



**Owuor v Excel Packaging Compay Limited (Cause 1091 of 2016)
[2024] KEELRC 2493 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2493 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1091 OF 2016
AN MWAURE, J
OCTOBER 11, 2024**

BETWEEN

TOBIAS OPIYO OWUOR CLAIMANT

AND

EXCEL PACKAGING COMPAY LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 2nd July 2024 seeking the following orders THAT: -
 1. spent
 2. to set aside the Judgment of the Court dated 3rd November 2022.
 3. to restrain the auction Vetrunk Investment Auctioneers, agents, workers from executing their proclamation of 11th June 2024.
 4. to set aside the decree dated 11th June 2024
 5. the court orders that the decretal sum be deposited in court.

Respondent/Applicant's Case

2. The Respondent/Applicant avers that this matter was heard, judged and issued a decree without any service to the Applicant who was not accorded any chance to raise a defence in this matter yet it has a valid defence.
3. The Respondent/Applicant avers that the Claimant/Respondent was at the place of work and was to be paid his dues but he went ahead and sued the Applicant without informing him.



4. The Respondent/Applicant avers that the Respondent has gone ahead to instruct Vetrunk Investments Auctioneers to levy distress against the Applicant which has been unfair since it did not defend himself.
5. The Respondent/Applicant avers that it wishes to stop the payment of any money to the decree holder and is ready to deposit the decretal sum in court.

Claimant/Respondent's Case

6. The Claimant/Respondent avers that on 5th July 2024, the Respondent paid Kshs. 230,000 via cheque no. 003858 through Vetrunk Investment Auctioneers.
7. The Claimant/Respondent avers that according Warrant of Attachment of movable property the total decretal sum was Kshs. 481,198 being the decretal sum, interest and costs. The Applicant has also to pay the auctioneer charges.
8. The Claimant/Respondent avers that payment of part of decretal sum of Kshs. 230,000 via cheque No. 003858 is an admission of liability rendering the draft statement of defence as mere denials and does not raise any triable issue.

Claimant/ Respondent's Submissions

9. The Claimant/Respondent submitted that the Applicant advocate does not have locus standi to conduct the matter herein on behalf of the Applicant on the basis that there is a judgment and decree on record. It is trite law that the Applicant advocate ought to have sought leave to conduct this matter on behalf of the Applicant since Messrs Otieno Ogola & Co. Advocate is still on record for the Applicant.
10. The Claimant/Respondent submitted that the Applicant has already paid part of the decretal sum. The part payment of the decretal sum of Kshs. 230,000 via cheque no. 003858 is an admission of liability, rendering the draft statement of defence mere denials and not raising any triable issues.

Analysis and Determination

11. The issue for this court's determination is whether
12. In *Shanzu Investment Ltd vs. the Commissioner of Lands*, Civil Appeal No. 100 of 1993 [1993] eKLR in the Court of Appeal held that:

“The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgment is varied, it must be done on terms that are just”

13. Further, in *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR it was held as follows:-

“Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Courts are not required to consider the merits of a defence in an application of this nature, although the applicant has a defence to the counter-claim which it should be allowed to be heard on merit. Therefore, courts ought to look at the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the applicant's defence raises triable issues. In *Patel -v- E.A. Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd* CA 38 of 1998 and *Mania -v-Muriuki* (1984) KLR 407 the courts held that the discretion of the court



should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another*, Civil Application No. Nair 236 of 2009 where it was held that:

“it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”

In the case *Winnie Wambui Kibinge & 2 Others -v- Match Electricals Limited Civil Case No. 222 of 2010* the Court held that:

“It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.”

In the case *Mohamed & Another -v- Shoka* (1990) KLR 463 the Court set out the tenets a court should consider in entering interlocutory judgment to include:

- i. Whether there is a regular judgment;
- ii. Whether there is a defence on merit;
- iii. Whether there is a reasonable explanation for any delay;
- iv. Whether there would be any prejudice.

14. . The issue of regular judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards EA LR (2001) 1 EA 148*, where the court stated;

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito for a court should never countenance an irregular judgment on its record.”

In the cases of *Patel -v- E.A. Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd* CA 38 of 1998 and *Thayu Kamau Mukigi -v- Francis Kibaru Karanja* (2013) eKLR, the court stated as follows:

“on the second prayer of the defendant that he be granted leave to file his defence and counter claim, I will be guided by the principles elucidated in the case of *Tree Shade Limited -v- DT Dobie Co. Ltd. CA 38/98* where the court held that when an ex-parte judgment was lawfully entered the court should look at the draft defence to see if it contained a valid or reasonable defence.”

.....

.....



15. The Court’s power to set aside a judgment is exercised with a view of doing justice between the parties. Reliance as is placed on the case of, Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR, where the Court held:

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”

16. In the case of, Kimani -v- MC Connell (1966) EA 545, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal (2014) eKLR, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”

17. In the case of **Patel -v- EA Cargo Handling Services Ltd (1974) EA**, the Court stated that the main concern of the court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”

18. In the instant case, it is evident that the Applicant vide his initial advocate on record Messrs Otieno Ogola & Co. Advocate had filed its Statement of Defence dated and filed on 28th June 2016. which is properly on record and was duly considered in the Court’s judgment of 3rd November 2022.

19. It is also key to note that Messrs Otieno Ogola & Co. Advocate as stated by the Respondent herein have not officially been reflected by RIOBA J OTEKI & CO. ADVOCATES as the advocates who are properly on record for the Applicant unlike the advocate who filed this application.

20. In the case APPEAL No. 003 of 2023(ELC) the court held –

In my considered view and as has been held court decisions and various rightly posited by the Respondent the intent of Order 9 rule 9 Civil Procedure Rules is to cure the mischief of litigants sacking their advocates at the execution state or at the point of filing their bill of costs thus denying their advocates their hard earned fees..... .

However the scenario is different in the instant as this court is sitting as an appellat court.....”

21. The case here however is not an Appeal and the Applicant seeks orders for stay of execution and also to set the court’s judgment aside. The court therefore finds the Applicant’s advocate is not properly on record to represent the applicant as he did not apply to replace the earlier Counsel and neither did he get a consent from the said earlier counsel to replace him as it were.

22. As for the prayer to set aside the judgment, the court finds the prayer is not merited for the reason that this judgment was delivered on 3rd November 2022 and damages were awarded at KShs 236,502/50. However on the 5th July 2024 the Applicant paid Khs 230,000/= to the Respondent’s counsels. Obviously, this was part of the decretal sum.



23 In view of that payment the Applicant conceded liability and so it will be impossible to set the judgment aside. The court holds that the Applicant's application therefore lacks merit and is dismissed accordingly.

24 The court orders each party to meet their respective costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

