Kasiti v Solo (Cause 261 of 2017) [2024] KEELRC 267 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 267 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 261 OF 2017

K OCHARO, J

FEBRUARY 16, 2024

BETWEEN

SHEILA KASITI ..... CLAIMANT

AND

MWIKALI SOLO ..... RESPONDENT

RULING

1. The Respondent filed the instant application dated 6th March 2023 and filed in Court on 7th March 2023 through the firm of Munyendo Mapesa and Company Advocates. The application is brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 12 Rule 7 and Section 3 of the *Employment and Labour Relations Act* and all other enabling provisions of the law and prays for the following orders:

    a. This application be certified as urgent and the service thereof dispensed with in the first instance (Spent)

    b. Leave be granted to the firm of Messrs Munyendo Mapesa & Co. Advocates to come on record for the respondent.

    c. Pending the hearing of this application, there be a stay of execution of the warrants of attachment and proclamation and sale dated 2nd March 2023.

    d. The proceedings of the Court conducted on 21st September 2021 be set aside.

    e. The Judgment and Decree of the Court dated 15th December 2021 be set aside.

    f. This Honourable Court be pleased to issue directions for a priority fresh hearing of the main suit herein.

    g. The costs of the application be provided for.

2. The application is premised on the grounds on the face of the motion and as further supported by the affidavit sworn by Mwikali Solloh on 6th March 2023 as highlighted herein:

    a. That the applicant's defence was closed without hearing the applicant. The respondent's failure to take part in the proceedings is attributed to the fact that the respondent lost contact with her then advocates on record and so had no knowledge of hearing notices or proceedings.

    b. That this honourable Court closed the Respondent's case and delivered its judgment on 15th December 2021, a decision the applicant maintains violates her right to hearing as protected under Article 25 of the *Constitution* of Kenya, 2010.

    c. The applicant is keen on defending this suit having filed her defence and counterclaim dated 22nd May 2019, which she defence she maintains was not regarded in the determination of the case.

    d. The affiant avers that the decree-holder never served the decree of the Court upon her advocates on record and only served them with proclamation notice and notice of the warrants of attachment and sale to her. She argues that the decree holder's actions were in bad faith and irregular as the same was done without prior notice to show cause under Order 22 Rule 18.

    e. Ms Solloh further argues the process of proclamation and sale of movable properties of the applicant is irregular, unjust and unlawful and thus urging this Honourable Court to nullify the same.

    f. She maintains that she had no knowledge of hearing of the suit and delivery of the Court's judgment on 15th December 2021. She urged this Honourable Court not to visit the mistakes of her then advocates on record upon her.

    g. The applicant argues that this Honourable has unfettered discretion to hear and determine the instant application and that the applicant has met the threshold for the grant of the orders sought in the instant application.

    h. It is in the interest of justice that the instant application is allowed as prayed.

3. The Claimant/Respondent opposes the application on the premise of those grounds obtaining on the replying affidavit sworn by the Claimant on the 21st March 2023.

4. Pursuant to the directions that were given by this Court the parties have filed submissions for and against the application.

Submissions by the parties

5. The respondent/applicant in her submissions maintains that she has met the threshold for setting aside proceedings and judgment thus paving the way for hearing of the suit afresh. She submits that this Honourable Court is clothed with unfettered discretion to grant the orders under Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* as read with Order 12 of the *Civil Procedure Rules* and Section 3 of the *Employment and Labour Relations Court Act*.

6. The applicant further submits that she remained unaware of the progress in this matter having lost contact with her then advocates on record and that the former advocates inadvertently used the wrong contacts in reaching out to her. She argued that the mistake of the advocate ought not to be visited upon the client and relied on the findings in the case of *Lucy Bosire v Kenhancha Div. Land Dispute Tribunal & 2 others* (2013) for emphasis.

7. The applicant submits that she has a meritorious defence and counterclaim with triable issues which should go to trial for adjudication by this Honourable Court failure to which she stands to suffer substantial injustice if denied a chance to be heard. To fortify this argument, the applicant cited and relied on the court findings in the Court of Appeal decision in the case of *CMC Holdings Limited v James Mumo Nzioki* (2004) and the case of *Joswa Kenyatta v Civicon Limited* (2020) eKLR.

