



Nyamweya v Chairman, Secretary, Treasurer Imara Daima Adventist Academy (Miscellaneous Case 1304 of 2018) [2024] KEELRC 2290 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2290 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE 1304 OF 2018
NJ ABUODHA, J
SEPTEMBER 25, 2024**

BETWEEN

LAWRENCE NYAMWEYA CLAIMANT

AND

THE CHAIRMAN, SECRETARY, TREASURER IMARA DAIMA ADVENTIST ACADEMY RESPONDENT

RULING

1. The Applicant filed application dated 31st January, 2024 under Under Section 1A, B and 3A of the *Civil Procedure Act*, Rule 17(1), (2) and (3) of the Employment and Labour Relations Court (Procedures), Rules of 2016; Order 10 Rule 11 and Order 42 of the Civil Procedure Rules 2010 seeking for orders of the court to grant an order setting aside the default judgment entered in the proceeding on the 27th February, 2023 and to allow the Respondent/Applicant unconditional leave to defend the suit and pending the hearing and determination of this application, an order be and is hereby granted staying any further proceedings relating to the taxation of the bill of cost currently pending before the taxing officer.
2. The application was supported by the grounds set on the application and Affidavit of Peter Otieno Awino the Chairperson of the Respondent /Applicant.
3. The Respondent /Applicant averred that they acknowledged that the Claimant had filed a suit against them since the claim was served upon them. That before filing the said suit they engaged the Claimant in an out of court settlement of the dispute and the matter was settled conclusively where the Claimant was paid Kshs 50,000/=
4. The Applicant averred that they instructed their counsel one Edwin Otongo Ochieng to represent and defend them in the matter who when they called him he assured them that he was engaging with the Claimants' counsel to withdraw the matter since they had already settled the Claimant.



5. The Applicant averred that they relaxed and went back to work after the assurance of their advocate and believed that the matter was in safe hands and was being given the required professional attention. That no other document was served upon them to signal that the matter was active in court by the Claimant. The applicant sought to have the process server who claimed to serve them to appear in court for purposes of cross-examination.
6. The Applicant averred that the judgement in this matter was delivered on 27th February,2023 and the same was served upon them on May,2023 three months after. That they did not act upon the judgment immediately since the judgment was served upon headteacher who no longer worked for them and that the said Head teacher while leaving the school did not notify the school of the said judgment.
7. The Applicant averred that they only learned of the Judgment when they were served with the Notice of taxation which prompted them to come to court and learn that a lot had happened behind their back.
8. The Applicant averred that mistakes of counsel should not be met on them since it was their advocate who never followed up as expected. That the Claimant filed this claim after being paid by the Respondent at the conciliation meeting and that attempt will vex them twice.
9. The Applicant averred in their attached response that they raised triable issues and urged the court to give them an opportunity to be heard and a decision be reached on merit.
10. The Respondent /Applicant averred that should the process proceed as scheduled the Respondent / Applicant will be exposed to the pangs of execution which will render the Applicant's involvement otiose. They further averred that they manage an institution which renders service to children whose interests and right to education remain at stake should the Respondent proceed to execute the decree extracted from the impugned judgment.
11. The Respondent /Applicant stated that they were ready to prosecute the matter as quickly as humanly possible to ameliorate the issue of delay that may be caused by allowing their application and that no prejudice would be suffered by the Respondent should this Application be allowed.
12. In reply the Claimant/Respondent filed its Replying Affidavit sworn on 28th February, 2024 in which he averred that he filed the suit against the Respondent on 18th August,2018 seeking compensation for unlawful termination of employment and served the Respondent/Applicant within the said pleadings and on 10th September 2018 the firm of Messrs Mwangambo & Okonjo Advocates filed a Notice of Appointment of Advocates to represent the Respondent/Applicant on the matter.
13. The Claimant/Respondent averred that since the year 2018 the Respondent has never filed a response/ defense to the statement of claim despite knowing very well there was a suit against them. The Claimant/Respondent further stated that the Respondent/Applicant through the Respondent Advocates were served with invitation letters, Mention Notices and hearing notices but never appeared in court.
14. That after several mentions the learned Judge Justice Monica Mbaru directed that the matter proceeds to formal proof as the Respondent had failed to take any steps to be present in court to put his defence. The Claimant/Respondent averred that the law aids the vigilant not the indolent and that the Respondent/Applicant had not brought any iota of evidence to demonstrate that they tried to follow up with his then advocates on the progress of the case for the last 6 years.
15. The Claimant/Respondent averred that via a letter dated 4th May 2023, the Respondent advocates wrote a letter to the Respondent informing them that a judgement had been entered against them



which letter was served upon the Applicant advocates and the Applicant themselves in which both signed a copy of the same. That despite the letter having been served upon the Applicant, it took them a period of 11 months to put in an application to set aside the judgment.

16. The Claimant stated that it was very misleading for the Applicant to inform the Honourable Court that the right to education of children would be prejudiced if the application is not allowed and if they are ordered to pay the decretal amount and costs of the suit.

Determination

18. The Court has the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. In such a case the court ought to look at the draft defence and accompanying witness statements in deciding on whether to grant or refuse the application.

19. In the case of, Kenya Commercial Bank Ltd -v- Nyantange & Another (1990) KLR 443 Bosire J, (as he then was) held that:

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”

21. The discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR. In the exercise of this discretion the Court will consider inter alia if:

- i) the defendant has a real prospect of successfully defending the claim; or
- ii) it appears to the court that there is some other good reason why;
- iii) the judgment should be set aside or varied; or
- iv) the defendant should be allowed to defend the claim

28. Accordingly, for purposes of determining whether the applicant is entitled to the discretion of this Court, the court considers the application for unconditional leave to defend the suit under the following parameters:

- (a) the nature of the defence;
- (b) the period of delay;
- (c) whether any prejudice will be suffered by Respondent

22. In respect of the first prerequisite, the holding in the case of *Kimani -v- MC Connell* (1966) EA 545 was that where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.

23. Having closely read through the intended response to the Statement of claim, the court is of the opinion that the same amounts into a mere denial and the issue of termination package given to the Claimant/Respondent was no reason not to defend the claim



24. Further the Court in *Habo Agencies Limited -v- Wilfred Odhiambo Musingo* (2015) eKLR stated that it was not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation.
25. On the second prerequisite, the question before court is why the application to set aside had not been made before. The court notes that this application together with intended defence was filed on the 31st January, 2024. This was around 9 months after the Respondent were served with the judgment.
26. The court is of the view that the Respondent/Applicant explanation as to what occasioned the over 5 years of delay to act in this matter is not satisfactory. The is in consideration of the fact that the Claimant/Respondent brought before court invitation letters, mention and hearing notices which were served upon the Respondent/ Applicant advocates without action. The court is therefore in agreement with the Claimant sentiments that the law aids the vigilant and not the indolent.
27. On the last prerequisite as to whether any prejudice will be suffered by Respondent, the court finds that litigation somehow must come to an end and for the Applicant, the end came when it failed to prosecute a case against them for 5 years.
28. Having regard to the undisputed facts, findings and observations already made, the court is not satisfied that Applicant deserves the discretionary orders sought in the application and the same is hereby dismissed with costs
29. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION.

