Rachuonyo v Jaramogi Oginga Odinga University of Science & Technology (Cause E053 of 2022) [2025] KEELRC 305 (KLR) (11 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 305 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E053 OF 2022

JK GAKERI, J

FEBRUARY 11, 2025

BETWEEN

GEORGE ONYANGO RACHUONYO ..... CLAIMANT

AND

JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE & TECHNOLOGY ..... RESPONDENT

RULING

1. Before the Court for determination is the applicant's Notice of Motion dated 29th November, 2024 filed under Certificate of Urgency seeking orders that –

    1. Spent.

    2. Spent.

    3. Spent.

    4. The judgment of the court dated 11th October, 2024, all consequential Orders and execution proceedings be set aside.

    5. The Applicant be granted unconditional leave to defend this suit.

    6. Costs be in the cause.

2. The Notice of Motion is expressed under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rule 11, Order 51 Rule 1 and 4 of the Civil Procedure Rules, 2010 and Articles 48 and 50 of *the Constitution* of Kenya and is based on the grounds set out on its face and the Supporting Affidavit of Millicent Lukasile Advocate, sworn on 29th November, 2024 who deposes that the Applicant appointed Ivor Aska Nyamita and Jeptanui Katwa to represent it in this matter and the same had been

partly negotiated and the respondent paid Kshs.1,739,008.00 as gross pay for the month of November 2023.

3. The affiant deposes that the applicant was surprised when it was served with a judgment delivered on 11th October, 2024 indicating that the applicant had not participated in the proceedings.

4. The affiant further deposes that the applicant has a merited case with chances of success as it had no chance to defend the suit and no prejudice will be occasioned to the respondent if the application is allowed and mistakes of counsel should not be visited on a litigant.

Response

5. By a Replying Affidavit of George Onyango Rachuonyo sworn on 13th December, 2024, the affiant depones that the Applicant has not been participating on the proceedings sin person or by the counsel on record which explains the ruling of 11th October, 2024.

6. The affiant deposes that the Applicant's laxity is the cause of the instant application, otherwise, its participation in the proceedings would have resolved the issue relating to the negotiations and in any case the applicant was not denied a chance to be heard as the court record reveals. The applicant was indolent.

7. The affiant provides a chronology of the proceedings since October 2023 to depone that it was because of the applicant's absence that the court scheduled an ex parte judgment a second time and the same was served electronically on 26th September, 2024 and even after being accorded an opportunity to comply they did not.

8. According to the affiant, the Applicant enjoyed tremendous grace from the court and the respondent's counsel and all notices were served promptly and the respondent suffered delay in seeking justice.

9. That the court should balance between the right to be heard and expeditious disposal of cases and there must be a good reason to justify the setting aside of the judgment.

10. The affiant deposes that since the counsels were in-house, they were obligated to act diligently and the applicant was engaging in a "drab blame-game" to its detriment and is the author of its misfortune.

11. Finally, the affiant depones that if indeed the applicant had an arguable defence, it should have tendered it in court earlier, otherwise the application is frivolous, made in bad faith and an abuse of the court process.

Applicant's submissions

12. As to whether the applicant has a viable defence, counsel submits that the defence raises triable issues and relies on the sentiments of the court in Five Forty Aviation Ltd V Tradewind Aviation Services Ltd [2015] eKLR CMC Holdings Ltd V James Mumo Nzioki [2004] eKLR and Gupta V Continental Builders Ltd [1976 -80] IKLR 809 among others on what a triable issue entails.

13. Concerning prejudice to the respondent if the ex parte judgment is set aside, the applicant submits that none will be occasioned as the same can be addressed by way of costs.

14. The applicant urges that the huge pecuniary award could cripple its operations.

15. On explanation for the delay, the applicant argues that although its in-house counsels who were supposed to represent it did not, reliance is made on Belinda Murai & 6 Others V Amos Wainaina [1978] to urge that a mistake is a mistake and submit that natural justice dictates that a litigant ought not to be driven from the seat of justice.

Respondents submissions

16. On whether the ex parte judgment should be set aside, the respondent relies on Order 10 of the Civil Procedure Rules on the consequences of non-appearance and default of defence and Rule 11 on the Court's discretion to set the judgment aside.

