



**Solanki v Hard Tech Industrial Supplies Ltd (Cause E752 of 2021)  
[2023] KEELRC 2283 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2283 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E752 OF 2021  
JK GAKERI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**SUDHIR SOLANKI ..... CLAIMANT**

**AND**

**HARD TECH INDUSTRIAL SUPPLIES LTD ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Respondent's Notice of Motion dated 19<sup>th</sup> May, 2023 seeking orders that;
  1. The Honourable Court be pleased to set aside the interlocutory judgement entered against the Respondent/Applicant ex parte, proceedings herein and consequential orders thereto in the matter.
  2. The court be pleased to grant leave to the applicant to defend this suit on merit and to file its defense, witness statements and bundle of documents out of time.
  3. The court be pleased to give such further orders as it shall deem fit and just in the circumstances of this case
  4. Costs for the Application be provided for.
2. The Notice of Motion is expressed under Section 1A and 1B of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and is based on the grounds and Supporting Affidavit of Jayantkumar Patel who depones that he received summons in 2021 and instructed Hashim & Lesaigor Associate Advocates to enter appearance and file a defense.
3. That when the Claimant served the Respondent with a Mention Notice on 18<sup>th</sup> May, 2023, it notified its advocates who had only filed a Memorandum of Appearance after mapping of the case and the suit had proceeded ex parte.



4. The affiant deposes that the Respondent has a merited defense to the suit, a copy of which was attached.
5. The affiant urges that it was trite law that a party should not be condemned unheard and it was in the interest of justice that the interlocutory judgement entered into irregularly be set aside.

### **Response**

6. In his Replying Affidavit sworn on 9<sup>th</sup> June, 2023, the Respondent/Claimant deposes that the Respondent's application is vexatious, scandalous, frivolous and abuse of the court process as no reasonable excuse for the delay has been given for the failure to enter appearance and file a defense.
7. That other than neglect by its counsel, no evidence was adduced to substantiate the claim of instructions to the law firm, not even a copy of the memorandum of appearance or copies of correspondence with counsel.
8. That the applicant has not disclosed the date on which it engaged the law firm to justify the absence of delay in filing of the application.
9. The affiant deposes that the applicant's allegation that it received a mention notice on 18<sup>th</sup> May, 2023 was untrue and was peddling falsehoods to conceal its indolence having been served on 30<sup>th</sup> September, 2021 via email.
10. A mention notice for 25<sup>th</sup> May, 2022 was also served upon the Respondent as well as the mention for 13<sup>th</sup> July, 2022.
11. That the applicant was at all material times aware that the suit was progressing.
12. That formal proof proceeded and directions on submissions were issued after the Claimant's case was closed and the Claimant's counsel served his submissions on 4<sup>th</sup> May, 2023.
13. The affiant deposes that the applicant has not explained why it ignored the documents served on it from September 2021 and was thus guilty of indolence and the suit belonged to the litigant not the advocate.
14. That the draft response filed by the applicant consisted of mere denials.
15. That the court's power to set aside an interlocutory judgement was discretionary to be exercised judiciously.

### **Applicant's submissions**

16. As to whether the Respondent/Applicant had met the threshold to set aside the proceedings before this court and file pleadings out of time, counsel cited the sentiments of Madan JA (as he then was) in *Belinda Murai & others V Amos Wainaina* (1978) KLR on mistake by counsel as well as the sentiments of the Court in *Phillip Chemwolo & Another V Augustine Kubede* (1982 – 88) KLR 103 on blunders by counsel.
17. Counsel urged that natural justice ordained that no person should be condemned unheard as held in *Tom Momanyi Mwamba & 6 others V James Nyachwaya Mwakolo & 3 others* (2021) eKLR.
18. Counsel submitted that the applicant had a good cause to defend on merit.



## **Respondent's submissions**

19. Counsel relied on the sentiments of the court in *Joswa Kenyatta V Civicon Ltd (2020) eKLR* to urge that the court should not exercise its discretion in setting aside proceedings to assist an indolent party as the applicant had not demonstrated sufficient cause to warrant the exercise of discretion in its favour having ignored court processes for a long time.
20. Reliance was also made on the sentiments of the court in *Pyramid Hauliers Ltd V James Omingo Nyaanga & 3 Others (2019) eKLR* where the Court of Appeal stated that while mistake by counsel should not be visited upon the litigant, it does not protect a litigant who has failed to comply with procedural requirements.
21. Counsel contended that the case belongs to the litigant as was held in *Gerald Mwithia V Meru College of Technology & Another (2018) eKLR*.
22. Counsel further submitted that the Respondent/Applicant had not demonstrated the steps it took in following its case and could thus not blame its advocates for the failure.
23. Counsel urged that since the suit was filed in September 2021, it would be prejudicial to re-open the Claimant's case.
24. The court was invited to find that there was inordinate delay in the filing of the application.

