Mutiso v Fresh Squeeze Limited (Cause 851 of 2017)
[2023] KEELRC 881 (KLR) (17 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 881 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 851 OF 2017

JK GAKERI, J

APRIL 17, 2023

BETWEEN

ALBANUS MBITHI MUTISO ..... CLAIMANT

AND

FRESH SQUEEZE LIMITED ..... RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Respondent/Applicant dated 12th October, 2022 seeking ORDERS THAT;

    1. Spent.

    2. Spent.

    3. Spent.

    4. The Honourable Court be pleased to set aside the Judgement entered on 12th October, 2021 in its entirety and any consequential order and/or decree herein and grant the Respondent leave to defend the suit herein.

    5. Costs of this Application be provided.

2. The Notice of Motion filed under Certificate of Urgency is stated under Order 10 Rule 11 and Order 9 Rule 9 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, and 3A of the *Civil Procedure Act* and is based on the grounds set out on its face and the Supporting Affidavit sworn by Lilian Wambui Kinyua dated 12th October, 2022.

3. The affiant depones that on 6th October, 2022, Mbusera Auctioneers proclaimed the Respondent's tools of trade to be seized for sale by auction on 14th October, 2022 on instructions of the Claimant in

execution of a Judgement which granted the Claimant Kshs.54,648/= plus costs and interest, a total of Kshs.206,521.43.

4. That the attachment was unlawful and bad in law as the Judgement and decree were being executed unprocedurally, unlawfully and irregularly obtained and the execution was flawed.

5. That the Respondent had not been served with summons plaint or notices so as to instruct its advocates to enter appearance and file a defence.

6. The affiant states that upon proclamation, the Respondent/Applicant instructed Muthee Kihiko Suni and Associates Advocates to ascertain the status of the matter.

7. That counsel discovered that the Claimant was serving documents upon C.W Kinuthia & Co. Advocates and the Respondent had not instructed the said firm to act on its behalf and was unaware of the existence of the suit.

8. That no notice of entry of judgment or decree was served upon the Respondent/Applicant to satisfy the Judgement.

9. That a party should not be condemned unheard.

10. That there is good reason for the court to set aside and/or vacate the ex-parte proceedings and ex-parte judgement and grant leave to the Respondent/Applicant to enter appearance, file a statement of defence and the matter be heard and determined on merit.

11. That the Applicant stands to suffer irreparable loss if the orders sought are not granted and the Respondent will proceed to execute judgement against the Applicant.

12. Finally, the affiant states that application will not occasion any prejudice to the Respondent that cannot be compensated with reasonable costs.

Response

13. By a Replying Affidavit sworn by Millicent A. Alividza dated 19th December, 2022, counsel depones that the mattes was heard on 13th August, 2021 and judgement delivered on 12th October, 2021 in favour of the Claimant.

14. The affiant states that the Respondent was aware of the matter as it had been served with pleadings and a demand letter and it instructed the firm of C.W Kinuthia & Co. Advocates as evidenced by the Memorandum of Appearance on record and a defence and service was affected on the firm on record until 7th October, 2022 when the Notice of Appointment of the current law firm was received.

15. The affiant states that notices of mention, hearing and taxation were served on the law firm on record.

16. That the Respondent/Applicant was all along aware of the proceedings but ignored the same.

17. The affiant states that the Applicant was misleading the court by intimating that it became aware of the proceedings when the auctioneers sent their proclamation notice.

18. That the applicant wilfully ignored court process and it is unreasonable for it to deny the Claimant the fruits of his judgement at this stage and the court should not allow its processes to be handled as afterthoughts.

19. The affiant further depones that it was settled that litigation must come to an end and it was not the duty of the court to assist parties that ignored its processes.

20. The court was urged not to grant the orders sought.

21. In a Supplementary Affidavit sworn on 20th January, 2023, Lilian Wambui Kinyua depones that she was the Manager of the Respondent and maintains that the Respondent/Applicant was unaware of the suit until the proclamation by the Auctioneers. That the witness statement on record was not hers as the signature was not hers. That no Bill of Costs or notice of taxation was served upon the Respondent.

Applicant's submissions

22. Counsel for the Applicant identified two issues for determination, namely;

    i. Whether there was proper service of summons and pleadings on the Respondent.

    ii. Whether the court ought to set aside the Judgment entered on 12th October, 2021.

23. As regards service, counsel relied on Rule 11 (2) and 12 of the Employment and Labour Relations Court (Procedure) Rules, 2016 on service of summons on a body corporate to urge that in this case the summons were not served upon the Respondent but on the firm of C.W. Kinuthia Advocates and no evidence of direct service upon the Respondent.

24. That the Respondent did not issue instructions to C.W Kinuthia Advocates.

25. That the signature on the witness statement on record was different.

26. On whether the judgment entered on 12th October, 2021 should be set aside, reliance was made on the decisions in Kabutha v Mucheru HCCC No. 82 of 2002 and Frigonken Ltd v Value Pak Food Ltd HCCC No. 424 of 2010 to urge that in the absence of proper service of summons to enter appearance, the judgement ought to be set aside to uphold the integrity of the judicial process.

27. The court was urged to set aside the judgement.

Respondent's submissions

28. Counsel identified two issues for determination on whether the application is merited and costs.

29. As to whether the application is merited, counsel submitted that the Respondent was duly served, and its counsel entered appearance and filed a defence and witness statement and did nothing more and was thus indolent and should not be rewarded for its inaction.

30. Counsel submitted that the judgement delivered on 12th October, 2022 should not be set aside as the record showed that service was effected.

31. Reliance was made on the decision in James Wanyoike and 2 others v CMC Motors Group Ltd and 4 others [2015] eKLR to demonstrate the parameters of setting aside of an ex-parte judgement such as defence on merits, prejudice to the Respondent and explanation of the delay, if any.

32. Counsel urged that the Respondent filed a defence to the claim but chose not to participate in the hearing.

33. Counsel submitted that the Respondent will suffer prejudice if the orders sought were granted.

34. As regards delay, counsel wondered how the Respondent would file a defence to case unknown to it or enter appearance.

35. Counsel urged that the Applicant's indolence ought not to be visited, revisited upon the Claimant/ Respondent who should be allowed to enjoy the fruits of his Judgement as setting it aside would amount to subversion of justice.

36. Reliance was also made on the sentiments of the court in Shah V Mbogo (1967) E.A 166 to urge that the courts discretion should not be exercised to assist a party to obstruct or delay the cause of justice.

37. Counsel urged the court to dismiss the suit with costs.

Determination

38. The singular issue for determination is whether the application herein is merited, specifically whether the ex-parte judgement dated 12th October, 2021 ought to be set aside.

39. As regards the setting aside of ex-parte judgement, the law is well settled that it is a matter of judicial discretion. (See Kimani v McConnel [1996] EA 547) and Pindoria Construction Ltd v Ironmongers Sanytary Ware Civil Appeal No. 16 of 1976).

40. The court must exercise its discretion judiciously, typically to avoid injustice as was held in Shah v Mbogo (Supra).

41. In CMC Holdings Ltd v Nzioki [2004] KLR 173, the Court of Appeal held as follows;

> "In an application for setting aside ex-parte Judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised judiciously . . . In law, the discretion that a court of law has in deciding whether or not to set aside ex- parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error.
>
> It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such excusable mistake, inadvertence accident or error. Such an exercise of discretion would be wrong principle."

42. Similarly, in the words of Odunga J. (as he then was) in Mureithi Charles and another v Jacob Atina Nyagesuka [2022] eKLR,

> "In considering whether or not to set aside a judgment, a judge has to consider the matter in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary upon terms to be imposed.
>
> Hence the justice of the matter and the good sense of the matter are certainly matters for the judge. It is as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits namely; a prima facie defence which should go to trial or adjudication. The principle obviously is that unless and until the court had pronounced a Judgement upon the merits or by consent, it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure . . . Indeed, there is no parallel with an appeal. The Judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing than the judge who acts ex-parte.

> Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustices, hardship would not result from accident inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is a prima facie defence.
>
> He may not be satisfied with the blunders or non-attendance of the defendant or his Advocate but nevertheless he may hold that it would be just to set aside the ex-parte judgement."

43. The court is in agreement with these sentiments and is guided accordingly.

44. In the instant case, while the Applicant submitted that there was no proper service of summons to enter appearance, pleadings, mentions and hearing dates and the judgment was therefore irregular and ought to be set aside ex debito justiciae, the Claimant/Respondent urged that summons and the claim were served on the Applicant and the judgement was regular as service had been effected.

45. From the record, it is discernible that the Claimant/Respondent filed the claim on 22nd May, 2017 and the summons were directed to the Director of the Respondent/Applicant and were received by one Lilian on 27th July, 2017 at 12.08 pm.

46. This is evidenced by the entry on the summons, signature and the Respondent's stamp and as attested to by the Affidavit of Service sworn by Festus Kyalo dated 19th October, 2017.

47. The Applicant/Respondent has not submitted or deponed that Lilian was not its employee at that time or stated the stamp affixed on the summons was a forgery.

48. Similarly, the record reveals that on 16th August, 2017, the Court Registry received a Memorandum of Appearance for Applicant/Respondent from M/S C.W Kinuthia & Co. Advocates dated 16th August, 2017 and the law firm subsequently filed a Statement of Defence and witness statement on 6th March, 2017, both dated 23rd February, 2018.

49. Subsequently, the Claimant's counsel served mention and hearing notices on the counsel on record as evidenced by Affidavit of Service dated 19th May, 2019 and 12th August, 2021.

50. Equally, the Notice of Taxation and the party to party Bill of Costs were served through email on 21st February, 2022.

51. The Affidavit of Service of summons and the claim reveals that the Applicant/Respondent's place of business was Limuru Town, Kiambu County and Ms Lilian was the Human Resource Manager.

52. The subsequent Affidavits dated 17th May, 2019 and 12th August, 2021 confirm that the place of business was on 2nd Floor, Jascat Centre in Limuru.

