**Kanyiri v Kuku Foods Limited (Cause 2388 of 2017)**
**[2023] KEELRC 755 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 755 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 2388 OF 2017**

**MA ONYANGO, J**

**MARCH 23, 2023**

**BETWEEN**

**VIOLET WANJIRU KANYIRI ..... CLAIMANT**

**AND**

**KUKU FOODS LIMITED ..... RESPONDENT**

**RULING**

1. Judgment in this suit was delivered on 6th November, 2020. Vide an application dated 16th March 2021 the respondent sought stay of execution of the judgment and leave to file defence to the suit among other prayers. The application was vide a ruling dated and delivered on 18th February, 2020, dismissed on grounds that Caulson Harney LLP Advocates who filed the application were not property on record. The Court further observed that in the said application the applicant, who is the Respondent in the suit, averred that it had a defence that raised triable issues but did not file a copy of the defence.

2. The respondent thereafter filed another application dated 25th April 2022 in which it sought orders of stay of execution of the judgment herein and all the consequential orders and that the respondent be allowed to file its defence out of time. The said application was fixed for inter parties hearing on 18th May, 2022. On the said date counsel for the respondent/Applicant did not attend court while counsel for the claimant was in Court.

3. On the application of the claimant's advocate, the application dated 25th April 2022 was dismissed for want of prosecution and non-appearance of applicants' counsel.

4. The application now before the court is dated 24th May, 2022 and seeks the following orders.

    a. This application be certified urgent and herar on a priority basis, and service thereof be dispensed with in the first instance for purposes of prayer 2 below;

b. There be a stay of the taxation of the Bills of Cost proceedings scheduled for 8th June, 2022, in respect of the Claimant's respective Bills of Costs dated 9th November, 2020, 26th April 2022, and 18th May, 2022 pending the hearing and determination of this application.

c. This Honourable Court be pleased to reinstate the Notice of motion application dated 25th April 2022.

d. Upon granting of prayer 3 above, this Honorable Court be pleased to order for the Notice of motion application dated 25th April 2022 be set down for hearing on merit inter-parties.

e. Cost be in the suit.

5. The application is supported by the grounds on the face thereof and the affidavit of Alfred Deya, counsel for the applicant who has conduct of the matter on behalf of the applicant. He states that the applicant's advocates were not aware that their application had been fixed for hearing on 18th May, 2022 suo moto. That he learned about the same on 20th May, 2022 upon being served with a notice of taxation by the Claimant's advocates.

6. Counsel deponed that the notification for the hearing date was sent to the email address of Simon John, a litigation clerk from the law firm who was on annual leave and had activated his out –of-office auto-reply to the effect that he would be away until 20th May, 2022, and that any assistance be obtained from his colleague Mr. Ihonga.

7. Counsel further deponed that the firm had in its application for the link given the Court the firm's official email contacts and expected all correspondence to the firm from the court to be made through the official email address.

8. The application is further supported by the affidavit of Simon Nyamai John, a licensed process server employed by Coulson Harney, the firm representing the applicant herein. He reiterates the averments of counsel that he was out of office and had activated his out of office auto reply, which he believed was received by the court registry and further that the court was aware about the firm's official email address.

9. In both affidavits it is deponed that this inadvertent mistake should not be visited upon the firm's client.

10. In response to the application the Claimant filed a verifying affidavit of the respondent and grounds of opposition opposing the application.

11. The application was disposed off by way of written submission. The applicant in its submissions dated 14th October, 2022 together with its List and Bundle of authorities has relied on the decisions in Eldoret ELC No. 375 of 2015, *Vincent Amolo Ambani t/a Fast Track investments .V. National Bank of Kenya LTD* [2021] eKLR; Kajiado Civil Miscellaneous Application No. 20 of 2016: *James Mwangi Gathara & Another .V. Officer Commanding station Lotitoktok & 2 others* [2008] eKLR; Civil Appeal No. 25 of 2020: *Ham .V. SOS* [2021] eKLR and the decision of Mativo J. (as he then was) in Petition No. 328 f [2017] eKLR where he cited with approval the decision of the Chief Justice of the Supreme Court of United States in *Osborn .V. Bank of the United States* 22.v. 738[1824]. All these decisions concern judicial discretion in reinstatement of suits dismissed for non-attendance or other default.

12. The applicant submits that it has through the two supporting affidavits demonstrated that it has reasonable grounds for seeking reinstatement, that the application was filed without delay and that the Claimant will not suffer prejudice by the reinstatement of the application.

13. On the application for stay of the taxation the applicant submits that the onus is on the respondent to convince the court why discretion should not be exercised in its favour. It relies on the decision of Ringera J (as he then was) in *Global Tours & Travels Limited, Nairobi Winding Up* Cause No. 43 of 2000 as quoted in Jinaan Nzioki Mbiuva .v. Cabinet Secretary Ministry of Lands and Housing & 6 others [2021] eKLR.

