



**Ogutu v St. Kevin Hills School (Cause 334 of 2018)  
[2023] KEELRC 930 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 930 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 334 OF 2018**

**AK NZEI, J  
APRIL 17, 2023**

**BETWEEN**

**PAUL OGUTU ..... CLAIMANT**

**AND**

**ST. KEVIN HILLS SCHOOL ..... RESPONDENT**

**RULING**

1. The application before me is the respondent’s notice of motion dated December 23, 2022. The respondent/applicant seeks the following orders:-
  - a. that the court be pleased to certify the matter urgent, and be heard exparte at the first instance and on priority basis.
  - b. that the court be pleased to issue an order staying the judgment/ruling against the respondent/ applicant and any consequential decree and warrants of attachment and sale pending hearing and determination of the application.
  - c. that the court be pleased to set aside all the proceedings and the resulting ruling/judgment in the suit entered against the respondent.
  - d. that the court be pleased to the respondent (sic) to file pleadings and defend the suit herein.
  - e. that costs of the application be provided for.
2. The application is supported by the supporting affidavit of one Kevin Nyongesa, sworn on 2December 3, 2022, wherein it is deponed:-
  - a. that on December 21, 2022, the said deponent received warrants of attachment and sale from Status Auctioneers, the matter having proceeded ex-parte without the deponent’s knowledge, and Judgment having been delivered on April 28, 2022.



- b. that upon being served with summons, the respondent/applicant instructed the firm of Ragira & Company Advocates to go on record for him; and assumed that everything was in order.
  - c. that the Judgment and subsequent decree were obtained irregularly.
  - d. that the mistake of an advocate should never be visited upon a client, and that the court should consider the respondent/applicant's plight and set aside its Judgment and decree.
  - e. that the respondent should not be condemned unheard as this would go against the principle of natural justice.
  - f. that the claimant came to court with unclean hands and deliberately misled the court to give him favourable outcome, hence the judgment/ruling should be set aside.
3. A copy of a draft response to the memorandum of claim is annexed to the said affidavit of Kevin Nyongesa.
4. The application is opposed by the claimant/applicant vide his replying affidavit sworn on January 19, 2023, wherein it is deponed, inter alia:
- a. that notice of summons and pleadings were served on the respondent on June 4, 2018. (A copy of a served Notice of summons is annexed to the replying affidavit).
  - b. that on June 12, 2018, the Firm of Mogaka Omwenga entered appearance for the respondent and duly filed a memorandum of response only on June 29, 2018, despite the matter coming up for compliance severally. (copies of a notice of appointment of Advocates and a memorandum of response are annexed to the replying affidavit).
  - c. that on October 12, 2021, the respondent's Advocates, Mogaka Omwenga & Company Advocates, were granted leave to cease acting for the respondent upon citing lack of instructions from the Respondent.
  - d. that consequently, the respondent appointed the Firm of Ragira Gideon & Company Advocates to act on their behalf. (A copy of a notice of appointment of Advocates dated and filed on November 12, 2021 is annexed to the replying affidavit).
  - e. that the suit was set down for hearing on January 31, 2022, but neither the respondent nor its Advocates attended Court, despite the fact that the date had been taken by consent.
  - f. that hearing proceeded and the court directed that the matter be mentioned on February 22, 2022 to confirm filing of submissions, which date was served on the respondent's advocates. (a copy of a served mention notice, duly served on February 4, 2022 and an affidavit of service are annexed to the replying affidavit).
  - g. that after judgment was issued by the court on April 28, 2022, the respondent was on May 13, 2022 served with a notice of entry of judgment by the claimant's advocates. (A copy of a duly served notice of entry of judgment, dated and duly served upon Ragira & Company Advocates on May 13, 2022, is annexed to the replying affidavit).
  - h. that consequently, the claimant's advocates lodged the claimant's party and party bill of costs before the deputy registrar for taxation, and despite service of the Bill of Costs and a taxation notice on the respondent's Advocates, they neither attended Court nor filed a counter-proposal. (A copy of a duly served Taxation Notice is annexed to the Replying Affidavit).



