



**Cnr & 2 others v Freight in Time & another (Cause E204 of 2021)
[2023] KEELRC 1003 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1003 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E204 OF 2021
NZIOKI WA MAKAU, J
APRIL 19, 2023**

BETWEEN

**CNR 1ST CLAIMANT
CNR 2ND CLAIMANT
CNR 3RD CLAIMANT**

AND

**FREIGHT IN TIME 1ST RESPONDENT
JT 2ND RESPONDENT**

RULING

1. The Respondent/Applicant through an application dated August 30, 2022 seeks the following orders:-
 - i. Spent
 - ii. Spent
 - iii. That the Honourable Court be pleased to grant leave to the firm of Ojjo Senaji & Associates to come on record for the Applicants herein.
 - iv. That the Honourable Court be pleased to stay the execution of the judgment dated April 24, 2022 together with the decree issued on May 1, 2022 and all consequential orders thereto, either by the Respondent or her agents, pending the hearing and determination of this Application.
 - v. That upon hearing of this Application, the Honourable Court be pleased to set aside its judgment issued on April 26, 2022 and reopen the Claimant’s case for cross examination and adducing of evidence by the Applicants.



- vi. That the Applicant's notice of motion dated March 22, 2022 pending determination be marked as wholly withdrawn with no order as to cost.
- vii. That the costs of this Application be in the Cause.

The application was grounded on the affidavit in support as well as grounds on the face of the motion.

2. The Claimant was opposed and filed a replying affidavit sworn on September 8, 2022. In it, she deponed that the Claimant secured the judgment after the Respondents failed to attend the hearing of the case, notice of which was duly served on the former advocates for the Respondents. She depones that she should be allowed to enjoy the fruits of her judgment as there was even a decree that was obtained and served on the advocates then on record for the Respondents and this was not settled either. She deponed that there is no meritorious reason given for the issuance of stay orders or even set aside the decision of the Court.
3. The parties were to canvass the motion by way of submissions and the Respondents/Applicants did not file any submissions. Only the Claimant filed submissions.

Claimant/Respondent's Submissions

4. The Claimant/Respondent submits that from the pleadings on record, the Honourable Court is being asked to set aside its Judgment of April 26, 2022 and the Decree on the grounds that the Respondents/Applicants were not able to attend Court on April 26, 2022 when they were aware that the matter was indeed scheduled for hearing. That as such, the matter proceeded *ex-parte* and Judgment was issued in favour of the Claimant. It is the Claimant's submission that the Respondents were served through their advocates on record M/s Otieno Arum & Co Advocates, a Hearing Notice dated February 3, 2022 but neither they nor their Advocates on record entered appearance in the Honourable Court during hearing of the case and on the date of delivery of the Judgment. That the Respondents were also served through their advocates on record, with a copy of the Decree with a decretal amount of Kshs 3,396,240/- that continues to attract interest and to be executed against them. Notably, that the Respondents took more than one (1) month to move court for the reopening of the case and/or setting aside of the *ex-parte* proceedings if at all, demonstrating that they were not interested in pursuing the matter and Judgment was thus entered and the Claimant then put them on notice for execution.
5. It is the Claimant/respondent's submission that whereas the Respondents filed a Notice of Appeal against this Honourable Court's Judgment, which is their right, they are misguided in seeking to set aside the said Judgment without valid and convincing reasons for so doing. That this Court can only consider granting stay of execution if merited but which is not the case as neither an offer of adequate security has been made nor are there any reasonable grounds of appeal which can form the basis for grant of the Orders being sought by the Respondents/Applicants. That the reasons for non-attendance are not only an afterthought but intended to hoodwink the Court into believing in the actions of non-vigilant parties to the suit. The Claimant/Respondent submits that the Respondents/Applicants should face the consequences of not attending Court at their own instigation as they were fully aware of the scheduled hearing date and time as cause listed on the material day. The Claimant submits that in any event, the Respondents' defence is a mere sham.
6. The Claimant/Respondent submits that there are no good grounds upon which this Court should exercise its discretion to set aside the Judgment in favour of the Respondents. The Claimant cites the case of *Hellen Waikunu v Dotsavvy Limited* [2013] eKLR in which the Court dismissed an application seeking to set aside *ex parte* orders and reopen the matter *de novo* for hearing on the basis that the application lacked merit and was misconceived. The Claimant further relies on the case of *Victor Amos*



Nandi Otipa v Malplast Industries Limited [2018] eKLR in which the Honourable Court dismissed an application seeking to set aside ex-parte orders, having considered the respondents' Defence and Statement and finding them to be devoid of merit. The Claimant/Respondent's prays for the dismissal of the Application with costs.

7. The application by the Respondents must fail. On May 12, 2022, the Respondents filed a similar application seeking the same orders. On July 28, 2022, this Court dismissed the application by the Respondents as being unmerited. There is no way a Court of law can do what the Respondents now seek as to do so would be to trample on procedure and muddy the fountain of justice. The Respondents cannot reopen the matter as it is res judicata. This Court is functus officio and as such the execution may now proceed since there is no stay granted nor reason given why there should be a stay granted at this late juncture, the previous attempts having failed. The Respondents' Application is dismissed with costs to the Claimant.

8 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2023

NZIOKI WA MAKAU

JUDGE