8. The applicant further submits that the reasons cited for her failure to accompany her then advocate on record for the hearing constitute sufficient cause to warrant the grant of the orders of setting aside sought. For emphasis, the applicant relied on the findings in the case of *Wachira Karani v Bildad Wachira* (2016) eKLR. To further fortify this argument, the applicant relied on the provisions of Article 25 of the *Constitution* of Kenya that guarantees her right to a hearing. For emphasis, the applicant referred this Court to the findings in the case of *Richard Nchapai Leiyangu v IEBC & 2 others* (2012) eKLR.

9. The applicant further submits that it was irregular and unlawful for the decree-holder to proclaim her goods without prior notice the said judgment having been more than a year old in line with the provisions of Order 22 Rule 18 of the *Civil Procedure Rule*s. It is on this basis that the applicant urges this Court to nullify the process.

10. In conclusion the applicant urged this Honourable Court to find her application dated 6th March 2023 with merit and to allow it in terms of the reliefs sought therein.

Claimant/Respondent's Submissions

11. The claimant on the other hand submits that no reasons have been advanced, and no justification and evidence adduced by the applicant to warrant the grant of the setting aside orders sought in the instant application. Further, from the proceedings, it is clear that counsel on record for the respondent took part in the hearing by cross examining the Claimant and no evidence has been tendered to support her assertion that the said counsel had no instructions from her as contended.

12. The claimant further submits that this Honourable Court properly exercised its discretion in hearing and determining this matter as provided under Rule 21 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 by determining this suit based on pleadings, affidavits, documents filed and submissions made by the parties. The Claimant maintains that the applicant's contention that she was not heard does not hold any water by dint of this provision. The Claimant argues that litigation must come to an end and that the instant application is an afterthought and /or forum shop and should not be allowed by this Honourable Court.

13. The Claimant further submits that the instant application lacks basis as the *Employment and Labour Relations Court (Procedure) Rules*, 2016 do not provide for setting aside Judgments but review under Rule 33 of the *Rules*. The Claimant further submits that the grounds raised by the applicant are contradictory, disjointed and therefore self-defeatist.

14. The Claimant further submits that the applicant has not met the threshold of setting aside as the Court's decision/ judgment was entered after all parties were accorded a fair opportunity to represent their cases. The Claimant further argues that should this Court be inclined to entertain and allow the instant application, then the Honourable Court will be sitting on its own appeal. For emphasis, the Claimant relied on the findings in the case of Shah v. Mbogo.

15. The Claimant contends that the allegations and grounds cited by the applicant in advancing the application are not substantiated and thus not proved. To fortify this argument, the Claimant referred

this Honourable Court to the findings in the case of *Anarita Karimi Njeru v Republic* (1976 – 1980) KLR 1272 and *Matiba v AG* (1990) KLR 666.

16. The Claimant further argues that the applicant has failed to prove her case for the grant of the orders sought in the instant application and thus the application lacks feet to stand on. For emphasis, the Claimant cited the case of *Leonard Otieno v Airtel Kenya Limited* (2018) eKLR.

17. The Claimant further submits that the applicant is not eligible to cite and rely on the provisions of Order 12 Rule 7 of the Civil Procedure Rules for reasons that she has not demonstrated sufficient cause as to why the Judgment delivered by this Honourable Court should be set aside and the case reopened for a fresh hearing. To buttress this argument, the Claimant cited and relied on the findings in the cases of *Rachael Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaika) v Hannah Wanjiru Kiniti & Another* (2021) eKLR and *Wachira Karani v Bildad Wachira* (2016) eKLR.

18. In conclusion the Claimant urged this Court to find the instant application without merit therefore urging it to dismiss same in its entirety with costs to the Claimant/Respondent.