- i. that ruling notice on taxation was duly served on the respondent’s advocates. (a copy of a ruling notice is annexed to the replying affidavit).
  - j. that ruling on taxation was delivered on November 14, 2022, taxing the Bill of Costs at Kshs. 181,570; and thereafter execution issued.
  - k. that the Judgment herein was obtained regularly, and that the Respondent has been aware of the same all this while.
  - l. that the application to set aside this Court’s Judgment came nine (9) months after the Judgment had been delivered.
  - m. that it was incumbent upon the Respondent, being the litigant, to follow up on the status of his file/suit which has been in Court since 2018; and to raise with the Court any issues that they may have had with their Advocates.
  - n. that equity does not aid the indolent. That the Respondent slept on its rights and its indolence should not be used to punish the Claimant by delaying justice.
  - o. That litigation must come to an end.
5. Both parties filed written submissions, for and against the application pursuant to the Court’s directions in that regard. I have considered the submissions filed.
6. The facts of the application Are quite interesting. I say interesting because despite having been represented by three firms of Advocates in the suit herein at different times, and despite having filed response to the Claimant’s claim way back on 29<sup>th</sup> June, 2018, well over four and a half years ago, the Respondent purports to seek an opportunity to file its pleadings and to defend the suit. Further, it is worth noting that the Respondent/Applicant has not disputed or controverted any of the averments made in the Claimant’s Replying Affidavit whereby the Respondent/Applicant’s Advocates are shown to have been served with appropriate notices at each stage and step of the proceedings herein.
7. As correctly stated by the Claimant/Respondent, the Respondent/Applicant, being the litigant, had a duty and an obligation to follow up with his duly appointed Advocates on the position and progress of the suit herein. The wheels of justice moved on as the Respondent/Applicant chose to go indolent over its case. As previously stated elsewhere, choices have consequences, and the consequence suffered by the Respondent/Applicant herein is that there is a regular Judgment/decree in place.
8. Justice is like a saw or sword that cuts on both sides. The Claimant/Respondent has demonstrated that he diligently prosecuted his case, ensuring service of court process on the Respondent/Applicant all the way. The Respondent/Applicant was only woken up from its chosen indolence by proclamation of its property in execution of this Court’s decree. Can this Court’s discretion to set aside an ex-parte Judgment be exercised in favour of the respondent/Applicant herein” It was held as follows in the case of *Shah -vs- Mbogo* [1969] EA 116, 123:-
- “ this discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designated to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
9. It was the respondent/applicant’s deposition that mistakes of an Advocate cannot be visited on the Advocate’s client. As already stated in paragraph 7 of this ruling, the respondent/applicant had an obligation to follow up on the position and progress of its case with its Advocates. In *Ruga Distributors*



Limited –vs- Nairobi Bottlers Limited [2015] eKLR, the Court (Aburili, J.) cited with approval the court’s sentiments in *Savings and Loan Ltd –vs- Susan Wanjiru Muritu – Nairobi HCCC No. 397/2002* (Kimaru, J) where the Court stated:-

“whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates’ failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default Judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.”

The foregoing holding is relevant to the facts of the case herein, and I wholly agree with the Honourable Judge’s sentiments.

10. It was stated in Charles Omwata Omwoyo –vs- African Highlands Produce Company Limited [2002] eKLR (Ringera, J.), and I agree as follows:-

“Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavor. The plaintiff should not be made to shoulder the consequences of the negligence of the defendant’s Advocates. This is a proper case where the defendant’s remedy is against its erstwhile advocates for professional negligence and not setting aside the Judgment.”

11. In the present case, the claimant cannot be made to suffer because of the respondent/applicant’s indolence and negligence on the part of its advocates. The respondent/applicant’s remedy does not lie in the setting aside of the regular and valid decree held by the claimant. The respondent/applicant’s remedy, if any, is against its advocates for professional negligence. Judicial process cannot be taken back and forth at the instance of litigants who are not vigilant over their cases. Litigation must come to an end.
12. It is my finding that the respondent’s notice of motion dated December 23, 2022 is devoid of merit, and the same is hereby dismissed with costs. The interim order of stay of execution dated December 28, 2022 is hereby vacated.
13. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> APRIL 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

..... for Respondent