17. Counsel relies on the decisions in CMC Holdings Ltd V James Mumo Nzioki [2004] eKLR Mbugo & Another V Shah [1968] EA 93 and Josphat Nderitu Kariuki V Pine Breeze Hospital [2006] eKLR on the exercise of the court's discretion.

18. According to the respondent, there are two ex parte judgments occasioned by the applicant through delays.

19. That at the applicant's instance the court permitted the applicant to defend the suit scuttling the judgment slated for 18th December, 2023 and no reason for the delay was provided yet all the applicant's counsels have been in-house.

20. That unlike the Court of Appeal in CFC Stanbic Ltd V John Maina Githaiga & Another [2013] eKLR where the client had acted with alacrity in giving instructions, in the instant case the counsels and the client are housed in the same premises.

21. Similarly, the respondent argues that while in Jomo Kenyatta University of Agriculture & Technology V Mussa Ezekiel Vebah [2014] eKLR the appellant explained the delay in the Replying Affidavit, in the instant case the over sight has been continuous and the applicant only moved to court to arrest a scheduled judgment or after a judgment was delivered.

22. The respondent urges that the applicant was not denied the right to be heard but scorned the opportunities accorded to it and the respondent ought not to be held hostage.

23. The respondent concludes that the applicant is by the instant application obstructing justice due to the respondent and the application ought to be dismissed.

Analysis and determination

24. Before delving into the issues raised by the parties, it is essential to capture the history of the instant case as it contextualizes the instant application and its determination.

25. This case was filed on 12th January, 2023 and on 22nd March, 2023, the court directed the respondent/applicant to comply, a direction the court repeated on 2nd May, 2023 as no action had been taken towards compliance. And as if that was not enough, on 10th July, 2023, the court accorded the respondent another 14 days to comply failing which the matter would proceed undefended. The respondent was not moved and on 25th September, 2023, the court directed that the matter should proceed as undefended and hearing took place on 18th October, 2023 and parties were accorded 14 days to file and exchange submissions.

26. A mention was scheduled for 15th November, 2023 to confirm compliance and judgment was slated for 19th December, 2023. However, on 18th December, 2023, the respondent filed a Notice of Motion seeking to arrest the judgment and the court obliged the respondent and a ruling on the Notice of Motion was delivered on 27th June, 2024.

27. In an endeavour to ensure that the respondent participated in the matter, the court set aside the directive that the matter proceeds undefended and granted the respondent time to respond. Strangely none of the parties appeared for mentions slated for 22nd July, 2024 and 1st August, 2024 and the

applicant did not attend the mention scheduled for 18th September, 2024 nor serve its defence and judgment was slated for 11th October 2024 and was delivered on even date in the absence of the applicant.

28. Predictably, by the instant Notice of Motion dated 29th November, 2024 the respondent sought various Orders and the court granted prayer No. 2 and 3 of the Notice of Motion.

29. The foregoing history reveals that: out of 18 court sessions, while the claimants counsel attended 15 sessions, the respondent was represented in 8 sessions only.

30. Puzzlingly, although the respondent's application dated 15th December, 2023 was successful and it was directed to pay the requisite court fees and serve the draft response which was deemed duly filed.

31. From the record, it is discernible that the court did all it could to accommodate the applicant as a litigant but the applicant did not reciprocate by complying with court directions.

32. Evidently, had the applicant been mindful of its role as a litigant the instant application would not have arisen.

33. As correctly submitted by both parties, it is trite law that the court has discretion to set aside or vary a judgment or Order on such terms as it may deem just under Order 10 of the Civil Procedure Rules.

34. In Mbogo & Another V Shah (Supra), the Court of Appeal stated as follows

> ...the courts 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".

35. Clearly, the applicant is obligated to demonstrate that it had a reason for not participating in the hearing and there must have been unintended accident, inadvertence, excusable error or mistake.

36. Strangely, the applicant's Supporting Affidavit while admitting that it allocated the matter to Ivor Aska Nyamita and Jeptanui Katwa, to jointly represent it in the suit, it does not explain why the two in-house counsels were unenthusiastic in representing it in court, yet they were under its superintendence.

37. The applicant is silent on when it appointed the duo to represent it or when it discovered that they were not attending court.

