



**Mwangemi v Mawingo Construction 2010 Ltd (Cause
235 of 2015) [2023] KEELRC 1220 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1220 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 235 OF 2015**

**AK NZEI, J
MAY 25, 2023**

BETWEEN

FERDINARD LENJO MWANGEMI CLAIMANT

AND

MAWINGO CONSTRUCTION 2010 LTD RESPONDENT

RULING

1. The application before me is the respondent's notice of motion dated November 10, 2021. The following orders are sought:-
 - a. That the firm of Miller George & Gekonde Advocates be granted leave to come on record for the Defendant herein.
 - b. That there be a stay of execution of the decree issued herein together with the execution process and or all consequential orders emanating therefrom, pending the hearing and determination of the application inter-partes or until further orders.
 - c. That the court be pleased to set aside the *ex-parte* judgment entered herein against the defendant on July 7, 2021 and grant the defendant unconditional leave to testify and adduce evidence in the suit.
 - d. That costs of the application be provided for.
2. The application is based on the supporting affidavit of Clive Irskine, a director of the respondent/applicant company sworn on November 10, 2022. It is deponed in the said affidavit:-
 - a. That a proclamation notice was served on one of the respondent/applicant's employees at the respondent's yard in Miritini area, Mombasa where the company ordinarily carries on business.



- b. That the deponent, upon investigating the circumstances leading upto the proclamation, learnt that the case proceeded in the absence of the respondent/applicant's previous advocates and without the deponent's knowledge, and that judgment was delivered on July 7, 2021.
 - c. That at all times, the respondent had a good defence that raises triable issues that may be successful on trial.
 - d. That the mistake and/or omission to defend the suit herein is attributable to the respondent/applicant's erstwhile Advocates previously on record who had clear instructions to act for the respondent/applicant company, and had an obligation to inform the respondent/applicant on the progress of the case, but never communicated when the matter came up for hearing and filing of submissions.
 - e. That the mistake of an Advocate should never be visited upon his client, especially to his (client's) prejudice.
3. The application is opposed by the claimant *vide* his replying affidavit sworn on November 28, 2022, whereby it is deponed inter-alia:-
- a. That the application is devoid of merit as all requisite procedures were followed in obtaining the judgment delivered on 7/7/2021.
 - b. That upon filing of the suit herein and service of summons on the respondent/applicant, the respondent/applicant entered appearance and filed response to the claim through Angelo Owino & Company Advocates.
 - c. That subsequently, the respondent/applicant, through the Firm of Mutuma Gichira & Associates, filed a Notice of change of Advocates, and that the matter was subsequently fixed for hearing on 7/10/2019.
 - d. That when the suit came up for hearing on 7/10/2019, and upon the Court being satisfied that proper service of a hearing notice had been effected, hearing proceeded in the absence of the Respondent, and that the Claimant testified and produced documents as exhibits in support of his case; upon which both the Claimant's case and the Respondent's case were closed.
 - e. That the court delivered a sound and regular judgment.
 - f. That there has been undue delay in filing the application herein, the same having been filed one (1) year after judgment in the matter was delivered, and that the application is an afterthought. That the Respondent/Applicant chose not to take part in the trial and is trying to avoid liability by obstructing and/or delaying the course of justice.
 - g. That the application herein is brought in bad faith and seeks to defeat the court's principal objective, which is to facilitate just, expeditious and proportionate resolution of disputes.
 - h. That the respondent/applicant has not given any reasonable grounds as to why the judgment entered herein should be set aside, or the claimant's case re-opened, or why leave should be granted to the respondent/applicant to defend the suit.
 - i. That the application is an afterthought aimed at remedying the respondent/applicant's mistakes at the expense of the claimant/respondent herein, and that mistake or lack of diligence on the part of the respondent/applicant's previous Advocates should not be extended to defeat the course of justice. That the application should be dismissed.



4. This court delivered its judgment herein on 7/7/2021 (Rika J.). The application herein was filed on 10/11/2022, approximately fifteen (15) months after delivery of the Court's judgment. No explanation has been given for this apparent inordinate delay. Nevertheless, the Court on November 14, 2022 granted an interim stay of execution on condition that the entire decretal sum was deposited in Court within fourteen (14) days of the order. The Respondent/Applicant's Counsel subsequently sought an extension of time to make the deposit, which extension was granted on November 30, 2022 with concession of the Claimant/Respondent's Counsel. The deposit is shown to have been made on 6/12/2022.
5. On 13/12/22, the Court gave directions to the effect that the application herein would be canvassed by way of written submissions, and directed the Respondent/Applicant to file and serve written submissions within fourteen (14) days of that date, upon which the Claimant/Respondent's submissions would be filed within fourteen (14) days of service. The Respondent/Applicant never filed written submissions, and hence there were no submissions filed by the Claimant/Respondent. The Court reserved a date for ruling on February 2, 2023.
6. The Respondent/Applicant seeks the setting aside of this Court's judgment delivered on 7/7/2021 on grounds that there was a mistake and/or omission on the part of its Advocates previously on record who were obligated to defend the suit, and who also did not communicate to the Respondent/Applicant when the suit came up for hearing, and that the mistake of an Advocate should never be visited on the Advocate's client to the client's prejudice.
7. What the Respondent/Applicant did not tell the Court was whether it was making a follow up on its case with its Advocates on record with a view to being updated on its progress in Court. Cases belong to litigants, not to their Advocates, and litigants have a duty to make follow up on their cases with their respective Advocates and to give appropriate instructions thereon. It is unfair and unacceptable for a litigant who has clearly ignored to follow up on the progress of his/its case to come up long after delivery of the Court's judgment and to seek the setting aside of such judgment alleging mistake or omission on the part of his Counsel. Such litigant's remedy lies against his Advocate for negligence, but not against a Claimant who holds a regular and valid decree of the Court. In such situations, the Court will refuse to push the wheels of justice backwards in favour of such litigant.
8. It was stated as follows in *Charles Omwata Omwoyo v African Highlands Produce Company Limited* [2002] eKLR (Ringera J), and I agree:-

“time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavours. The plaintiff should not be made to shoulder the consequences of the negligence of the defendants' Advocate. This is a proper case where the defendant's remedy is against its Advocates for professional negligence and not setting aside the judgment.”
9. In the present case, the Claimant cannot be made to suffer because of apparent indolence and negligence on the part of the Respondent/Applicant or its previous Advocates. This Court recently stated as follows in the case of *Paul Ogutu v St. Kevin Hills School* [2023] eKLR:-

“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.”

10. The foregoing sentiments hold valid in the present case. Having said that, I find no merit in the notice of motion dated November 10, 2022. The same is hereby dismissed with costs to the claimant/respondent.

11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

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AGNES KITIKU NZEI

JUDGE

Appearance:

Ms. Wanyama for Claimant

N/A for Respondent

