenced by the several affidavits of service. The Applicant unlawfully terminated the Respondents' employment subjecting them to untold pain and anguish. Delaying their right to justice by setting aside the judgement will be detrimental to them as they'll continue suffering injustice.

44. The Respondents further relied on the Ugandan case, Captain Philip Ongom v Catherine Nyero Owota (SCCA No. 14 of 2001) submitting that a party seeking to set aside ex-parte orders must demonstrate either lack of service or sufficient cause for non-attendance. They argued that the Applicant had proved neither, and that blame placed on former counsel could not, without more, amount to sufficient cause where the record showed repeated non-attendance and inaction.

45. The Respondents submitted that the right to a fair hearing under Article 50(1) of *the Constitution* is not absolute and must be balanced against the equally important principle that litigation must come to an end. They contend that they were entitled to enjoy the fruits of a lawfully obtained judgment, particularly where they had diligently prosecuted the matter while the Applicant remained inactive.

46. On whether leave to defend should be granted, the Respondents submitted that the Applicant had failed to annex a draft defence, thereby depriving the Court of the opportunity to assess whether any triable issues existed.

47. It was submitted that granting leave in the absence of a draft defence would amount to exercising discretion blindly. The Respondents reiterated that the Applicant had already been afforded ample opportunity to participate in the proceedings but had chosen not to do so.

48. Regarding stay of execution, the Respondents submitted that the Applicant had failed to satisfy the mandatory requirements under Order 42 Rule 6(2) of the Civil Procedure Rules. There had been inordinate delay, noting that the Applicant's director had been notified of the judgment by email on 10th June 2025 sent to their official email addresses; rosengaywa@theconstructionhouse.co.ke , bngaywa@theconstructionhouse.co.ke ; info@eshuchi.co.ke , yet no prompt action was taken. They further submitted that execution is a lawful process and does not, in itself, amount to substantial loss.

49. Reliance was placed on Njoroge & another v Malweyi & another [2024] KEHC 16207 (KLR), where the Court held that an applicant must demonstrate specific and tangible loss that would render an appeal or application nugatory if stay is not granted. The Respondents submitted that the Applicant had merely made generalized allegations without demonstrating how execution would cause irreparable harm.

50. The Respondents cited Amoke Otieno Pascal v Melvin Anyango Owuor [2022] eKLR wherein the court mentionedwith authority the case of Butt V Rent Restriction Tribunal (1982) KLR 417:

> "(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.
>
> (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.

(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.

(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."

51. It is the Respondents' submission that there will be no substantial loss if the subject is upheld. The Applicant's intention is to further delay justice since they are not keen in prosecuting this suit.

52. I have examined all the averments and submissions of the parties herein. I note from the affidavit of the applicant dated 8th December 2025 they have filed a consent order executed by themselves and the former counsel on record executed on 20th November 2025.

53. By virtue of this, the application by the firm of Abantu & Kariuki advocates to come on record for the applicants is allowed.

54. The applicants however filed the application on 12th November 2025 seeking the other orders i.e prayer 3, 4, 5 and 6 when they did not have authority from this court to come on record. The prayers cannot therefore be granted having been filed by counsel not on record as envisaged under order 9 rule 9 of the Civil Procedure Rules.

55. The rest of the application cannot therefore stand and is stuck out accordingly. Costs in the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2026.

HELLEN WASILWA

JUDGE