38. The applicant's assertion that the matter was partly negotiated and the sum of Kshs.1,739,008.00 was paid cannot avail it, as this was done in 2023 and it successfully arrested the judgment scheduled for delivery on 19th December, 2023 and thus cannot pretend that that it was unaware that the matter was proceeding in court.

39. The alleged payment, which the respondent admitted was done earlier and thus could not have been the justification for non-participation in the suit.

40. Equally, counsel's averment that the applicant was surprised when it was served with a judgment delivered on 11th October, 2024 appears disingenuous as counsel must have been aware that by a ruling date 27th June, 2024 the court set aside its Orders and gave the applicant time to pay court fees and serve the draft response for the matter be heard of a priority basis.

41. Intriguingly, the applicant did not appear in court for the ruling on its application notwithstanding that the date was taken in court in the presence of its counsel and the applicant did not attend court again after 30th April, 2024 when the ruling date was issued.

42. The applicant skipped the mentions slated for 27th July, 2024, 1st August, 2024 before the Deputy Registrar and 18th September, 2024 when the judgment date was set yet the judgment notice was served.

43. The instant Notice of Motion was filed 48 days later which would appear to suggest that no follow ups on the case were made by the applicant or its in-house counsels.

44. Similarly, the applicant's averment that it did not get a chance to defend the suit and its fundamental right to be heard was violated to all intents and purposes comedic in light of the applicant's history of participating in this case.

45. It is trite law that "a mistake is a mistake irrespective of the person who committed it" as held by Madan J. A. in Belinda Murai & 6 Others V Amos Wainaina (Supra).

46. See also Wekesa Tolula V Hilda Wanjiru Tulula Kitale ELC Case No. 52 of 2013, Philip Chemwolo & Another v August Kubende [1982-1988] KLR 103 among others.

47. Although the affiant deposes that the applicants right to be heard was frowned owing to mistakes or omissions of counsel, the affidavit is silent on who committed what mistake or omission. Such details are crucial in determining whether the mistake or error is excusable and bearing in mind these were in-house counsels, evidence of supervision by way of periodic reports or status update of suits against the respondent would have demonstrated the applicant's keenness to defend the suit.

48. A credible explanation as to why neither of the two counsels attended court after 30th April, 2024, yet the suit was on-going would have demonstrated the applicant indeed had a reason for non-attendance. On the contrary, not a single reason or excuse has been given, even a weak one.

49. As held in Savings and Loans Ltd V Susan Wanjiru Muritu HCCC No. 397 of 2002.

50. It is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

51. Justice Mutungi expressed similar sentiments in Duale Mary An Gurre V Amina Mohamed Mahamed & Another [2014] eKLR that "litigation does not belong to the advocate but to the client".

52. The foregoing sentiments apply on all fours to the facts of this case in that if the respondent was a diligent litigant it could have clearly demonstrated it by complying with the directions of the court issued on 27th June, 2024 when its application dated 15th December, 2023 was granted.

53. Needless to emphasize, this case was filed on 12th January, 2023 and was not heard until 18th October, 2023 because of the applicant's non-compliance having been accorded time to do so on 22nd March, 2023, 2nd May, 2023 and 10th July, 2023, but was keen to arrest the judgment.

54. Did the learned trial Judge afford the applicant its constitutionally ordained right to be heard on the matter? The answer to this question is undoubtedly in the affirmative.

55. Not even the emails on record and documents on the respondent's clearance can avail the applicant as all that took place in 2023 and the judgment sought to be set aside was delivered on 11th October, 2024, almost one year later and the applicant has refused, failed or neglected to explain why it was not represented by any of the two counsels handling the matter from 30th April, 2024 to 29th November, 2024 when the instant application was filed.

56. Could it have been that the counsels were too busy handling other matters, forgot about the pending suit, misdiarised mention dates or outright dereliction of duty? These were employees of the respondent, and it cannot disassociate itself from them. It supervised them and could demand reports from them and hold them to account and having failed to do so, it has itself to blame as it is the author of circumstances it finds itself in for not being a diligent litigant.

57. In the courts view, this is a case where were the court to exercise its discretion in the applicant's favour and allow the instant application, it would be assisting a litigant to "deliberately obstruct or delay the cause of justice" as held in Mbogo & Another V Shah (Supra).

58. Flowing from the foregoing, it is discernible that the applicant's Notice of Motion dated 29th November, 2024 is for dismissal and it is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 11TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE