Gold Crown Beverages (Kenya) Limited v Ngugi (Cause 635 of 2016)
[2024] KEELRC 2619 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2619 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 635 OF 2016

M MBARŨ, J

OCTOBER 24, 2024

BETWEEN

GOLD CROWN BEVERAGES (KENYA) LIMITED ..... CLAIMANT

AND

MAINA NGUGI ..... RESPONDENT

RULING

1. The respondent, Maina Ngugi filed an application dated 17 May 2024 seeking orders that;
    1. Spent.
    2. Pending hearing and determination of this application, the firm of John Mwendwa & Company Advocates be placed on record to act for the respondent/applicant.
    3. The court be pleased to order a stay of execution of the final judgment delivered on 28.9.2023 and all other consequential orders pending the hearing and determination of this application.
    4. The court be pleased to set aside, review and annul the proceedings of 13.72013 and ex parte judgment entered against the respondent/applicant.
    5. Further to prayer 3. This court be pleased to reopen the claimant's case for cross-examination by the respondent/applicant.
    6. This court be pleased to reopen the respondent's case and allow the applicant to call its witnesses and tender evidence in defence of the suit.
    7. Costs of this application be in the cause.
2. The respondent filed his Supporting Affidavit in support of the application and aver that he was served with the summons to entre an appearance in this case. He instructed the firm of E.A. Ochieng & Company Advocates to come on record and act for him in this matter. He then travelled to Nairobi

trusting his advocate would attend to the matter but due to reasons not within his knowledge, the advocates handled the matter in a shoddy manner with constant non-appearance in court and a failure to give updates. Consequently, the court entered judgment on 28 September 2023 against the respondent.

3. In his affidavit, the respondent aver that he was dismayed to learn that judgment had issued when auctioneers called and informed him that they had been instructed by the respondent to attach his property in execution. The firm of E.A. Ochieng & Company Advocates exercised professional negligence while handling the matter. The mistake of an advocate should not be visited against the client and the court should therefore grant a stay of the judgment and allow the orders sought.

4. In reply, the claimant filed the Replying Affidavit of Daniel Karanja the finance manager who avers that application by the respondent is an abuse of the court process and should be dismissed. The respondent blames his advocates but fails to take responsibility for the delay in addressing the issues at hand. The application is fatally defective as the orders sought to be reviewed have not been attached to the application and cannot be ascertained.

5. The judgment herein was not ex parte as alleged. The application is purely designed to deny the claimant the fruits of the judgment and there is no sufficient cause outlined in the supporting affidavit.

6. The respondent was represented by his advocates in these proceedings and where there is alleged professional negligence, the law provides a recourse. The claimant should not be prejudiced by the mistake of a third party since there are legal avenues the respondent can follow to recover any losses incurred due to the professional negligence of his advocates. By appointing his advocates, the respondent did not cease being the duty bearer in these proceedings. He reveals a lack of diligence in a matter filed 8 years ago.

7. The orders sought in their nature cannot be issued as the judgment is regular and was with the participation of the respondent. The application should be dismissed with costs.

8. Both parties attended and agreed to address the application by way of written submissions.

9. The respondent as the applicant submitted that he only learnt of the judgment herein when auctioneers called him to proclaim his property in execution. He had instructed his advocates to attend in these proceedings but due to professional negligence, they did a shoddy job and failed to inform him accordingly.

10. Under Order 12 Rule 7 of the Civil Procedure Rules, a party is allowed to make an application to set aside a judgment. Where judgment is entered in default of appearance, an applicant can seek the same be set aside for good cause. In the case of Njue Njagi v Ephantus Njiru & Another [2016] eKLR, the court held that dismissal of a suit for non-attendance by a party amounts to judgment in that suit.

11. If the judgment is not set aside, the respondent will suffer irreparable loss and damage. The claim is for Ksh.3, 133,939.86 and when this matter proceeded on 13 July 2023 undefended, the respondent stood condemned unheard. The counterclaim was not considered contrary to the principles under Article 159 of *the constitution* which seeks substantive justice and not technicality.

12. Under Section 3 of the *Employment and Labour Relations Court Act*, the court is required to observe its objectives to achieve justice. In the case of Shah v Mbogo & another [1967] EA, the court held that there are no limits or restrictions on the judge's discretion. In this case, unless the orders sought are granted, the respondent will suffer irreparable loss and damages.

13. The claimant submitted that the judgment herein is not ex-parte and the hearing proceeded with the full participation of the respondent. His advocate attended these proceedings and was served with

all notices. There is an appearance and a response filed. Section 22 of the *Employment and Labour Relations Court Act* allow a party to be represented in court by his advocates of choice.

14. The respondent is seeking to review the judgment without giving any reasons why such orders should be issued. There is no error, mistake, clarification or sufficient cause given to warrant such an order. In any event, there is no compliance with Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. The only matter that the respondent has addressed is grievances against his advocates which is not sufficient discovery to justify seeking to review the judgment.

15. The claimant submitted that the general rule is that a suit belongs to a litigant and not his advocates. The respondent had a duty to personally ensure that the case was defended properly. In the case of Equatorial Commercial Bank Limited v Pickwel and Deal Limited & another [2019] eKLR the court held that while a party may have instructed his advocates to attend, this does not in any absolve them from following up on their case. Where the appointed *advocates act* negligently, under Section 53 of the *Advocates Act*, the client can claim under professional negligence.

16. In the case of *National Bank of Kenya Ltd v E. Muriu & Njoroge Nani Mungai t/a Muriu Mungai & Co. Advocates HCCC 539 of 2004* the court held that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocate is in breach of the contractual duty to his client, the client can claim under such breach of duty.

17. In this case, it is not sufficient for the respondent to blame his advocates and seek to prejudice the claimant who has been in court seeking justice for the last 8 years. The application is without merit and should be dismissed with costs.

Determination

18. The issues which emerge for determination are;

    Whether the respondent should be allowed to change advocates post-judgment delivered on 28 September 2023;

    Whether the court should stay execution, review and annul the proceedings of 13.7.2013 and ex parte judgment;

    Whether the court should reopen the claimant's case for cross-examination by the respondent;

    Who should pay costs.

19. On the issues outlined above, a brief history of the matter is necessary.

20. The claim herein was filed on 1st September 2016.

21. On 6 February 2016, the respondent entered an appearance and filed an application seeking to strike out the claim or transfer the suit to Nairobi.

22. In a ruling delivered on 14 July 2017, the court dismissed the application

23. On 27 December 2017, the respondent filed a response and counterclaim.

24. Parties exchanged pleadings and after many days of mentions and adjournments, by consent, the matter was fixed for hearing on 21 February 2019. On the due date, the respondent did not attend and another hearing date was allocated for 6 November 2019 when both parties indicated they were ready for a hearing. However, due to a lapse in the exchange of documents, the hearing was adjourned.

25. Several other hearings were scheduled and adjourned for one reason or the other, largely, the respondent was not ready for hearing, his advocate could not be able to travel to open court and also there was bereavement.

26. The hearing did not commence until 22 March 2022. The claimant's witness testified in the presence of the advocate for the respondent.

27. The hearing did not conclude until 26 May 2022. The witness was cross-examined at length by the respondent.

28. When the matter came up for the defence on 17 April 2023, the respondent remained absent. The hearing was reallocated to 13 July 2023. The respondent's advocate was in court but the client could not be reached.

29. The above history demonstrates that the respondent actively participated in these proceedings. The judgment was delivered on 28 September 2023.

30. Therefore, there is no ex parte judgment capable of being stayed or sufficient cause to justify any review. In any event, these proceedings only came alive on 1st September 2016 and orders sought for stay of execution, review and annul the proceedings of 13.7.2013 and ex parte judgment, no proceedings commenced on such date to allow for the orders sought.

31. The court can only stay, review or annul that which exists.

32. It is trite that the regulatory legal framework on change of advocates post-judgment is contained in Order 9 Rule 9 of the Civil Procedure Rules which provides as follows:

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    (9) when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

        (a) Upon an application with notice to all the parties; or

        (b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

33. This framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often to unfairly dislodge previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting the change of advocates post-judgment. Once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the court is merely intended to make the court record clear for the avoidance of doubt. Further, the formal adoption of the consent does not in any way prejudice the other parties to the case because a litigant is at liberty to change advocates

34. Where the consent is not secured, leave must be obtained first. Reasons must be given particularly why the consent could not be secured in the first instance. It is not permissible for an applicant to simply apply to change advocates post-judgment without any restrictions. The intention of Order 9 rule 9 would otherwise be lost.

35. In the case of Kibai v Permanent Secretary Ministry of Public Health & 3 others (Environment & Land Case 145 of 2018) [2023] KEELC the court held that;

> The provisions of Order 9 Rule 9 are to be interpreted as free from respect for any offices but regimenting the court's and litigants' approach to change of representation for the overarching need for setting out a conducive environment for orderly conduct of civil proceedings before court. The rule must be applied uniformly without regard for whether the office of the incoming counsel coming has been set up by statute or not.

36. In this case, there is nothing to explain why the change was done save to blame the advocates attending during the hearing. No leave is sought to introduce other advocates. Without that leave being secured, any record filed by any other advocates save the ones who entered an appearance is invalid.

37. These proceedings should not have seen the light of day. They should have terminated instantly where no leave was obtained for a change of advocates.

38. On the substantive issue for the reopening of proceedings, the background addressed above does not place the respondent in good standing. The record is replete with attendances that were frustrated by his failure to attend and present his case. He cannot blame his advocates. To do so would be tantamount to failing to take responsibility for his actions, particularly on 13 July 2023 when all else stood and waited for him to no avail. This included his advocates who could not trace his whereabouts. To turn and blame the advocate over his case is to shift blame where it does not belong. This is his case, the respondent should have attended to agitate his case with the assistance of the advocates of his choice.

39. Defence was closed on 13 July 2023.

40. Taking the claimant back is not justified. Such is prejudicial in the face of the judgement delivered on 28 September 2023. The counterclaim was well addressed with finality.

41. Application dated 17 May 2024 is found to abuse of court process and is hereby dismissed with costs to the claimant.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 24 DAY OF OCTOBER 2024.

M. MBARŨ

JUDGE