Chirani v Ecoplast Limited (Employment and Labour Relations Cause 226 of 2018) [2024] KEELRC 2312 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2312 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 226 OF 2018

K OCHARO, J

SEPTEMBER 26, 2024

BETWEEN

SAMUEL NYAUMA CHIRANI ..... CLAIMANT

AND

ECOPLAST LIMITED ..... RESPONDENT

RULING

Background

1. Through its Notice of Motion dated 22nd April 2024, the Respondent/Applicant seeks that this Court set aside the Judgment entered against it on 09/03/2023 and resultantly, allow it to file its response to the Claim out of the prescribed time.

2. The application is premised on the grounds on the face of it, and bolstered by those in the Supporting Affidavit sworn by one Ajaykumar Premchandbhai Gudka, the Managing Director of the Respondent, on 22nd April 2024.

3. The application is expressed to be under the provisions of Rule 13 (4) of the *Industrial Court (Procedure) Rules 2010*; Order 10 Rule 11, Order 40 Rule 7 and Order 51 Rule 1 of the *Civil Procedure Rules 2010*; Section 1A, 1B, 3A, 6 and 7 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya; and Article 159 of the *Constitution* .

4 The Claimant/Respondent resists the application upon the basis of the grounds set out in his replying affidavit sworn on the 2nd May 2024.

5. The application is premised on the prime ground that neither the Claimant's Statement of Claim nor summons to enter appearance were served on the Respondent before the matter was slated for formal proof, and the Judgment herein consequently given. That this suit and the Judgment existence only

came to the knowledge of the Respondent, on or about the 22nd March 2024, when its properties were proclaimed in execution of the decree that emanated from the Judgment.

6. The Respondent/Applicant asserted that the formal proof and the Judgment were a product of the untruths and falsehoods encompassed in the affidavit of service sworn by one Benson Mutinda, an alleged licensed process server. The assertion in the affidavit that the requisite court process was served on the Respondent's Managing Director [read the deponent of the supporting affidavit], is untrue. The fact that none of the documents that were alleged to have been served is signed by him, is a testament to this.

7. The deponent of the supporting affidavit expressed that in the circumstances of the instant matter, the process server needed to be cross-examined on what he deposed in the affidavit.

8. The Respondent/Applicant urges the Court to set aside the default Judgment entered, as the same was obtained irregularly and on false information. Further, if the order sought isn't granted and the execution process is allowed to continue, it will suffer irreparable loss. It has a defence with triable issues.

9. On his part and in opposition to the application, the Claimant argues that the Judgment herein was regularly and rightfully entered. Summons to enter appearance and the Statement of Claim, were duly served on the Respondent/Applicant's Managing Director, who identified himself as Mr. Ajay.

10. The Claimant/Applicant further contends that the service of the court process was received by the Managing Director who, however, refused to sign the documents in acknowledgement of receipt thereof. This was unambiguously indicated in the affidavit of service filed before the Court.

11. Despite the service, the Respondent neither entered an appearance nor filed a response to the statement of claim, hence the formal proof and subsequent default Judgment.

12. The Claimant/ Respondent assert that post the Judgment, other court processes like the party and party bill of costs and a taxation notice were effected on the Respondent/Applicant's Managing Director on 10th November 2023 via Whatsapp on his mobile phone number 0701758899. The mobile number was confirmed to be the Respondent/Applicant's Managing Director's as evidenced by the Mpesa extract, annexed to the replying affidavit. The Respondent/Applicant could have then applied to set aside the Judgment. The Respondent is guilty of laches.

13. The Claimant/Respondent invites this Court to note that the Respondent/Applicant hasn't placed before it a draft statement of defence from where it can be discerned that it has a defence with triable issue[s]. It should be safely concluded that it hasn't such a defence.

14. Following the directions of this Court issued on 3rd May 2024 that the application be canvassed by way of written submissions, the Claimant/Respondent filed submissions dated 10th June 2024. The Respondent/Applicant is yet to file their submissions.

Analysis and determination

15. I have considered the Notice of Motion dated 22nd April 2024, the Grounds thereof, the Supporting Affidavit sworn on the same day, the Claimants/Respondents' Replying Affidavit sworn on 2nd May 2024; and the Claimant/Respondent's submissions. The sole issue for determination is: -

    a. Whether this Court should grant outstanding the orders sought in the Respondent/ Applicant's Notice of Motion dated 22nd April 2024.

Whether this Court should grant the outstanding orders sought in the Respondent/Applicant's Notice of Motion dated 22nd April 2024.

16. It is not in dispute that this Court delivered Judgment in this matter on 9th March 2023 following a formal proof hearing of the Claimant/Respondent's case. The Court entered Judgment for the Claimant/Respondent in the sum of Kshs. 207,000/- plus costs of the suit and interest at Court rates from the date of Judgment until payment in full.

17. It is also not in dispute that the Claimant/Respondent, in execution of the Decree issued by the Court, instructed one M/s Vision Root Auctioneers, who proclaimed the Respondent/Applicant's property on 22nd March 2024. It is this proclamation that prompted the present application.

18. It is imperative to state from the onset that the Respondent/Applicant has anchored its application on the provisions of inter alia, Rule 13 [4] of the *Industrial Court[Procedure] Rules*, a piece of subsidiary legislation that in my view is non-existent, put in another way not existent and applicable at the material time, and this gives a clear impression of how litigants and Advocates alike haven't kept themselves abreast of the developments in the legal system of the realm of employment and labour relations. In my view, the *Employment and Labour Relations Court [Practice] Rules, 2016*, applied to the instant application.