14. For the Claimant it is submitted that the application is founded on falsehoods and misrepresentation as deponed in the verifying affidavit in response to the application. That the court record and pleadings represent the true position. That the fact that the litigation clerk handling the matter was away is not sufficient ground to grant the orders sought in the application as this is an internal matter and the advocates of the applicant are duly bound to organise their affairs.

15. It is submitted that this is not the first time the applicant seeks the courts discretion for its omissions as demonstrated in the court record, starting with failure to file defence back in 2017. The Claimant invokes the maxim "Res inter alios acta alteri nocere non debet" meaning things done between strangers ought not affect a third person who is a stranger to the transaction. That the confusion in the applicant's advocate's office which resulted in non-attendance and prosecution of its application need not be visited on the Claimant. That the applicants remedy is against the advocates for professional negligence.

16. The Claimant cites and relies on the decision of Ringera J (as he then was) in *Charles Omwatta Omwoyo .v. African Highlands and Produce Co. LTD* [2002] eKLR and the decision of Kimaru J (as he then was) in *Alice Mumbi Nyanga & Another* Civil Case No. 394 B of 2001 [2006] eKLR.

17. On whether or not the court's discretion should be exercised in favour of the Applicant the Claimant states that the judgment herein was entered in her favour on 6th November, 2020. That due to incessant applications by the applicant she is yet to realise the fruits thereof. That there is as yet no defence on record 5 years after the suit was filed. That the applicant does not deserve the exercise of the Courts discretion in its favour.

**Analysis and determination**

18. Having considered the pleadings and rival submissions on the record, the issue for determination is whether or not this Court's discretion should be exercised in favour of the applicant to grant the orders sought in the applications dated 24th May, 2022.

19. The main reason that the applicant seeks the discretion of this court to be exercised in its favour is that it was not aware of the date fixed by the court for inter parties hearing of the application as the notice was sent to the personal email of its litigation clerk yet it had communicated the official address to court.

20. It is a matter of common knowledge that the court has moved filing of documents to the virtual platform. it is further a matter of common knowledge that urgent applications are considered by the court exparte and the orders made are posted on the virtual platforms. Such orders are available to the parties 24/7.

21. In this particular instance the Judge on duty considered the application and posted her orders on the virtual platform on 27th April 2022. The orders were to the effect that the applicant serves the application, the Claimant files reply within 14 days and that a date shall be allocated by the registry for hearing before the trial court.

22. The registry fixed the application for inter partes hearing on 18th May, 2022 and notified the parities by email. The Claimants counsel states that it also received a text message, which must have been sent to both parties.

23. It would appear that the applicant's advocates have been using multiple email addresses and perhaps phone numbers to file pleadings. That would explain why the court's virtual platform which is automated picked on the litigation clerks email rather than the official email of the applicant.

24. The virtual system would not be in a position to read and respond to any out–of-office alert that has been alluded to in the affidavit in support of the application. If a party provides an official email to the court, that should be the only email used in all correspondence.

    If a party uses multiple emails, it cannot use that as an excuse when notice is sent to any one of such emails. And it is a lame excuse to accuse the court for using a litigation clerks email instead of an official email. The system cannot distinguish between the two.

25. Be that as it may, what is not excusable is the fact that after the Court ordered a date to be taken at the registry, the applicant sat back to wait for the court to act on its application that had been filed under certificate of urgency and where no stay was granted at interim stage. A diligent advocate would have sent its clerk to follow up at the registry to ensure that action was taken on the orders of the duty Judge. It would have also been checking the causelists daily to ensure that if such a matter was listed it would not escape the advocate's attention.

26. This was critical taking into account the nature and history of the application. The Respondent has in the past conducted its affairs in this suit with utmost lethargy

27. Finally, managing a court diary is the responsibility of the litigation counsel. Where such counsel delegates to a litigation clerk or even another counsel in the same firm the responsibility still remains with the counsel. A matter that has been mismanaged as much as this one requires even keener follow up. Counsel who fails to do so must take responsibility for any consequences that arise therefrom.

28. On the question of prejudice, I want to believe that counsel of the applicant was not serious when submitting that no prejudice would be occasioned to the Claimant who has been waiting to benefit from her judgment since it was delivered on 6th November, 2020.

29. From the foregoing, this is a case that does not deserve the benefit of this courts discretion. It is accordingly dismissed with costs. The registry is directed to fix the Claimant's Bills for taxation within the next 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 23RD DAY OF MARCH, 2023**

**MAUREEN ONYANGO**

**JUDGE**