Maina v Squid Kenya Limited (Cause 2430 of 2017)
[2024] KEELRC 13621 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13621 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2430 OF 2017

JW KELI, J

DECEMBER 18, 2024

BETWEEN

ZACHARY MOKAYA MAINA ..... CLAIMANT

AND

SQUID KENYA LIMITED ..... RESPONDENT

RULING

1. The Applicant/Respondent vide Notice of Motion dated 31st January 2023 and received in Court on 1st February 2024 sought the following orders:-

    a. That pending the hearing and determination of the Application inter-parties; this Honourable Court be pleased to stay execution of the Judgment passed on the 26th January 2023 against the Respondent/Applicant.

    b. That the judgment issued against the Respondent/Applicant on the 26th January 2023 and any consequential orders be set aside.

    c. That the Respondent/Applicant be allowed to re-open this trial and allow the Respondent/ Applicant to ventilate its case in full.

    d. That the costs of this Application be in the cause.

2. The application was premised on the grounds stated in the Application and on the contents of the Affidavit of Faith Wamuyu Advocate.

3. Grounds of the application.

    a. That the Claimant/Respondent instituted his claim against the Respondent/Applicant in the year 2017.

b. That the Respondent/Applicant filed and served its reply to the Memorandum of Claim on 1st October 2018 pursuant to obtaining the leave of the Court.

c. That the Respondent/Applicant was not aware that the matter had proceeded for hearing and final determination until it was mapped on the judiciary case tracking system where it learnt that the Exparte Judgment had since been entered against it on the 26th January 2023 and further, that the Claimant's Bill of Costs is pending taxation on 5th February 2024.

d. That upon perusing the Court record, the Respondent/Applicant has established that the Court proceeded with the hearing by way of formal proof on 5th July 2022 in the absence of the Respondent/Applicant.

e. That the Respondent/Applicant's advocates have also established from the Court record that the Claimant/Respondent effected service of the notices to the former via the email, info@attorneysafrica.com, and upon examination of the said email address, they have noted that the Claimant/Respondent's advocates emails were marked as SPAM and moved to the junk email box.

f. That the Respondent/Applicant has a good defence to the Claimant's claim and the defence raises serious triable issues which need to be canvassed at the full hearing of the case.

g. That that the application has been filed without delay and the mistake of Counsel should not be visited upon an innocent litigant and the Rules of Natural Justice dictates that no party should be condemned unheard.

h. That if the judgment is enforced before this instant Application is heard and the orders sought therein granted, the Respondent/Applicant will suffer irreparable loss and damage, hence the urgency of this Application.

4. The deponent of the supporting affidavit sworn on the same date, Faith Wamuyu Advocate, averred that the Claimant/Respondent instituted his claim against the Respondent/Applicant in 2017 and that the Respondent/Applicant filed and served its reply to the Memorandum of Claim, documents and witness statements with the leave of the Court on 1st October 2018(Annexed and marked as FW-1 was the filed Response).

5. Ms. Wamuyu contended that on or about January 2024 they received instructions from the Respondent/Applicant to apply to dismiss the suit for want of prosecution because the Claimant had failed to prosecute his suit since 28th September 2018.To enable them file the said application, they applied to be linked in the matter on the Judiciary Case Tracking System where it was established that a judgement had already been entered against the Respondent/Applicant on 26th January 2023 and taxation of the Claimant's Bill of Costs was scheduled on 5th February 2024.

6. Ms. Wamuyu further averred that upon perusing the Court record, the Respondent/Applicant established that the Court proceeded with the hearing by way of formal proof on 5th July 2022 in the absence of the Respondent/Applicant. Upon perusing the judgment of the Court , they established that the Judge held that the Respondent had not filed a memorandum of appearance and/or a response to the claim, whereas the Respondent/Applicant had filed its response, documents, and witness statements on 1st October 2018 (Annexed and marked as FW-2 was the Judgment)

7. Ms. Wamuyu contended that neither the Respondent/Applicant nor its firm of advocates were aware that the matter had proceeded to hearing and final determination until they were mapped on the Judiciary Case Tracking System. That the Respondent/Applicant's advocates had also established

from the Court record that the Claimant/Respondent effected service of the notices to the former via the email, info@attorneysafrica.com, and upon examination of the said email address, they have noted that the Claimant/Respondent's advocates emails were marked as SPAM and moved to the junk email box (Annexed herein and marked as FW- 3 were the Certificates of Service).

8. Ms. Wamuyu further averred that the law firm reviewed the server connected to the said email address and established that the Claimant/Respondent's advocates emails sent were automatically marked as SPAM by their server thus the said notices and/any correspondences thereof were stored in the Junk email box and not the normal inbox (Annexed and marked as FW-4 were the emails marked as Spam).