19. Further, the Respondent/Applicant invoked the provisions of Order 10 rule 11 of the *Civil Procedure Rules, 2010*. I am not under considerable difficulty to fathom what informed the invocation yet it is a trite principle flowing from the forestated Practice Rules of this Court that provisions of the *Civil Procedure Rules* only apply to proceedings before this court to the extent allowed under the Rules, for instance, execution proceedings. However, this Court hasn't lost sight of the fact that where it happens that the Rules of this Court don't provide for a certain situation whereof the Court has been called upon to render itself, for the interest of dispensation of justice, the Court will feel least shackled to invoke the *Civil Procedure Rules*.

20. The Respondent/ Applicant further placed reliance on the stipulation of Order 40 Rule 7, of the *Civil Procedure Rules, 2010*. Undeniably, this provision of the Civil Procedure Rules applies to temporary injunctions, and Rule 7 provides for the discharge of orders of temporary injunctions under certain circumstances. The question that springs up then is, did the Respondent's Counsel appreciate the scope of this Order? If he did, is it relevant to the instant application? I can only think that the Order is very elaborate and clear on its scope and that it could have been easy for one to recognise that it was and could not be relevant to an application to set aside a default Judgment and for an extension of time to enter appearance and file defence.

21. In the upshot, I come to an inescapable conclusion, that the application before this Court is gravely mis-anchored. It should sink. It is hereby struck out. Article 159 of the *Constitution* , cited by the Respondent/Applicant cannot come to its aid as, in my view, it is not a panacea for every ill, every transgression. It shall not be readily allowed to diminish the purpose and importance of procedural justice, which is as pivotal as substantive justice.

22. Assuming I am wrong on the above analysis and conclusion, let me look at the application from a different angle which will not be temptingly looked at, as procedural technicality, as the foregoing angle, could.

23. The Court's authority to aside a default Judgment is discretionary exercised. However, the exercise should not be capricious, whimsical, and a product of sympathy. It should be judicious, dependent on the peculiar circumstances of each case, and only geared to do justice to the parties.

24. Over time courts have established the factors that need to be considered when a Court is faced with an application for setting aside a default Judgment and leave for filing of a defence [read response] out of time. The Court of Appeal in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR, elaborated the factors thus: -

> " We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with the summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).
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> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been an inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456).

25. Expressing that the Court's discretion should be exercised in a manner geared towards doing justice between the parties and that a Court's discretion to set aside a default judgment is unfettered, the Court in the case of *Nixon Murathi Kiratu v Director of Criminal Investigations & 2 others; Mercy Nyakio Mburu & another (Interested Parties)* [2019] eKLR. held: -

> " 12 ...in exercise of the discretion and in doing substantive justice, the courts have no limits or restrictions on Judges direction except that it should be based on such forms as may be just because the main concern of the court is to do justice to the parties and that the discretionary powers should be exercised judicially and not arbitrary. The court's hands are never tied as long as the court is acting within the law and not arbitrarily. The discretionary power to set aside an exparte judgment or order does not cease to apply simply because a decree has been extracted. Unfairly obtained exparte judgment or order should not be allowed to stand once

the applicant has demonstrated lack of service or having not been a party to a suit in which adverse orders have been issued without it being aware of the matter or being involved."

26. In the circumstances of the instant matter, I hear the Respondent/Applicant as contending that the Judgment of this Court herein, is irregular, the same having arrived at without it being heard, as it was not served with summons to enter appearance. This being the case, the issue of service is vital in the current application.

27. The Respondent contends that contrary to the Claimant's/Respondent's position that its Managing Director was served with the summons to enter an appearance and a statement of claim, he wasn't. The Claimant/Respondent asserts that he was served but opted willingly not to acknowledge the service by signing on the documents served. I am not persuaded, by the Respondent/Applicant's position that the fact that the documents do not bear the signature of the Managing Director, will be reason enough for this Court to believe that the service was effected. There have been situations where court processes are served, but the recipient, deliberately or otherwise, fails to sign on the documents served acknowledging the service.

28. In a situation like is, in the instant application, where the Court can only duly determine it by believing the account given by one of the parties, the law and or practice has availed a mechanism to enable the Court justly weigh the matter, examination of the process server. If borrowing were to be done from the *Civil Procedure Rules, 2010*, Order 5 Rule 16, will be an example of such a mechanism. It provides: -

> " Examination of serving officer [Order 5, rule 16] On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

29. The Respondent/Applicant expressed its consciousness of this mechanism, and its availability to it for engagement in the instant matter for its benefit. Inexplicably, it didn't pursue the avenue. It didn't seek that the deponent of the affidavit of service be caused to appear before the Court for examination. In this circumstance, I can only make an adverse inference, that if the examination had been pursued, the result couldn't have aided the Applicant's application. I conclude, therefore, that service of the summons to enter appearance and the statement of claim was served on the Respondent as stated by the process server in his affidavit of service. The Respondent hasn't convinced this Court that service wasn't done. As a result, I hold that the formal proof of the Claimant's case, and the default Judgment, were not irregular.

30. In the upshot, I find the Respondent/Applicant's application without merit. It is hereby dismissed with costs.

31. It is so ordered.

READ, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2024

OCHARO KEBIRA

JUDGE

In the presence of:

Mr Ochako for the Claimant/Respondent

No appearance for the 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.