



REPUBLIC OF KENYA



KENYA LAW
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**Mulama v Cezam & Associates Limited (Cause 152 of 2019)
[2024] KEELRC 13382 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13382 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 152 OF 2019
CN BAARI, J
DECEMBER 11, 2024**

BETWEEN

DESTERIOUS SHITSAMA MULAMA CLAIMANT

AND

CEZAM & ASSOCIATES LIMITED RESPONDENT

RULING

1. For determination is the Respondent's motion application dated 26th August, 2024 brought pursuant to Sections 3 & 12(3)(i) of the Employment & Labour Relations Court Act and Article 159 of *the Constitution* of Kenya, 2010. The Applicant seeks orders THAT:-
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. A stay of execution do issue against the Claimant/Respondent, his servants and/or agents from executing the Decree herein against the Respondent/ Applicant.
 - v. This Honourable Court be pleased to set aside the judgment entered against the Respondent/ Applicant on 30th April 2024, and all consequential orders.
 - vi. Upon setting aside of the impugned judgment, the Respondent/ Applicant be allowed to defend the suit and the same be heard on merit.
 - vii. The cost of this application be in the cause.
2. The application is supported by grounds on the face thereof and the affidavits of Christopher M. Chege a Director of the Applicant and Mutundu W. Chege, the Counsel on record for the Applicant. The crux of the motion is that on or about 21st August 2024, the Applicant was served with a Judgment



Notice via email by the Claimant's Advocates, in which they indicated that they will commence execution within 14 days from the date of service of the notice.

3. It is the Respondent/Applicant's position that the directors of the Applicant were not aware of the proceedings, subsequent to the service of summons and pleadings upon the Applicant and filing of response for reasons that:-
 - i. When the suit was filed and served upon the Applicant, one of the directors of the Applicant, Mr. Zephryn S. Muchunguzi was the one handling the matter as he was the director in charge of United States African Development Foundation (USA OF) program in Turkana under which program the Respondent was employed, and that he subsequently instructed the firm of Kimani Kahiro & Associates Advocates to act on behalf of the Applicant.
 - ii. On or about 19th September 2021, the said Mr. Muchunguzi passed on and when the surviving directors went through his office files and records, there were no records of any subsequent proceedings in this matter.
 - iii. Upon being served with the Judgment Notice, the Applicant has since learnt that on or about 1st October 2022, the founder and Managing Partner of the Applicant's former Advocates on record, Mr. Kimani Kahiro passed away and the Firm was closed down after his demise.
4. The Applicant further avers that at all material time, the said Mr. Muchunguzi and the Firm of Kimani Kahiro & Associates Advocates were the ones who had conduct of the matter with Mr. Muchunguzi now being deceased, and the Firm closing down after the demise of the said Mr. Kahiro. It avers that the surviving directors of the Applicant were not aware of the status of any proceedings as they do not have in their possession any documents pertaining to the case, and were shocked to learn that the matter was heard ex-parte and subsequently determined without their knowledge.
5. It is the Applicant's assertion that it is only upon perusal of the court file, that it learnt that a Hearing Notice was served upon the former Advocates of the Applicant via email on 13th December 2022, which was after the demise of Mr. Kahiro and there was no one from the former Firm to receive the said notice on email.
6. The Applicant states further that it was not personally served with the Hearing Notice despite the Claimant's Advocates being aware of the demise of Mr. Kahiro who not only was a well-known within the legal profession, but an announcement was sent to all advocates by the Law Society of Kenya of his demise as is the norm.
7. The Applicant avers that it is quite interesting that the Advocates have now served her with the Judgment Notice via email which was well within their knowledge.
8. It further avers that it has always been ready to defend this suit having filed their response, witness statements and bundle of documents, but the persons who had conduct of the matter are deceased and there have been no records of the proceedings in the matter available to the Applicant, and only learnt of the true position upon being served with the Judgment Notice and on perusal of the court file.
9. The Applicant pleads that the unfortunate circumstances should not be visited upon it, and should not be allowed to suffer for the same and should be allowed to have the suit heard on merit as not only must justice be done, it must also be seen to be done being the constitutional right of the Applicant.
10. The Applicant states that it is ready and willing to abide by any conditions that this Honourable Court may set for the expeditious disposal of the suit. It avers further that the instant application has been



made expeditiously and without undue delay from the time it learnt of the factual proceedings in this matter.