Analysis and Determination

19. Imperative to state from the onset that this matter came up for hearing on 21st September 2021, the Claimant was represented by Ms. Njenga, while the Respondent/Applicant who was not in attendance of court was represented by Mr. Ongegu who was holding brief for Counsel Bosire. Counsel Ongegu informed the Court that Mr. Bosire was trying to get in touch with his client and sought a time allocation. The matter was allocated 11.00 am for proceeding. At this appointed time, the Respondent/Applicant was still not in attendance. The Court proceeded with the Claimant's/Applicant's case with the Respondent's/Applicant's Counsel having an occasion to cross examine her.

20. At the close of the Claimant's/ Respondent's case, this Court considered it necessary to indulge the Respondent/Applicant. It adjourned the matter for defence hearing on the 18th of October 2021. On this day the Respondent was again not present in Court to prosecute her defence. Her Counsel Mr. Ongegu moved the Court, thus;

> "We have tried to have our client, the Respondent come for a pre-trial conference. She has refused. We want to file an application to cease acting."

Holding that there was no sufficient reason to attract the adjournment of the matter, this Court declined to grant an adjournment and deemed the Respondent's case closed.

21. Where a judgment has been entered the way it was in this matter, without the Court taking and considering the evidence of the Respondent, a Respondent has three remedies available to him or her. First, is by way of filing an application for setting aside the Judgment; the second is by way of filing an appeal against the judgment and the third, is by way of review before the same Court against the Judgment. I am not persuaded therefore by the Claimant's/Respondent's position that there is no law, the basis on which this Court can grant the orders sought.

22. The power of this Court or any other Court for that matter to set aside a judgment regularly entered, on the account that the proceedings leading to it were without the Respondent presenting his or her case is discretionary and only exercised; where the justice of the case dictate; judiciously: not capriciously and or whimsically; and giving regard to the fact that justice is two-way traffic.

23. In the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75, Duffus P. held:

> " The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on 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 which should go to trial for adjudication."

24. I have not lost sight of the fact that the unfettered discretionary power hereinabove mentioned 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. See, *Shah v Mbogo*[1967]EA 116.

25. The Respondent/ Applicant asserted that the matter herein proceeded in a manner that affronted her constitutional right to a fair hearing, as she was not heard. Applicants like her should better heed this, where there is ample material that he or she was invited for a hearing but didn't turn up without sufficient cause, blaming the Court that it proceeded to hear the matter in his or her absence, and render itself on the matter based on the ex parte proceedings, therefore affronting his or her constitutional right to a fair hearing, shall be, to say the least, woeful from all fronts. In any event, a balance must be struck between the right to a fair hearing and her adversary's right to an expeditious dispensation of justice, and the Court's constitutional mandate to avail such a dispensation.

26. An Applicant seeking the setting aside of a judgment that ensued from her or his failure to attend a hearing, must demonstrate that he or she had a sufficient reason why he or she failed to attend the hearing. In *Wachira Karani v Bildad Wachira* [2016] eKLR the Court stated and I agree;

> " Sufficient cause is thus for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formation of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause....."

27. The Supreme Court of India in Civil Appeal 1467 of 2011- *Parimal v Veena Bharti* aptly put it;

> " Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting negligently...."

28. In the instant application, the Applicant advances the reason that since her former advocates lost her contacts, they could therefore not reach her regarding the proceedings in this matter. This reason as advanced in my view doesn't align with what her Counsel told this Court on 18th October 2021, when he sought to have the matter adjourned for further hearing. Counsel's address expressly suggested that the Applicant was aware of the hearing date. If indeed Counsel had lost contact with their Client, nothing could have been easier than him so stating to Court as a basis for the application for adjournment.

29. The Applicant deposed in her supporting affidavit and reiterated in the supplementary affidavit, that in their attempts to trace her, her Counsel used an erroneous address and as a result information regarding the proceedings in this matter didn't reach her. Surprisingly, she does not mention anywhere, what her

correct contact address was, and what erroneous address was used. In my view, this could be a vital thing that could be expected of any reasonable and candid Applicant.

