



REPUBLIC OF KENYA



**Kilakoi v Olkejuado Water and Sewerage Company (Cause 2138 of 2016)
[2024] KEELRC 13356 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13356 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2138 OF 2016
SC RUTTO, J
DECEMBER 6, 2024**

BETWEEN

ELIJAH TORET KILAKOI CLAIMANT

AND

OLKEJUADO WATER AND SEWERAGE COMPANY RESPONDENT

RULING

1. What comes up for determination is the Respondent/Applicant's Notice of Motion Application dated 6th March 2024, seeking the following orders:
 1. Spent.
 2. Spent.
 3. That a temporary order of stay of execution be issued against of (sic) the judgment issued herein and any consequential orders pending the hearing and determination of the suit.
 4. That the Garnishee order issued on 4th December 2023 be set aside.
 5. That the Respondent be granted leave to defend the claim.
2. The Application is premised on grounds appearing on its face and the Affidavit of Julius Paita Koinet who has described himself as the Applicant's Managing Director.
3. Grounds in support of the Application are that the Claimant was the Managing Director of the Applicant at all material times and was responsible for paying salaries. That the Claimant awarded himself salary yet he was aware that the Applicant did not have funds. It is further averred that the employees of the Applicant cannot access their salary.
4. The Application is opposed through the Replying Affidavit sworn on 5th July 2024 by the Claimant. It is his assertion that the Applicant was duly served but failed to file its Defence.



5. That judgment was delivered on the 10th day of February 2023 in his favour against the Application for the sum of Kshs. 2,977,291/= together with interest at Court rates from the date of judgment until payment in full.
6. He is aware that several demands for payment were made which the Applicant failed to honour prompting him to institute Garnishee proceedings.
7. He is also aware that the Garnishee in their Further Affidavit dated 13th March 2024 indicated that the attached accounts are loan accounts that do not have money hence the claim by the Applicant that they are unable to pay salaries to their workers through the said accounts are unsubstantiated.
8. He is informed by his Advocate on record whose advice he verily believes to be true that the Applicant has failed to meet the legal threshold for setting aside judgment.
9. He is further informed by his Advocate on record that the Draft Defence annexed to the Applicant's Application does not raise triable issues and it only contains mere denials.
10. The Claimant further avers that the Applicant does not explain the inordinate delay in bringing the Application and the same is an afterthought meant to frustrate him from enjoying the fruits of his judgment.
11. That the Applicant was aware of the existence of the suit as early as 2020 as parties tried to negotiate and settle the matter.

Submissions

12. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

13. I have considered the Application, the grounds in support thereof, the Claimant's Replying Affidavit as well as the submissions on record and to my mind, the singular issue that stands out for determination is whether the Application is merited.
14. The Applicant has sought an order to stay execution pending hearing and determination of the suit. The Applicant has further sought an order to set aside the garnishee order issued on 4th December 2023 and to be allowed to defend the Claim.
15. From the record herein, the matter proceeded as an undefended suit and judgment was delivered by this court on 10th February 2023.
16. Notably, the Applicant has not asked for an order to set aside the said judgment. It is therefore not clear why the Applicant is seeking a stay of execution pending hearing and determination of a suit whereas there is a judgment on record. Similarly, I question how the Applicant will defend the Claim if granted leave whereas there is a judgment on record that is yet to be set aside.
17. In a nutshell, the orders sought by the Applicant in the instant Application cannot logically be granted without first granting an order to set aside the judgment of the Court.
18. Be that as it may, it is worth pointing out that the Applicant has not advanced any ground either on the face of the Application or the Affidavit of Julius Paita Koinet, as to why they failed to file a Defence and participate in the hearing of the main suit.



19. Indeed, it was noted on the judgment of the court that the Applicant had neither entered appearance nor filed a Response in answer to the Memorandum of Claim. hence the reason the claim proceeded as undefended.
20. It was further noted in the judgment that on 15th March 2022, when the matter came up for mention, Mr. Kibet Korir, Advocate, informed the Court that he had been instructed to hold brief for Mr. Mahiri who intended to come on record for the Applicant. Subsequently, he sought to be served afresh with the Claimant's pleadings.
21. As such, the Court directed that the Applicant's Advocate regularize his appointment and the Claimant to serve the Applicant afresh with the pleadings in the matter. In addition, the Applicant was granted leave to file its response and such other documents it may so wish. The matter was slated for mention on 25th May 2022 for purposes of confirming compliance and taking a hearing date.
22. Come 25th May 2022, the Applicant's side was absent from Court and despite being granted the requisite leave by the Court on 15th March 2022, it had neither entered appearance nor filed any document. Consequently, the Court reaffirmed its orders that the matter proceed as an undefended suit.
23. In light of the foregoing chronology of events, it is apparent that all along, the Applicant has seemed unbothered by the proceedings herein and only made an appearance to file the instant Application. Even so, the Applicant only made one appearance in Court on 30th April 2024 through Mr. Itaya, Advocate. From then on, it has been missing in action.
24. This being the case, I cannot help but conclude that the Applicant was not interested in defending the suit in the first place and was only jolted into action by the garnishee proceedings commenced by the Claimant through the Application dated 17th October 2023.
25. What's more, the Court has considered the Draft Defence annexed to the Supporting Affidavit of Julius Koinet Paita and evidently, the same does not raise any triable issue calling for adjudication. A triable issue is said to exist if there is a dispute in the facts which dispute can only be resolved after ventilation in a full hearing. As it is, the said Draft Defence only consists of bare denials.
26. As was stated by Madan JA (as he then was) in *Gupta v. Continental Builders Ltd (1978) Kenya L. R. 83* at p. 87:

“If a defendant is able to raise a prima facie triable issue he is entitled in the law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial just as a sham or bogus defence ought to be rejected peremptorily”.
27. In sum, the Applicant's conduct in this matter depicts an indolent litigant and it is this court's view that the Applicant was granted an opportunity to be heard but it squandered the same by failing to file a defence and to attend Court to defend the Claim during the hearing.
28. As was rightly stated in the case of *Union Insurance Co. of Kenya Ltd. vs Ramzan Abdul Dhanji - Civil Application No. Nai. 179 of 1998 (unreported)*, the law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilize it.



- 29. In this case, I have not discerned any reason why the Applicant did not utilise the opportunity it was given to be heard.
- 30. All things considered, it is my respectful view that the Application dated 6th March 2024 is without merit and consequently, it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Khafafa for the Claimant/Respondent

No appearance for the Respondent/Applicant

Millicent Court Assistant

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

