



**Juma v Cooperative Bank Limited (Cause 468 of 2018)
[2023] KEELRC 1198 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 468 OF 2018**

M MBARÚ, J

MAY 4, 2023

BETWEEN

JOSEPH JUMA CLAIMANT

AND

COOPERATIVE BANK LIMITED RESPONDENT

RULING

1. The claimant filed application dated February 28, 2023 seeking leave to have new advocates on record and for orders that there be stay of execution if the judgment ad decree herein and the court to be pleased to set aside the judgment against the respondent and to allow the claimant to re-open and prosecute his case.
2. The application is supported by the Supporting Affidavit of the claimant and who avers that he filed his claim herein on July 19, 2018 but upon perusal of the record he realised that on October 19, 2019 there were pre-trial directions when his advocate asked for a hearing date which was allocated for June 9, 2020 but could not proceed due to Covid-19 measures. On May 18, 2022 the matter came up for hearing but the advocate submitted that he lacked instructions. Failure to prosecute this matter was as a result of lack of communication leading to the claimant being condemned unheard.
3. The claimant also avers in support of his application that when the matter came up for hearing, his then advocate had a criminal matter and failed to inform him and hence would like to change advocates. the resulting judgment and decree of the court occurred without the claimant being given a hearing and seek the judgment be stayed and the claimant allowed to prosecute his case which has triable issues.
4. In reply, the respondent filed the Replying Affidavit of Florence Njuguna, legal manager and who avers that on May 18, 2022 the claimant's case was dismissed under rule 22 of the *ELRC Rules, 2016* and the respondent's counterclaim heard and allowed in the presence of the claimant's advocate. The court lacks jurisdiction to reinstate the suit as it would be sitting on appeal from its own decision. The claimant



excuse for not attending court is that his advocate did not communicate with him but this is not correct because the claimant's advocate stated in court that the claimant had failed to give him instructions in the matter while the claimant avers in his affidavit that he had been visiting his advocate's office. The application is not supported by the advocate to clarify on the position.

5. Njuguna also avers that the claimant's conduct in the matter is undeserving of the orders sought because since being served with the counterclaim he has not filed a response and despite being given more time to respond on July 15, 2021 he failed to address. The respondent took the hearing date and served the claimant through his advocates and on the due date on May 18, 2022 he failed to attend and the counterclaim was heard and allowed. Such conduct is undeserving of the discretion of the court and should be dismissed.
6. The claimant's case was dismissed on May 18, 2022 and he has taken over 9 months to move the court as herein done which delay is not explained and he is not deserving of the orders sought.

Parties attended and agreed to file written submissions.

7. The claimant as the applicant submitted that his advocate failed to communicate on the hearing date and such mistake should not be visited against him as held in the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR. A human error should not be used to defeat justice and deny the claimant a right to be heard as held in *John Peter Kiria & another v Pauline Kagwiria* [2013] eKLR that under article 50 of the *Constitution* every person has a right to a hearing. The claimant had full trust on his advocate and his conduct in so far as his failure to communicate should not be visited on him as an innocent party as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.
8. In response, the respondent submitted that the court lacks jurisdiction to set aside judgment herein since hearing and dismissal of the claimant was in the presence and attendance of the claimant represented by his advocate and the court proceeded under the provisions of rule 22 of the *ELRC Court Rules, 2016* and as held in *Julianne Ulrike Stamm v Tiwi Beach Hotel Limited* [1998] eKLR appearance at the hearing does not mean appearance for the claimant but appearance of counsel and a suit dismissed on the presence of counsel gives rise to a final order and can only be set aside on appeal and the instant application having been filed with inordinate delay should be dismissed with costs.
9. Parties agreed to have the claimant enjoy representation by his current advocates.
10. With regard to whether the court should stay execution of the judgment and re-open the case to allow the claimant prosecute his claim, the court is called to consider the matter in the light of all the facts and circumstances both prior and subsequent to judgment herein after the claimant's case was dismissed on May 18, 2022. In considering what is just and reasonable to stay execution or re-open the hearing, if necessary, the conduct of the claimant must be interrogated.
11. On April 29, 2021 parties attended court and by consent agreed to have the pleading amended to allow hearing to proceed on 10th June, 2021 but on the due date the claimant was absent and the court allocated another hearing date for July 15, 2021. The court allocated another date for October 26, 2021 but both parties remained absent.
12. On February 15, 2022 the respondent attended and was allocated hearing date for May 18, 2022 and served the claimant through his advocates who attended court and indicated that threw re no instructions and would apply to cease acting for the claimant and the court, in the presence of such advocate dismissed the claim and allowed the counterclaim since there same was not opposed.



13. Hearing hence proceeded in the presence of the claimant's advocate and the suit was dismissed with the full participation of the advocate as he still remained on record. The allegations by the claimant that there was no communication between him and his advocates in view of matters addressed on May 18, 2022 cannot justify his conduct.
14. The claimant as the right-holder had a duty to seek out his advocates and have the matter heard and determined particularly with the knowledge that there was a counterclaim filed against him and he had not replied to the same.
15. Upon the dismissal of his case on May 18, 2022 the instant application was not filed until February 28, 2023 a period of 6 months after the fact. Had the claimant been keen to prosecute his case, he should and ought to have sought out his advocates to be informed on the progress of his case. The delay to address the same is not addressed and the court finds no sufficient cause to justify the delay.
16. The claimant was represented by advocates throughout these proceedings and he exercised his right to secure the services of new advocates upon filing his application herein dated February 28, 2023. He cannot claim that he was denied the right to be heard while well aware of these facts. Where the claimant's advocates acted contrary to his interests, recourse exists for professional negligence as held in *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others* [2018] eKLR where the court in addressing a similar matter as herein quoted the case of *Omwoyo v African Highlands & Produce Co Ltd* [2002]1 KLR, where it was held;

Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. 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 Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment
17. Upon rendering judgment herein on May 18, 2022 the court cannot revisit its own orders unless the matter is up for review or for good cause which the claimant has failed to address.
18. Accordingly, application dated February 28, 2023 is hereby found without merit and is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

