



Ndibo & 2 others v Rezial Limited (Employment and Labour Relations Cause E480 of 2022) [2024] KEELRC 2407 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2407 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E480 OF 2022
BOM MANANI, J
OCTOBER 3, 2024**

BETWEEN

IRENE NTHENYA NDIBO 1ST CLAIMANT

BRANICE ADONGO MAYIENGA 2ND CLAIMANT

SOLOMON ONYANGO 3RD CLAIMANT

AND

REZIAL LIMITED RESPONDENT

RULING

1. The application before court is dated 26th February 2024. It seeks the following orders:-
 - a. An order certifying the application as urgent.
 - b. An order for stay of execution of the court's decree and all processes against the Respondent/Applicant pending the hearing and determination of the application.
 - c. An order setting aside the court's judgment which was read on 16th November 2023.
 - d. An order to summon the process server, one Brian Mutinda Kioli for cross examination on his affidavit of service sworn on 14th November 2023.
 - e. An order granting the Respondent/Applicant unconditional leave to file its defence and defend the suit.
 - f. An order for costs of the application.
2. The application is premised on the grounds appearing on the face of it and the affidavit by one Amon Maina, the Respondent's/Applicant's Director. The Respondent/Applicant presents the following two reasons as the basis for its request in the application:-



- a. That it was not served with Summons to Enter Appearance in the cause.
 - b. That it has a defence on the merits which this court should consider.
3. The application is opposed by the Claimants. They rely on the replying affidavit sworn by the 1st Claimant dated 25th March 2024 to resist the motion.
 4. In the affidavit, the Claimants contend that the Respondent/Applicant was properly served with the Summons to Enter Appearance. They contend that service of the court processes on the Respondent/Applicant was done both physically and electronically. As such, the court's decision dated 16th November 2023 is regular.

Analysis

5. The two grounds which the Respondent/Applicant alludes to in urging its application are the key considerations which the court should take into account in determining an application of this nature. Where Summons to Enter Appearance were not served, the court is obligated to set aside the resultant decision as a matter of right to the aggrieved party. It (the court) has no discretion to sustain the decision.
6. However, where Summons to Enter Appearance were properly served, the Respondent is not entitled to have the resultant decision set aside as a matter of right. Nevertheless, the court has discretion to set aside the proceedings and decision if the Respondent is able to demonstrate that he has a valid defence to the cause (*Mbugua v Sigimo Enterprises Limited & another* (Environment and Land Case Civil Suit 478 of 2017) [2023] KEELC 22453 (KLR) (19 December 2023) (Ruling)).
7. That said, the court can only exercise the discretion to set aside judgment when it has been appropriately moved. Ordinarily, courts do not act suo moto.
8. The court record shows that the issue regarding whether the Respondent/Applicant was served with Summons to Enter Appearance was raised before the court's Deputy Registrar on 25th April 2023. After considering the record, the Deputy Registrar was satisfied that the Respondent/Applicant had been properly served. Accordingly, she made an order that the matter proceeds by way of formal proof as an undefended cause.
9. The proceedings of 5th June 2023 which resulted in the impugned decision of 16th November 2023 were premised on the proceedings and orders that were issued on 25th April 2023 certifying the cause as undefended. Therefore, in order to successfully assail the decision of 16th November 2023, it was necessary to dismantle its foundation set on 25th April 2023.
10. The Respondent/Applicant has moved the court to set aside the decision of 16th November 2023. However, it (the Respondent/Applicant) has not moved it (the court) to set aside the order of 25th April 2023 by which the cause was certified to proceed as an undefended cause by way of formal proof.
11. As mentioned earlier, the court cannot move suo moto to set aside the orders of 25th April 2023. What is the implication of this?
12. In my view, even if the court were to grant the instant application, the proceedings and order of 25th April 2023 certifying the cause as undefended will remain undisturbed. This means that the Respondent/Applicant cannot file a defence even if it is granted the orders setting aside the decision of 16th November 2023 since there is an order on record certifying the cause as undefended.



13. It was up to the Respondent/Applicant to move the court to vacate the orders of 25th April 2023 and all subsequent orders. However and as the record shows, it (the Respondent/Applicant) did not do so.
14. By asking the court to set aside the decision of 16th November 2023 without seeking to set aside the orders of 25th April 2023, the Respondent/Applicant is metaphorically attempting to demolish a building by removing its windows without interfering with its foundation. This will be an exercise in futility.

Determination

15. Having regard to the foregoing, I do not think that the instant application is properly founded. It serves no useful purpose to set aside the judgment of 16th November 2023 without contemporaneously setting aside the orders of 25th April 2023. Such action will not open the door for the Respondent/Applicant to file a defence in the cause and defend the matter due to the fact that the orders of 25th April 2023 certifying the cause as undefended and ready for formal proof remain on record.
16. As such, I decline to grant application as it will be an exercise in futility.
17. I make no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 3RD DAY OF OCTOBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimants

.....for the Respondent/Applicant

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

