



REPUBLIC OF KENYA



**Ogechi v Kisii Safari Inn Ltd t/a Kaskazi Beach Hotel (Cause  
12 of 2020) [2023] KEELRC 49 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 49 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 12 OF 2020  
AK NZEI, J  
JANUARY 19, 2023**

**BETWEEN**

**DANIEL OGECHI ..... CLAIMANT**

**AND**

**KISII SAFARI INN LTD T/A KASKAZI BEACH HOTEL ..... RESPONDENT**

**RULING**

1. The application before me is the respondent's notice of motion dated October 4, 2022. The respondent/ applicant at this stage seeks the following orders:-
  - a. that the ex parte judgement herein be varied and/or set aside.
  - b. that the judgement debtor be allowed to testify on its defence without re-opening the claimant's case.
  - c. that costs of the application be provided for.
2. The application is expressed to be brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and order 12 rule 7 of the *Civil Procedure Rules*, and is based on a supporting affidavit of Richard Otaru sworn on October 4, 2021. It is deponed in the said affidavit:-
  - a. that the respondent/judgement debtor filed and served a defence which has overwhelming chances of success.
  - b. that a notice for the hearing on January 18, 2022 was served on the respondents advocates on November 25, 2021, by which time the said advocates had not acquired diaries for the year 2022.



- c. that the matter was not diarized when the respondents advocates bought new diaries for the year 2022, and therefore the respondent's advocate did not log into the hearing on January 18, 2022 when the matter came up for hearing.
  - d. that no notice of judgement was served, and the respondent/judgement debtor's advocates were served with a bill of costs on June 17, 2022, which they thought was a mistaken one on the part of the decree holder; and only came to know about the judgement when they were served with the garnishee application dated July 19, 2022.
  - e. that the respondent/ applicant does not intend to re-open the claimant's case, but wishes to be heard on its defence.
  - f. that counsel's mistake ought not to be visited on an innocent litigant.
3. The application is opposed by the claimant/decreed holder *vide* a replying affidavit sworn on October 14, 2022. It is deponed in the said affidavit, inter-alia:-
- a. that the application is fatally incompetent, superfluous and an abuse of the court's process.
  - b. that the judgement debtor seeks to be given an opportunity to be heard on its defence and yet they never filed any witness statement or list of documents; opportunities given by the court having been ignored.
  - c. that the claimant/decreed holder stands to be prejudiced if the respondent/ applicant (judgement debtor) is allowed to file documents and to call witnesses after closure of the claimant's case.
  - d. that the respondent/ applicant has put up its hotel for sale, and that there are several online adverts on intention to sell the hotel. (A copy of an online advert was annexed to the replying affidavit.
  - e. that the application dated October 4, 2022 is a mere tact to buy time in order to finalize the process of disposing the hotel and to deny the claimant/respondent the fruits of his judgement.
  - f. that the respondent/ applicant has admitted having been served with a hearing notice on November 25, 2021 for hearing of the suit on January 18, 2022.
  - g. that the court's record attests to the numerous occasions when the court indulged the respondent/ applicant by granting it time to file its documents, but the respondent only filed a reply to the memorandum of claim.
  - h. that on November 25, 2021, the respondent/ applicant was served with a hearing notice for January 18, 2022 but did not attend court.
  - i. that on 21<sup>st</sup> January, 2022, the respondent/ applicant was served with the claimant's written submissions and a mention notice. (Copies of duly served written submissions and a mention notice for January 27, 2022 were annexed to the replying affidavit).
  - j. that the respondents advocates were duly served with a judgement notice for May 19, 2022, but they failed to show up in court. (A copy of a duly served judgement notice, for May 19, 2022, was annexed to the replying affidavit).
  - k. that on June 17, 2022, the respondent was served with a taxation notice, a bill of costs and a copy of the judgement.



- l. that even after learning that hearing of the suit had proceeded (on January 18, 2022), the respondent/ applicant took no step to find out what had happened in the proceedings.
  - m. that the respondent/ applicant has not approached the court with clean hands to warrant exercise of the court's discretion in its favour.
4. The respondent/ applicant has not controverted and/or denied any of the matters deponed to in the claimant/respondent's replying affidavit.
  5. The court's record shows that the respondent filed a reply to the memorandum of claim on May 11, 2021 and did not file any witness statement and/or witness affidavit, this despite having been granted seven days by the court on the aforesaid date to file witness statements. The respondent/ applicant has not told the court how it wishes to testify on its case in the absence of witness statements on record.
  6. The respondent/ applicant admits that a hearing notice was served on its advocates on November 25, 2021 to attend court for hearing of the suit herein on January 18, 2022, but did not diarize the same. The reason given for the respondent/ applicant's advocate's failure to diarize the matter is that the said advocates had not acquired diaries for the year 2022. It was deponed on behalf of the respondent/ applicant that an innocent litigant should not be punished for mistakes of an Advocate, and the court was urged to allow the application.
  7. The orders sought by the respondent/ applicant are discretionary. In deciding whether or not to exercise discretion in favour of a litigant, a court must take into consideration the conduct of that litigant and his or her counsel in conducting the proceedings. Instances of laxity, indolence or pure negligence will ordinarily dissuade a court of law from exercising discretion in favour of a litigant. To a great extent, such instances have contributed to case backlogs in our courts as litigation moves back and forth. The mistake alleged in the present case is not one that can be excused. It bounds on negligence.
  8. In *Mawji v Laiji & Others, Civil Application No 236 of 1992*, Kwacha J A drew a line between negligence, pure and simple, and a genuine error or mistake on the part of an advocate. He went on to cite with approval the dicta of Lord Griffins in the case of *Kettleman v Hensel Properties Ltd [1988] 1 ALL ER 38*, at page 62 where the learned Lord of Appeal said:-

“Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interest of the whole community, legal business should be conducted, effectively. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings.”
  9. In *Charles Omwata Omwoyo v African Highlands & Produce Co Ltd [2002] eKLR*, Ringera, J (as he then was) stated as follows:-

“I think the time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour.”
  10. In view of all the foregoing, and having considered the submissions filed, I find no merit in the application dated October 4, 2022. The same is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**AGNES KITIKU NZEI**



**JUDGE**

**ORDER**

In view of restrictions on physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr Odhiambo for claimant/Applicant

Mr Ngaine respondent

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