



Bwanamzee & another (Suing for and on Behalf of the Estate of Bwanamzee Mohamed – Deceased) v Ready Consultancy Company Limited & another (Miscellaneous Application E023 of 2025) [2025] KEELRC 1908 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1908 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E023 OF 2025**

M MBARŪ, J

JUNE 26, 2025

BETWEEN

MUNIRA MUNYIVA BWANAMZEE 1ST APPLICANT

FILOHI KASSIM YUSUF 2ND APPLICANT

**SUING FOR AND ON BEHALF OF THE ESTATE OF BWANAMZEE
MOHAMED – DECEASED**

AND

READY CONSULTANCY COMPANY LIMITED 1ST RESPONDENT

**OLD MUTUAL LIMITED (PREVIOUSLY UAP OLD MUTUAL INSURANCE
COMPANY LIMITED) 2ND RESPONDENT**

RULING

1. The 2nd respondent, Old Mutual Limited, filed an application dated 2 April 2025 seeking orders:

The court be pleased to set aside the ex parte orders and judgment entered on 10 March 2025 in favour of the applicants against the 2nd respondent and all consequential orders thereto,

This court be pleased to grant the 2nd respondent unconditional leave to file their response in terms of the draft copy of the Replying Affidavit annexed to the supporting affidavit,

The court is at liberty to make such or other orders as it deems expedient to achieve justice.

Costs of the 2nd respondent bear the application.

2. The application is supported by the affidavit of Joy Muthoka, a legal officer who avers that the 2nd respondent was served with summons to enter appearance through the Mombasa office. In turn, there



was a delay in forwarding the same to the main office in Nairobi. Furthermore, there was a delay in instructing the advocate to defend the matter, occasioning the delivery of judgment herein.

3. Muthoka avers that the 2nd respondent has a viable response to the claim and shall suffer irreparable loss and damage if the response is not considered and the judgment is executed without a fair chance to respond. There will be no prejudice upon the applicants if the orders sought are allowed and the 2nd respondent. Any loss or damage incurred can be compensated through damages.
4. In her affidavit, Ms Muthoka asserts that the 2nd respondent entered into an agreement with the 1st applicant through discharge vouchers dated 29 July 2022 for the sum of Ksh. 3,406,216 to ensure full and final settlement of the claim. Payment was remitted on 3 August 2022, representing full settlement of all claims against the insurance company amounting to Ksh. 3,406,216. The applicants have not refunded these payments; therefore, the application seeking further payments lacks merit and constitutes an abuse of the court process.
5. In reply, the Munira Munyiva Mwanamzee filed a Replying Affidavit and avers that as a co-administrator to the Estate of the late Bwanamzee Mohamed, the application by the 2nd respondent is in abuse of court process and the Estate should be allowed to enjoy the fruits of the judgment herein. The 2nd respondent has confirmed proper service of summons and application and therefore, judgment entered herein on 10 March 2025 is regular and lawful. There is no legal basis to stay the judgment.
6. The 2nd respondent has attached a remittance advice supporting their application, yet this remittance does not constitute sufficient grounds for a stay of execution of the judgment herein; there is no proof of payment of the sum due.
7. The application before the court is a mere afterthought meant to delay justice. If the court is inclined to grant the application, the respondents should be directed to deposit Ksh. 4,104,016 in court to secure the judgment.

Both parties filed written submissions.

8. The main contention of the 2nd respondent is that they were properly served, but they were delayed in filing a response due to delays in transmitting files from the Mombasa office to the Nairobi office.
9. The other fundamental issue raised by the 2nd respondent is that they have since paid the 1st applicant Ksh. 3,406,216. He executed the discharge voucher, and the funds were transmitted to him. There is payment in full.
10. The applicants contend that where there is an admission of proper service and no court attendance, the judgment herein is lawful and valid, and execution should be allowed to proceed. The 1st applicant also contends that the records filed, indicating the transmission of funds to him, are not sufficient proof of full and final payment.
11. It is clear, therefore, that the decision to grant the orders sought—specifically, the request to set aside the ex parte judgment herein and the permission to file a reply to the main application—is an exercise of discretion. Like any other, such an exercise of judicial discretion must adhere to established principles and not be guided by private opinions, sentiments, sympathy, or benevolence. It should be deservedly and not arbitrarily, whimsically, or capriciously exercised, as held in *Ikuuni Hotel Ltd v Serah Nundu Nthaku* [2020] KEHC 2192 (KLR). Consequently, the Court’s judicial discretion must be exercised based on evidence and sound legal principles, with the burden of disclosing the material resting squarely on the applicant for such orders. One of those judicial principles expressly stipulated in the above provision is that the applicants must satisfy the Court that they have reasonable cause for doing so, as held in *Feroz Begum Qureshi and Another v Maganbhai Patel and Others* [1964] EA 633.



12. The applicants moved the court through an application dated 13 February 2025, seeking the court to adopt the Director of Occupational Safety and Health Services (DOSHS) award dated 8 March 2024 for Ksh. 3,381,216. The applicants claimed Ksh.716,800 as burial expenses, costs, and interests at 14%.
13. The applicants attached DOSH Form 1 and 4, where there is an assessment and compensation at Ksh. 3,381,216.
14. The 2nd respondent has attached evidence of paying Ksh. 3,406,216 to the applicants. The 1st applicant executed a discharge voucher.
15. Despite the 2nd respondent being served and failing to attend court in good time to respond and defend the matter, the records submitted in the instant application raise crucial material and evidence to justify the court reexamining the application to meet the ends of justice. The applicants did not disclose the payment of Ksh. 3,406,216 in their original application, leading to the judgment herein. Therefore, sufficient and reasonable cause exists for the court to revisit the matter.
16. The 2nd respondent has offered to meet the applicants' costs. These costs are herein assessed under Section 12(4) of the *Employment and Labour Relations Court Act*, read together with Rule 70(4) of the Employment and Labour Relations Court (Procedure) Rules, all at Ksh. 20,000.
17. Accordingly, the application dated 2 April 2025 is with merit and is hereby allowed. Judgment herein is set aside; the 2nd respondent shall file and serve a response upon the applicants and 1st respondent within 7 days from the date herein to allow 14 days right of reply. A hearing date shall be allocated at the registry. Applicants awarded Ksh.20,000 in costs.

DELIVERED IN OPEN COURT THIS 26TH DAY OF JUNE 2025

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