30. As a result of the foregoing premises, I am not persuaded that; the Applicant's former Advocates lost contact with their client, the Applicant; the Applicant was not aware of the hearing date; and an erroneous address was used in the attempt to inform her of the proceedings.

31. The Applicant pleaded with the Court that her Counsel's mistake shouldn't be visited on her. I am cognizant that indeed, Counsel's mistakes shouldn't be visited on his client. However, I must say that this plea that is commonly raised by Applicants in applications like the instant one, cannot be embraced by the court so automatically as an aid of the application. As to how it sits in a particular case depends on the circumstances of each case. The mistake must be purely by the Advocate, not fermented by any action by the Applicant.

32. In my view, it is clear that the Applicant has not been following up with her Advocates to check on the position of her matter at various times. Hers was a lack of due diligence. This Court declines her plea.

33. It is trite law that whether or not the court can set aside an exparte judgment the other factor considerable is whether the Applicant has any defence which raises triable issues. See, *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75.

34. In *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR, the Court of Appeal stated;

> " The law is now settled that in an application for setting aside ex perte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."

35. I note that on the 23rd May 2019, the Applicant filed a Response and Counterclaim. In the Response, it is denied that the Claimant was dismissed from employment. Her assertion that she was all through in the course of her employment underpaid, is equally denied. In the Counter-Claim it is alleged that at the time of separation, she owed the Respondent specific amounts. I have carefully considered these, as against the other material on record, and I am persuaded that the Respondent's pleadings raise triable issues.

36. As a result of the foregoing premise [that the Respondent's pleadings raise triable issues], I find this is a proper application for this Court to exercise its unfettered discretion in favour of the Applicant. However, having found as I have hereinabove, that she lacked diligence in following up her case with her Advocates, hence the situation that there is in this matter, the justice of this matter dictates that she compensates the Claimant/ Respondent by way of thrown away costs. Costs which I hereby fix at KShs. 40000.

37. The costs shall be paid within 45 days of the date of this ruling, in the defaulting execution to issue against the Applicant.

38. The Applicant assailed the process of execution of the decree initiated by the Claimant herein. The attack is two-pronged. The commencement of the proceedings unprocedural as it wasn't preceded by a notice to show cause process, since the commencement came in after twelve months of the judgment. Further, the decree was not extracted in the manner prescribed by the *Civil Procedure Rules*.

39. Order 22 Rule 18 of the *Civil Procedure Rules* 2010 provides that: -

> Notice to show cause against execution in certain cases [Order 22, rule 18]
>
> (1) Where an application for execution is made—
>
> (a) more than one year after the date of the decree;
>
> (b) against the legal representative of a party to the decree; or
>
> (c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:
>
> Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:
>
> Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.
>
> (2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in the execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.
>
> (3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

40. There is no dispute that judgment in this matter was delivered on the 15th of December 2021, and that the process of execution of the decree that ensued therefrom, was commenced on or about the 31st of January, 2023. No doubt, more than a year of the date of the Judgment. The provisions of Order 22 Rule 18[b] therefore set into play. The Claimant was required to cause issuance of a notice to show cause as contemplated thereunder before initiating the execution process as she did. I am certain that this Rule of procedure is not for ornamental purposes, it is one of those that are designed to inhibit practices and actions by the Decree Holders that may amount to ambushes on the Judgment Debtors, thereby causing unnecessary inconveniences, prejudices, and incurring of unnecessary further costs.

41. The execution process was initiated incompetently, therefore. There is no explanation why the Claimant initiated the process against the clear provisions of the Civil Procedure. As a result, I hereby hold that the process was so initiated and hereby set aside the execution process. As her action was unjustified, the Claimant shall bear auctioneers' charges.

42. By reason of the foregoing premises, I direct that the matter herein shall be heard afresh, but on a priority basis.

READ, DELIVERED AND SIGNED THIS 16TH DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Ms Bosibori for Miss Njenga for Claimant/Respondent

Mr. Mapesa for Respondent/Applicant

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 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.

A signed copy will be availed to each party upon payment of Court fees.

.....

OCHARO KEBIRA

JUDGE