



**Pathenol v Indian Ocean Forwarders and Logistics Company (K) Limited
(Cause E068 of 2023) [2024] KEELRC 1411 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1411 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E068 OF 2023
M MBARÚ, J
MARCH 20, 2024**

BETWEEN

ODERA OGUTU PATHENOL CLAIMANT

AND

**INDIAN OCEAN FORWARDERS AND LOGISTICS COMPANY (K)
LIMITED RESPONDENT**

RULING

1. The respondent, Indian Ocean Forwarders and Logistics Company (K) Limited filed an application dated 7 February 2024 under the provisions of Section 1A, 1B, 3A, 63(e), 79G of the [Civil Procedure Act](#), Order 22 rule 22, Order 9 rule 9, Order 10 rule 11 and Order 50 rule 15 of the [Civil Procedure Rules](#) and seeking for orders that;
 - a) Spent.
 - b) This court grants leave to the firm of Lawrence Obonyo Legal Advocates to come on record for the respondent post-judgment and the Notice of Appointment of Advocate filed be deemed as properly on record.
 - c) The court be pleased to stay proceedings with regard to taxation of claimants Party to Party Bill of Costs dated 28 November 2023 pending hearing and determination of this application.
 - d) This court be pleased to set aside the judgment dated 23 November 2023 and all consequential orders and direct the matter to proceed de novo.
 - e) This court be pleased to grant leave to the respondent to defend the suit on merit.
 - f) The court to make orders it deems appropriate.
 - g) Costs be provided for.



2. The application is supported by the affidavit of Gilbert Andugu on the grounds that the respondent was not aware that the claim filed by the claimant was not served with the pleadings and only became aware when served with the Notice of Taxation dated 30 November 2023. In the interests of justice, the respondent can appoint advocates to defend the suit and be heard on the merits.
3. In his Supporting and Supplementary Affidavits, Andugu aver that he is the director of the respondent, and the claimant was employed as a transport manager and resigned on 13 June 2023. The respondent was not aware of these proceedings and was not served. Unless a stay of proceedings is allowed and the respondent is allowed to defend the claim, there will be prejudice. There is a good defence with high chances of success and if allowed to state its case, it will be apparent that the claimant resigned from his employment and failed to disclose to the court that salaries for April and May 2023 were partly paid. He was not entitled to house allowances.
4. In response, the claimant filed his Replying Affidavit and aver that the application by the respondent is an abuse of the court process and should be dismissed with costs. Leave to come on record post-judgment is misplaced since there was no appearance in the first instance. Taxation has taken effect.
5. Service of summons was lawful, returns were filed and the court was satisfied when the hearing proceeded. Before filing suit demand was issued but the despondent failed to address it. Judgment notice was issued but the respondent failed to attend.
6. The claimant avers that the respondent deliberately failed to attend court and through its directors has been calling him over the matter. This is full knowledge of this matter. The respondent refused to attend court and should not enjoy the discretion of the court. The application should be dismissed with costs.
7. Both parties attended and filed written submissions; these are analyzed and the issues for determination are whether the respondent should be allowed to appoint its advocates post-judgment; whether a stay of proceedings with regard to taxation should be stayed; and whether the judgment delivered on 23 November 2023 should be set aside.
8. As submitted by the claimant, the respondent never made an appearance. Leave to appoint an advocate is a right that was not secured and applied. The advocates attending for the respondent need not seek leave and are properly on the record.
9. The process of taxation resulted from a valid judgment of this court. dealing with the judgment will resolve whether to allow the process commenced on taxation of the bill of costs to conclude.
10. Judgment herein was delivered on 23 November 2023 after the hearing of the claim. The court was satisfied that the respondent was served with all pleadings and hence aware of the matter. In his Supporting Affidavit, Andugu only acknowledges service of the Taxation Notice dated 28 November 2023 while the summons and Hearing notices were served through the same address and mode. The Affidavit of Service and the averments therein are not contested. This does not place the respondent in good standing.
11. Summons to attend court should be respected to allow the court to dispense justice without undue delays. Where the respondent had a good defence as now proposed, such a response existed at the end of employment and cannot be more important post-judgment.
12. I take note the respondent has shared the intended response and in his Replying Affidavit, the claimant does not contest any matter therefrom. To allow the court to hear the respondent on its case, several conditions will be issued in setting aside the judgment delivered on 23 November 2023.



13. Balancing the rights, the respondent will be allowed time to attend and file their response.
14. The claimant moved on a good basis that he had served all pleadings and to be taken back to accommodate the respondent, it is only fair that his due costs are assessed and paid before the hearing can commence afresh. The claimant has in total attended five court sessions. A sum of Ksh. 50,000 shall be paid by the respondent before the hearing can commence.
15. Accordingly, the application dated 7 February 2024 is conditionally allowed in the following terms;
 - a) The respondent is at liberty to appoint his advocates;
 - b) Judgment delivered on 23 November 2023 is hereby set aside to allow the respondent to file its response and serve within the next 7 days;
 - c) The respondent to pay the claimant costs assessed at Ksh. 50,000 within the next 14 days;
 - d) Hearing directions to issue.

DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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