11. The Applicant finally avers that if the orders sought are not granted, the Claimant/Respondent will proceed with execution of the decree to the Applicant's extreme prejudice for reasons stated herein.
12. The Respondent/Claimant opposed the motion vide a replying affidavit dated 14th October, 2024. It is his position that the Applicant has repeatedly attempted to drag this matter and delay his access to justice by failing to attend court since the matter was instituted.
13. The Claimant avers that after the Respondent/Applicant filed the Statement of Response, it opted not to attend court despite the matter coming up for mention on various dates and its Advocate on record being served as evidenced by the Affidavit of Services on Record. He further states the matter came up for hearing on 6th March, 2023, and the Applicant was duly served through its Advocates on record as evidenced by an Affidavit of service and as noted by the court at paragraph 4 of its judgment.
14. The Claimant avers that the matter proceeded for hearing on 6th March, 2023, and the Court proceeded to deliver its judgment in his favour on 30th April, 2024, after being convinced that he had proved his case against the Applicant.
15. It is the Claimant's further assertion that the discretion to set aside ex parte proceedings and judgment is intended to be exercised by the court to avoid injustice and not to assist those who deliberately seek to obstruct or delay the course of justice as the Applicant's herein.
16. He further avers that the Applicant has failed to establish sufficient cause as to why it failed to attend court, and this application is merely a ploy to financially drain and frustrate him and further hinder his expeditious access to justice.
17. It is his position that the Applicant's allegation that it was one of its deceased directors that was handling this matter, and as a result, they were not aware of the matter is unfounded as he extracted summons and served the same on the Respondent/Applicant company and not the said Mr. Zephryn Muchunguzi and that the suit is against the company and not an individual.
18. He avers that despite the demise of the Applicant's advocate, the Applicant ought to have exercised due diligence in following up the matter or assigning it to another Advocate. That the well-known legal maxim, "equity aids the vigilant and not the indolent," is particularly applicable in this instance. That the Applicant's failure to take proactive steps demonstrate lack of vigilance and seriousness in handling the case.
19. It is his assertion that it is not the work of his Advocate to keep tabs on who is deceased and that the unfortunate demise of Mr. Kimani Kahiro has only come to the attention of his Advocates through the present application.
20. He contends that he will be greatly prejudiced if the ex parte proceedings and judgment are set aside, and the case is re-listed for fresh hearing since he is unemployed and has been struggling to meet the legal costs of this suit.
21. That the reasons advanced by the Applicant in failing to participate in the hearing of this matter is inexcusable and is an afterthought. That it is clear beyond peradventure that the application is only intended to delay the execution of the decree herein.
22. The Claimant prays that the application be dismissed with costs and he allowed to enjoy the fruits of his judgment.



23. Parties canvassed the application through written submissions, and which have been duly considered.

Determination

24. I have carefully considered the application by the Applicant/Respondent, together with the grounds and affidavit in support and further affidavit, the Claimant's opposition captured in his replying affidavit, and the submissions by both parties. The issue that fall for determination is whether the judgment delivered on 30th April, 2024 in this matter should be set aside, and which if it is, renders the prayer for stay of execution moot.

25. What the Applicant seeks from this court, is the exercise of the Court's discretionary power. In the case of Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR, the court had this to say on setting aside of an ex parte judgment:-

“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”.

26. Further in the case of Samuel Kiti Lewa v Housing Finance Co of Kenya & another (2015) eKLR, Kasango J expressed herself as follows:-

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay. ”

27. The Applicant's position is that its Director who had conduct of the matter, and the Firm of Advocates instructed to handle the matter on its behalf are now both deceased. Indeed, the death certificate for one Mr. Zephrin S. Muchunguzi has been produced in evidence, and the Claimant has not contested that the Advocate who previously handle the matter passed on in December, 2022.

28. It is the Applicant's further submission that by virtue of receipt of the Claimant's email on the notice of judgment, it is evident that the Claimant knew their email address, and should have notified them of the hearing date just as they did the judgment notice, but which they did not.

29. It is also evident that the hearing notice that was last served on the Respondent/Applicant's advocates, was actually served after the date the advocate is reported to have passed on.

30. The court further notes that the Applicant had filed a response to the Claimant's claim, witness statements and a bundle of documents, which in my view, indicates that it was ready and willing to participate in the case if not for the death of both the Director and the Advocate.

31. The Claimant/Respondent's argument that service of summons was on the Respondent's company and not the deceased Director, is in my view not sufficient ground to disallow the motion. In Gladys Wakiuru Nyota v Pincle Njoroge & another (2020) eKLR Kamau J stated as follows:-

“Having said so, re-opening of a case is not a matter of course. A court must consider each case on its own merits. As was held in the case of Joseph Ndung'u Kamau v John Njihia (Supra) and Standard Chartered Financial Services & 2 others v Manchester Outfitters (Suiting Division) Ltd & 2 others (Supra), the decision to re-open a case is a discretionary



one. The rider is that such discretion must only be exercised sparingly to avoid injustice and miscarriage of justice.”

32. Indeed, the circumstances of this case, clearly show that the Applicant suffered a double tragedy; firstly, that of losing a director, and at the same time losing the Advocate acting for them in the matter, and which circumstances, the court deems warrant the re-opening of the case to allow the Applicant have its day in court.
33. In *Shah V. Mbogo & Another* (1967) EA 116, the Court of Appeal of East Africa stated:-

“ This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
34. I have through out the pleadings in this matter not come across anything suggesting that the Applicant’s failure to attend court on the hearing date was deliberate, and therefore, re-opening this matter is in my view the only way to avoid a miscarriage of justice.
35. In the premise, the Applicant’s motion succeeds, and the Judgment of this court (differently constituted) is set aside, and the matter ordered to be heard afresh.
36. I further order that being evident that both parties had complied, the matter be set down for hearing on priority basis, on a date to be set on the day of this ruling.
37. I make no orders on costs.
38. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 11TH DAY OF DECEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Oduo Present for the Claimant/Respondent

Mr. Chege present for the Respondent/Applicant

Ms. Esther S - C/A

