



**Amalgmated Union of Kenya Metal Workers v Reliable Electrical Engineers [M] Ltd (Cause E102 of 2021) [2023] KEELRC 1521 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1521 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E102 OF 2021**

**AK NZEI, J**

**MARCH 9, 2023**

**BETWEEN**

**AMALGMATED UNION OF KENYA METAL WORKERS ..... CLAIMANT**

**AND**

**RELIABLE ELECTRICAL ENGINEERS [M] LTD ..... RESPONDENT**

**RULING**

1. The suit herein was filed on December 9, 2021 via an evenly dated Memorandum of Claim. The Respondent did not enter appearance and did not file response to the claimant's claim, though shown to have been served with summons and suit documents herein. The claimant's suit was filed alongside a Notice of Motion dated December 9, 2021 seeking directions that the claim be heard on priority basis. The Notice of Motion is shown to have been served on the Respondent together with the suit documents, pursuant to the court's directions in that regard; and was allowed by the court on February 2, 2022. The suit was thereupon fixed for formal proof.
2. Formal Proof hearing proceeded on April 27, 2022, and judgment was delivered on October 13, 2022. On November 24, 2022, the respondent filed a notice of motion dated November 23, 2022 seeking a stay of execution of this court's decree and setting aside of the decree and all consequential orders. The application was presented to the court under a Certificate of Urgency, but I declined to either certify the application as urgent or to issue interim orders of stay, as no urgency had been demonstrated.
3. On November 29, 2022, the respondent filed yet another application under a certificate of urgency dated November 28, 2022, seeking orders of stay of execution. The Notice of Motion dated 23<sup>rd</sup> November sought the following orders:-
  - a. stay of execution of the court's judgment entered on October 13, 2022.
  - b. that the court be pleased to vary, set aside and/or discharge the judgment delivered on October 13, 2022.



- c. that the respondent/applicant be given time to put in their response to the claim and other necessary documents to defend its position.
  - d. that costs of the application be in the cause.
4. The application is supported by an affidavit of Manoj Shah, a director of the respondent company sworn on November 23, 2022. It is deponed in the said supporting affidavit:-
  - a. that the respondent was not properly served with summons and pleadings in the suit, and is desirous of defending the claim.
  - b. that the respondent has an arguable defence.
5. A draft response was annexed to the said replying affidavit of Manoj Shah, and I have perused the same. The respondent states in the draft response:-

“that issues raised in paragraph 3 of the memorandum of claim give birth to a defence of “sub judice and sub judicature” as they have been raised before.”
6. On December 8, 2022, the respondent/applicant withdrew the Notice of Motion dated November 28, 2022, and left for determination the Notice of Motion dated November 23, 2022, which I have reproduced in paragraph 3 of this Ruling.
7. The respondent opposed the application vide a replying affidavit of Rose Omamo, the claimant’s General Secretary, sworn on December 13, 2022. It is deponed in the said replying affidavit:-
  - a. that both the respondent/applicant and their Advocate, S. Ruwa & Company Advocates, were kept aware of each happening in the case herein, but failed either to attend court or show interest therein.
  - b. that the only thing that moved the Respondent was the proclamation and warrants of attachments.
  - c. that the court will be setting a bad precedent by allowing a review in a matter where a party had ample opportunity to make representation but chose not to, by disrespectfully and blatantly ignoring attendance (court) sessions.
  - d. that it will be unfair for the court to aid, assist, indulge, entertain or sympathise with such a reluctant litigant.
  - e. that there must be an end to litigation, and parties should be restrained from wasting valuable judicial time.
8. The respondent did not deny having been served with summons and suit documents. All that the respondent’s director, Manoj Shah, deponed to was that the respondent had not been properly served. There is on record an affidavit of service sworn by one George Ondiege on January 18, 2022 and filed in Court on February 1, 2022 stating that the respondent was on December 15, 2021 served with a memorandum of claim and other mentioned suit documents, upon which the respondent/applicant instructed the claimant to serve their Advocates (S. Ruwa & company Advocates) who were not on record, and that the claimant served the said Advocates as well, nevertheless. Indeed, copies of the served documents filed in court with the affidavit of service are shown to bear the said Advocates date stamp.



9. There is also on record an affidavit of service filed in court on April 27, 2022 stating that a Formal Proof Notice for April 27, 2022 was served on both the Respondent and its said Advocates on March 8, 2022 by email (soft copy). Proof of that service was filed together with the affidavit of service.
10. The respondent/applicant's application herein was filed through S. Ruwa & Advocates, the same advocates that the claimant was directed by the respondent to also serve with the suit documents herein. The Formal Proof Notice for April 27, 2022 is shown to have been served on both the Respondent and its said Advocates.
11. It is clear from the foregoing that the respondent was properly served with both the suit documents herein and a hearing/Formal Proof Notice, but chose to ignore the court process. As has previously been stated elsewhere, choices have consequences, and the consequence suffered by the respondent herein is that hearing proceeded ex-parte, and there is in place a regular and valid decree of this court.
12. The Court of Appeal held as follows in the case of *Philip Kiptoo Chemwolo & Mumias Sugar Company Ltd v Augustine Kubebe* [1982-1988] KAR:-
 

“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. *Kimani v MC Connell* [1966] EA 545 where a regular judgement had been entered, the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.”
13. The foregoing ties up with the question of whether or not the applicant has a defence in the merit. In the case of *Tree Shade Motor Limited v Dt Dobie CO. LTD* CA 38/98, the court held that even where the ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contains a valid or reasonable defence.
14. Having perused the respondent/applicant's draft defence, I am convinced that the same amounts to a general denial of the claimant's claim, and one that does not raise any triable issue or reasonable defence. It is not a defence in the merit. The respondent/applicant did not exhibit any documents to show or even to suggest, that the dispute herein had been determined before as alleged in the draft defence.
15. Finally, and having considered written submissions herein, I find no merit in the Notice of Motion dated November 23, 2022, and the same is hereby dismissed with costs.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> MARCH 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

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:**

.....for Claimant/Respondent



..... for Respondent/Applicant

