



**Lidede v Early Learning Montessori Centre & 2 others (Cause
1400 of 2018) [2023] KEELRC 1494 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1400 OF 2018
MA ONYANGO, J
JUNE 21, 2023**

BETWEEN

VICTORIA MIGALE LIDEDE CLAIMANT

AND

EARLY LEARNING MONTESSORI CENTRE 1ST RESPONDENT

DR. OLIVER WALA 2ND RESPONDENT

SARA CHEPCHUMBA 3RD RESPONDENT

RULING

1. The application dated July 28, 2022 and filed in court on August 3, 2022 seeks the following orders: -
 - (i) That leave be hereby granted to the firm of Kiskan Law Africa Advocates LLP to properly come on record for the 1st, 2nd and 3rd Respondents/ Applicants in place of the firm of M/s Mulandi Kisabit & Associates Advocates.
 - (ii) That this Honorable Court be pleased to stay the execution of orders pursuant to the judgment entered on June 14, 2022 against the Respondents.
 - (iii) That the Court be pleased to set aside the judgment entered on June 14, 2022 and all consequential orders arising there from.
 - (iv) That the Respondents/Applicants be granted leave to file and serve statement of Respondent out of time and within such time as the Honourable Court may deem fit.
 - (v) That costs of this application be provided for:
2. The grounds on which the said application is made are that the 1st, 2nd and 3rd Respondents/Applicants were previously represented by the firm of M/s Mulandi Kisabit & Associates Advocates but after judgment now wish to be represented by the firm of Kiskan Law Africa Advocates LLP; that judgment



was entered against the Respondents/Applicants on June 14, 2022; that failure to file a Statement of Response within the requisite time frame was not advertent; that the then advocates on record failed to file a Statement of Response despite having adequate instructions to do so; that it is only fair and just that the ex-parte judgment be set aside and the case be heard on merit; that the Respondents have a good defence that raises triable issues and ought to be allowed to file their Statement of Response out of time; that the Claimant will suffer no prejudice if the *ex-parte* judgment is set aside; that it is in the interest of justice and fairness that the Respondents/Applicants be accorded an opportunity to be heard and to defend themselves and that the Respondents are interested in defending this cause.

3. The application is supported by the affidavit of the 2nd Applicant sworn on July 28, 2022. The affidavit reiterates the grounds on the face of the application.
4. The application is opposed. The Claimant filed a Replying Affidavit sworn on September 12, 2022. According to the Claimant, the Respondents were served with Summons to enter appearance and the bundle of documents on October 5, 2018; that through the firm of Messrs Mburugu & Kanyoge Associates Advocates, they entered appearance on October 8, 2018 did not file a response to the Claim nor respond to correspondence from the Claimant's advocate until January 28, 2021 when the Respondents filed a Notice of change of Advocates from Messrs Mburugu & Kanyonge Associates to Messrs Mulandi Kisabit & Associates; that the Respondents despite alleging that the firm of Mulandi Kisabit & Associates failed to act on instructions given by them, have not availed any evidence to demonstrate that they followed up with the advocates ascertain whether the advocates had acted on their instructions.
5. The Claimant posits that a case belongs to the litigants whose duty it is to pursue the progress of their case. That failure to follow up on the progress of their case amounts to negligence and indolence by the litigant.
6. It is further the Claimant's position that the Respondents have failed to provide a plausible explanation for their failure to file a defense on time; that it is unjust and unfair to deny the Claimant the fruits of the judgment due to the Respondents indolence and the court should therefore not entertain the Respondents for their indolence.
7. The Claimant prayed that she be paid throw away costs should the court be inclined to allow the application.
8. The application was disposed of by way of written submissions.

Determination

9. A brief background of the proceedings in this file is important as it will give a perspective for the determination of this application.
10. The Respondent first appeared in court on November 5, 2019 through Counsel Kanyonge of Mburugu and Kanyonge Associates Advocates. On that day Mr Kanyonge informed the court that he had not filed a defence because he had received an application from the Claimant and did not know what the matter was coming up for. He did not seek leave to file response to the Statement of Claim.
11. Because of this ridiculous response of counsel for a matter in which the firm had filed a memorandum of appearance on October 9, 2018, and never filed a response to claim, the court certified the suit as ready for hearing an undefended suit. Under the rules of this court a party is required to file defense within 21 days from the date of service as provided in rule 13(1) thereof. The parties were directed to take a hearing date at the registry.



12. On January 27, 2021 the parties appeared before the Deputy Registrar. The counsel then on record for the Respondents Mr. Mutua informed the court that the Respondent had filed a notice of change of advocates. The court informed counsel that the matter had been certified ready for hearing as an undefended claim. Counsel informed the court that he was not aware of that position and would file an application for leave to file defence out of time.
13. On 22nd February when the matter came up for mention Mr Mulandi for the Respondent informed the court that although the matter was coming up to confirm filing of defense by the Respondents, the parties were negotiating an out of court settlement and prayed for another mention date. The suit was fixed for further mention on May 31, 2021 to confirm settlement.
14. At the next mention on May 31, 2021 Mr Kanyonge who was holding brief for Mr Mulandi for the Respondent informed the court that although there was no agreement they were still intent on pursuing the negotiations. Mr. Madowo for the Claimant however informed the court that parties were unable to settle the claim and asked for a hearing date. The court referred the parties to the registry to take a hearing date.
15. The case was on February 9, 2022 fixed for hearing on April 26, 2022 in the absence of the Respondent who did not appear for fixing of hearing date even though they were invited.
16. The record reflects that a hearing notice was served upon Mburugu and Kanyonge Advocates on January 20, 2022 and was received at 12.07 pm according to the stamp on the copy filed in court with the affidavit of service dated the same day.
17. On the hearing date there was no appearance for the Respondents and the suit proceeded in their absence. Judgment was thereafter delivered on June 14, 2022.
18. The instant application seeks the setting aside of the judgment herein and leave to file and serve Statement of Response out of time. No mention is made of this courts orders of November 5, 2019 certifying the suit ready for hearing as an undefended suit. Until those orders are set aside, the Respondent would still not be able to defend the suit. The orders sought in the application are therefore not capable of being granted as courts will not make orders in vain.
19. For the foregoing reasons, the application dated 28th July 2022 is without merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF JUNE, 2023

MAUREEN ONYANGO

JUDGE

