



REPUBLIC OF KENYA



KENYA LAW

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**Wanjiku v Aldonai Enterprises Ltd (Cause 26 of 2020)
[2023] KEELRC 1988 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1988 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 26 OF 2020**

**AK NZEI, J
JULY 31, 2023**

BETWEEN

JOHN NJOROGE WANJIKU CLAIMANT

AND

ALDONAI ENTERPRISES LTD RESPONDENT

RULING

1. The suit herein is shown to have been filed by the Claimant on June 12, 2020 vide a memorandum of claim dated June 10, 2020. There is on record an affidavit of service sworn by one Petero Omogi on July 24, 2020, stating that the claim documents and notice of summons were physically served on the Respondent on July 24, 2020. On record there is also another affidavit of service by the said Court process server indicating that the Respondent was on March 18, 2022 physically served with a mention notice on the suit herein. On March 29, 2022, the Respondent entered appearance through the firm of Mwaniki Gitahi & Partners Advocates.
2. When the suit came up for pre-trial directions on March 31, 2022, the Respondent's Counsel, Mr. Mwaniki, attended Court and requested the Court to grant him 7 days to file response to the claim, the Respondent's witness statements and documents. The Court made the following orders:-
 - (a) the Respondent is granted 14 days to file and serve response to the claim, witness statements and documents, if any.
 - (b) Hearing on June 6, 2022.
 - (c) Parties to avail all their witnesses."
3. The respondent did not file any response to the claimant's claim, witness statements or documents, either as ordered on March 31, 2022 or at all.



4. When the suit came up for hearing on June 6, 2022, the respondent and its counsel did not attend court. The claimant testified and closed his case; upon which the court made the following orders:-
 - (a) the respondent's case is hereby marked as closed.
 - b. The claimant shall file and serve written submissions within 14 days of today.
 - c. The respondent may file written submissions within 14 days of service.
 - d. Mention on July 25, 2022 to fix a judgment date.
 - e. Notice to issue.”
5. I must state, for record purposes, that I ordered service on the Respondent, who had entered appearance but not filed any response to the claimant's claim, in order to avail the respondent every possible opportunity to participate in the proceedings herein. Although there is on record an affidavit of service indicating that the respondent's Advocates were duly served with notice, they did not attend court on July 25, 2022, and they did not file any submissions on behalf of the Respondent.
6. I fixed the matter for Judgment on November 3, 2022, and ordered that notice in that regard be served on the respondent. There is on record an affidavit of service sworn by Peter Ogweno Omogi demonstrating that a Judgment notice was duly served on the respondent's Advocates on July 26, 2022. Neither the Respondent nor its counsel attended Court on November 3, 2023 when this court's judgment was delivered.
7. Further, the court's record shows that the respondent's Advocates were on November 24, 2023 served with a party and party bill of costs filed in this court and subsequently taxed by the Court's Deputy Registrar.
8. It was not until execution of the court's decree was commenced and the respondent's movable properties proclaimed by an Auctioneer that the respondent filed the notice of motion dated March 20, 2023, which is the application before me, seeking the following orders:-
 - a. that this Court grants leave for the firm of Mwangi Gitau & Partners to come on record for the Applicant in the place of Mwaniki Gitahi & Partners.
 - b. that the Court be pleased to order a stay of execution of the judgment issued in this matter by this Honourable Court.
 - c. that upon interpartes hearing of this application, this Honourable Court be pleased to order setting aside of the entire proceedings in this matter, and the same to start de novo.
 - d. that costs of the application be provided for.
9. The application, expressed to be brought under Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), is premised on the supporting and further affidavits of David Mburu, the Respondent's director, sworn on March 20, 2023 and May 17, 2023 respectively. It is deponed in the said affidavits:-
 - a. that upon being served with summons and pleadings in this matter in 2020, the Respondent instructed the firm of Mwaniki Gitahi & Partners Advocates to come on record and to defend the Respondent.
 - b. that due to the fact that the said Advocates were served with an incomplete set of proceedings, they only filed a Memorandum of Appearance but failed to file a statement of defence/reply



to the memorandum of claim, and wrote a letter calling for the missing pages of the pleadings, but which were never availed to him.

10. The application is opposed by the claimant/respondent vide a replying affidavit sworn by him on April 12, 2023 whereby he deponed that he served a complete set of pleadings herein, and demonstrated that all along, the respondent was served with notices to attend court.
11. Both parties filed written submissions on the application pursuant to the court's directions in that regard, which I have considered.
12. The single issue that presents for determination is whether the respondent/applicant deserves the orders sought in the notice of motion dated March 20, 2023.
13. It is to be noted that the respondent/applicant admits, in paragraph 1 of the supporting affidavit of David Mburu sworn on March 20, 2023, to having been served with summons and pleadings in the suit herein, upon which the respondent instructed the Firm of Mwaniki Gitahi & Partners Advocates to defend it in the suit. The said deponent goes ahead to contradict himself at paragraph 2 of the said affidavit by deponing that "the respondent's said Advocates were served with an incomplete set of pleadings and only filed a memorandum of appearance." The court was not told at what point in time the pleadings served on the Respondent together with summons became incomplete.
14. I have previously said, and I repeat it here, that parties to court proceedings must always treat such proceedings with the seriousness that such proceedings deserve. I note lack of seriousness on the part of the respondent/applicant and/or its Counsel. Conversely, the claimant/applicant has demonstrated, to the Court's satisfaction, that the respondent was duly served with summons and the pleadings filed herein. Indeed, when the respondent's counsel appeared before me on March 31, 2023 and sought to be granted 7 days to file the respondent's pleadings, witness statements and documents, he did not indicate that the Respondent had been served with an incomplete set of pleadings.
15. I refuse to allow this court to be misled by any of the parties herein. The Respondent's attempt to place blame on its "outgoing Counsel" with a view to hoodwink this Court into granting undeserved orders must fail. The respondent/applicant is not being truthful, in my view. Further, the respondent/applicant has not demonstrated any efforts that it made on the suit herein by making a follow up of the same with its Advocates. It is not acceptable for a non-vigilant litigant, when woken up by execution proceedings against it, to attempt to hide behind alleged transgressions by its Counsel. Allegations of inaction or negligence by Counsel can only be positively considered on case to case basis, based on facts and circumstances of each individual case. Enough said on that issue.
16. It is my finding that this Court's judgment delivered on November 3, 2022, and the proceedings leading thereto, cannot be set aside based on the facts and/or reasons advanced by the Respondent/Applicant. It was stated as follows in *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 designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."



17. On the issue of alleged failure by Counsel to act, the Court stated as follows in *Charles Omwata Omwoyo -vs- African Highlands Produce Company Limited* [2002] eKLR (Ringera, J as he then was), and I entirely 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 erstwhile Advocates for professional negligence and not setting aside the judgment.”

18. In the present case, the Respondent’s/applicant’s Counsel failed to file the Respondent’s pleadings, witness statements and documents even after being granted leave by the Court to do so. The Respondent and its Counsel failed to attend Court for hearing of the suit despite the fact that the hearing date had been fixed in the presence of Counsel for both parties. Proceedings herein were, in my view, conducted in a manner that was above reproach; and there exists no reason on the basis of which the judgment delivered on November 3, 2022 can be set aside.

19. Consequently, I find no merit in the respondent’s notice of motion dated March 20, 2023, and the same is hereby dismissed. Proceedings herein must come to a close.

20. Costs of the application are awarded to the Claimant/Respondent. The same to be agreed upon or taxed as by law provided.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST JULY 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 the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Tollo for Claimant

Mwangi Gitau for Respondent