9. Ms. Wamuyu contended that the Respondent/Applicant has a good defence to the Claimant's claim and that the defence raises serious triable issues which need to be canvassed at the full hearing of the case. That the mistakes of Respondent/Applicant Counsel should not be visited upon an innocent litigant and the rules of natural justice dictate that no party should be condemned unheard. That if the judgment is enforced before this instant Application is heard and the orders sought therein granted, the Respondent/Applicant will suffer irreparable loss and damage, hence the urgency of this Application. That this application has been filed without delay and no prejudice will be suffered by the Claimant/ Respondent if the orders sought herein are granted and in any event the Respondent/Applicant is willing and ready to pay thrown away costs to the Claimant.

10. In opposition to the application the Respondent filed replying affidavit to the application sworn by Henry Nyaga Advocate for the Claimant on the 8th February 2024. The advocate opposed the application on the basis that the application was filed one year since delivery of Judgment in the matter (HN1 was judgment delivered on the 26th January 2023 and posted on the Kenya Law Reports Website). That the applicant had previously made similar application to set aside proceedings and had been granted an opportunity to prosecute its defence (HN2 was the Ruling dated 28th September 2018) , that the Claimant issued a notice of hearing dates to the Applicant served on proper email addresses of the law firm, that the defence of email having been diverted to SPAM was not an issue in control of the claimant.

Written submissions

11. The application was canvassed by way of written submissions with both parties filing.

DECISION

12. The Court noted that the Applicant was approaching the Court for the second time to set aside proceedings in the suit. The applicant was served with the hearing notice and the Trial Court established that. The Trial Court found no defence had been filed. On the 16th May 2022 when the claimant appeared before the Court through Nyaga Advocate in the absence of the Respondent, Mr.Nyaga told the Court that the Applicant had complied with the condition of throwaway costs but had not filed a response.

13. The applicant through the affidavit of Faith Wamuyu stated they had filed response pursuant to the leave granted by Justice ON Makau on 28th September 2018. That the Response was filed on the 1st October 2018. A copy of the said response was annexed as FW-1. On scrutiny of the annexure FW-1 the Court found it had Court stamp of receipt on 1st October 2018. It also bore the stamp of Kamau Nyaga Advocates for the Claimant as received on the 3rd of October 2018. The Court found that the advocate for the claimant may have misled the Trial Court on the 16th May 2022 that the respondent had not been filed a response yet they had been served. The Court did not find the response on perusal of the Court file but took notice of the fact that physical filing of pleadings and documents before the

launch of the Judiciary Case Tracking System, was encumbered by the misplacement of filed pleadings in the Court Registry. The Court noted that in his replying affidavit, Nyaga Advocate for the claimant, did not expressly deny the existence of the response (FW-1).

14. The Court finds that the excuse of email having diverted to SPAM is not a sufficient reason to set the decision aside guided by the decision in Metropolitan Cannon General Insurance Company Limited V Kalondu 2024 e KLR :- where Justice Musyoka observed:- ''The mix-up, regarding the process served straying into the spam box, was an internal matter. It was up to the appellant to organise and manage its mail affairs. A chance was given to it, to be heard in that matter, the fact that it did not get to be hard, because the court process served on it got lost within its systems, cannot possibly be blamed on the court or the respondent. It was the appellant's own disorganised system to blame.'' The respondent seeks a second opportunity to defend the case. The Court finds triable issues are raised in the response. The suit was filed in 2017 and judgment entered on 26th January 2023. The application was filed on 1st February 2024, a year later following the delivery of the judgment. It is trite that litigation must come to an end. The respondent had been granted the opportunity to be heard. However, the advocate raised the defense of the mistake of the advocate not being visited on the client and they had filed a response which raises arguable points. These two reasons persuade the Court to return the Respondent to the seat of justice.

15. On the strength of the existing response filed on 1st October 2018 and served on the respondent/ claimant and the principle of mistake of advocate not being visited on the client the Court is inclined to allow the respondent the last opportunity to be heard. The application filed on 1st February 2024 is allowed with costs to the claimant. The judgment dated 26th January 2023 is set aside. The prejudice the claimant is likely to suffer due to the delay and the setting aside of judgment can be compensated by costs. Taking in consideration the conduct of the applicant the court awards the claimant throwaway costs for the sum of Kshs. 50,000 payable within 30 days of this Order in default the setting aside orders stand vacated. The respondent is Ordered to comply with Rules of the Court in terms of pleadings and evidence and file its trial bundle within 30 days and serve. The claimant is at liberty to file reply upon service. Mention on the 3rd February 2025 to confirm compliance and issue fresh hearing directions. This is the last opportunity for hearing granted to the Respondent in this suit.

16. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF DECEMBER, 2024.

JEMIMAH KELI,

JUDGE.

In the presence of:

Court Assistant: Caleb

Applicant : - Wamuyu

Respondent: Nyaga