53. Although Ms Lilian contests the signature on the witness statement dated 23rd February, 2018, she has not contested the contents or any other information contained in the Affidavits of Service filed in court.

54. The Supporting Affidavit by M/s Lilian dated 12th October, 2022 is reticent on how documents allegedly served upon the Applicant/Respondent's director on 27th July, 2017 and which show that she was at the time the Human Resource Manager of the Applicant were in fact not served on the Respondent. The Affidavit is similarly silent on how the law firm of C.W Kinuthia & Co. Advocates learnt of the suit and filed a Memorandum of Appearance. The argument that the Applicant did not instruct Ms. C.W Kinuthia & Co. Advocates cannot avail the Applicant as the record reveals that the

original service of summons and the claim was effected on the Applicant/Respondent at its place of business which has not been denied.

55. To this extent, the court is in agreement with the Claimant/Respondent counsel's submission that it was incumbent upon the Applicant to respond to the suit having been notified of its filing in 2017.

56. Puzzlingly, the Applicant did not plead mistake, error or inadvertence by anyone including the counsel on record.

57. In the court view, it would appear that the Applicant received summons and the claim but failed to act in the hope that the matter would fade away and the inaction is attributable to the Applicant.

58. The court is cognizant of the centrality of the right to be heard in Kenya's Constitutional jurisprudence and in matters germane to termination of employment or summary dismissal as held in Martha Wangari Karua v Independent Electoral and Boundaries Commission and others cases. Although the Applicant avers that if the Judgement delivered on 12th October, 2021 is not set aside, it will have been condemned unheard, it has not sought orders whose effect would be to facilitate the expeditious disposal of the suit.

59. In exercising its discretion on whether or not to set aside a Judgement, the court is enjoined to consider a wide spectrum of circumstances including reason for the Applicant's default to act, length of time since judgement was delivered, whether the defence raises triable issues, the respective prejudices each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the judgment.

60. From the record, it is unclear as to why the Respondent did not follow up the matter after service.

61. Similarly, the Application herein was filed on 18th October, 2022 more than one (1) year after the Judgement sought to be set aside was delivered on 12th October, 2021 which is inordinately long and has not been explained by supportive evidence.

62. The court is guided by the sentiments of the court in Rayat Trading Co. Ltd V Bank of Baroda and Telezi House Ltd [2018] eKLR as follows;

> " It is an old adage that justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the court is obligated to promote the provisions of Article 159(2) (d) of *the Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgement Creditor for justice to be seen to be done. Even then, a mistake by counsel is not a technicality. In the same vein, the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the court in the expeditious disposal of cases."

63. These sentiments are consistent with the constitutional and statutory mandates that cases be disposed of efficiently, justly and expeditiously.

64. The instant case was certified ready for hearing on 20th May, 2019 and hearing took place on 13th August, 2021 from 11.30 am in the Respondent's absence.

65. Strangely, the Applicant/Respondent's application is reticent on what it intends to do after the Judgement delivered on 12th October, 2021 is set aside. It has not indicated that it intends to file an amended statement of response or witness statement or documents or to participate in the hearing.

66. An indication of the proposed course of action would have demonstrated the Applicant's desire to have the suit herein disposed off after more than 5 years.

67. The court is further guided by the sentiments of the court in Jomo Kenyatta University of Agriculture and Technology v Musal Ezekiel Sebal [2014] eKLR addressing the object of giving the court jurisdiction to set aside an ex-parte Judgement

> " To avoid injustice or hardship resulting from accident inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."

68. A cursory glance of the orders sought provides no indication of a party eagerly desirous of concluding the suit herein expeditiously and efficiently. It is unclear as to why the contents of paragraph 11 of the Supporting Affidavit were not applied for as substantive orders in the Notice of Motion.

69. Relatedly, the Applicant has neither deponed nor submitted that the defence on record or the one it intends to file raises triable issues.

70. Needless to emphasize, the quality of the defence is one of the issues the court takes into consideration in exercising its discretion.

71. In Noniko Holdings and 2 others v Atticon and 5 others [2020] eKLR the court stated as follows;

> " Further, the court will consider inter alia whether the draft defence has merits and/ or raises triable issues, whether the Respondent will suffer prejudice, if any, and whether there is sufficient reasons for the delay."

72. In the instant case, the Applicant was not vigilant, it slept on its rights for about two (2) years and cannot now allege that it was unaware of the suit yet court records show that the claim and summons were served on it in July 2017 and no evidence has been adduced to demonstrate that the alleged service was a forgery.

73. Finally, it is trite law that a successful party or litigant should not be denied the fruits of his Judgement save in exceptional circumstances (See Kenya Shell Ltd V Kibiru (1986) KLR 410 and Justus Kyalo Musyoka v John Kivungo [2019]eKLR).

74. For the foregoing reasons, it is the finding of the court that the Respondent has failed to place before the court sufficient material for the setting aside of the judgement delivered on 12th October, 2021.

75. Consequently, the Notice of Motion dated 12th October, 2022 is dismissed.

76. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF APRIL 2023

DR. JACOB GAKERI

JUDGE

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 has 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.**

DR. JACOB GAKERI

JUDGE

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