## **Determination**

25. The only issue for determination is whether the application's Notice of Motion dated 19<sup>th</sup> May, 2023 is merited.
26. As submitted by the Respondent/Claimant's counsel, the suit herein was filed 1<sup>st</sup> September, 2021 and documents on record reveal that the suit was served on the applicant on 30<sup>th</sup> September, 2021 via email address [hardtech.ke@gmail.com](mailto:hardtech.ke@gmail.com) and physically on 1<sup>st</sup> October, 2021.
27. The Claimant's counsel was present during a mention before the Deputy Registrar on 13<sup>th</sup> April, 2022 and hearing was scheduled for 25<sup>th</sup> May, 2022.
28. During the mention on 13<sup>th</sup> July, 2022, the Deputy Registrar gave directions that the suit be mentioned before this court for formal proof and the court directed the Claimant's counsel to take an early hearing date before the Deputy Registrar. That the matter would proceed undefended as per the courts directions on 27<sup>th</sup> September, 2021.
29. The hearing scheduled on 18<sup>th</sup> January, 2023 was adjourned at the instance of the Claimant's counsel.
30. Hearing proceeded on 4<sup>th</sup> May, 2023 and the witness adopted the statement, produced exhibits and the Claimant's counsel was directed to file and serve submissions with a mention on 23<sup>rd</sup> May, 2023 to confirm compliance.
31. On 23<sup>rd</sup> May 2023, the claimant counsel confirmed that he had filed and served submissions and a judgement date was given and the instant application was slated for hearing on 10<sup>th</sup> July, 2023.
32. These are the proceedings the applicant seeks to be set aside for the suit to proceed a fresh.
33. Puzzlingly, the applicant prays for the setting aside of the interlocutory judgement yet there is none.



34. It is not in dispute that the Claimant’s counsel has ably demonstrated that service of mention and hearing notices upon the Respondent/Applicant was effected but the same elicited no response from the applicant.
35. Needless to belabour, the court has jurisdiction to grant the orders sought by virtue of Article 159(2) (d) of *the Constitution* of Kenya, 2010 and Section 3A of the *Civil Procedure Act* which provides that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
36. This provision is embellished by the provisions of Sections 1A and 1B of the *Civil Procedure Act* and Section 3(1) of the *Employment and Labour Relations Court Act*, 2011 which sets out the overriding objects of the statute
37. Finally, Order 51 Rule 15 of the Civil Procedure Rules, 2010 confer on the court jurisdiction to set aside an order made ex parte.
38. In the instant application, the Respondent/Applicant relies on the allegation that it instructed a law firm, but the firm did not take steps to defend the suit.
39. Intriguingly, the affiant, Mr. Jayantkumar Patel, a Director of the Respondent/Applicant did not indicate when he instructed the alleged law firm as it was “sometime in 2021.” The affiant is also silent on how he instructed the law firm as he had no demonstrable evidence of the alleged instructions.
40. In sum, Mr. Jayantkumar Patel provided no scintilla of evidence that he or anyone else instructed the law firm of Hashim & Lesaigor Advocates or any other law firm to represent the Respondent/Applicant in this suit.
41. Shockingly, although the affiant deposed that the law firm filed a Memorandum of Appearance, he did not avail a copy and none is on record.
42. In the court’s view, the Respondent/Applicant has failed to demonstrate why it did not respond to the summons served on 1<sup>st</sup> October, 2021 and the numerous mention notices. The allegation that the counsel it had instructed failed to act remains unproven and is not believable as it would not have changed counsel.
43. Even assuming that the affiant instructed the alleged firm of advocates, it is apparent that he did not follow up from “sometime in 2021” until May 2023.
44. While the court is aware of the place of the right to be heard in the administration of justice as encapsulated by the maxim audi alteram partem which is both a constitutional and statutory imperative, it is also alive to the fact that justice is for both parties and the right to be heard must be balanced with other interests in the suit.
45. A litigant cannot insist on his or her right not to be condemned unheard where it is evident that he or she has deliberately avoided court processes as was the case here.
46. Mr. Jayantkumar Patel was at all material times aware of the suit and its progress and wished it away but the Claimant persisted and he ultimately had to defend the suit.
47. The alleged mistake or blunder by counsel and the authorities cited to buttress the argument are to no avail.



48. The sentiments of the court in *Belinda Murai & 6 Others V Amos Wainaina (Supra)* and *Phillip Chemwolo & another V Augustine Kubede (Supra)* are unpersuasive in this case as the applicant has not demonstrated by credible evidence that it instructed any firm of Advocates.
49. Conversely, the authorities cited by the Claimant’s counsel are spot on.
50. In *Joswa Kenyatta V Civicon Ltd (Supra)*, the court stated as follows;
- “The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah V Mbogo & another (1967) EA 166*, the Court of Appeal held that;
- “This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
51. The legal threshold before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting the setting aside of the ex-parte decision or proceedings. In *Wachira Karani V Bildad Wachira (2016) eKLR*, Mativo J. held that;
- “Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand . . .”
52. In a nutshell, it must be evident that the applicant did not act in a negligent manner or in a manner exhibiting want of good faith. (See *Parimal V Veena Bharti (2011) Supreme Court of India*).
53. Another relevant consideration alluded to by the Claimant’s counsel is the fact that a civil suit belongs to the litigant and not the advocate as held in *Gerald Mwithia V Meru College of Technology (Supra)* where the Court stated as follows;
- “A civil case once filed is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his Advocate when a decision adverse to him is made by the court . . .
- An applicant ought to have demonstrated that they took tangible steps to follow up this matter. It would be unjust and unfair to have the case start all over again.”
- The other point to note is that the draft defence contains general denial of the plaintiffs claim.”
54. The foregoing sentiments apply on all fours to the facts of the instant application.
55. For the foregoing reasons, the court is satisfied that the applicant has failed to demonstrate that it took any steps to respond to the Claimant’s suit before the instant application was filed and it has not demonstrated that the delay was excusable.
56. In the upshot, the Notice of Motion dated 19<sup>th</sup> May, 2023 is unmerited and is accordingly dismissed.
57. However, in the interest of justice, it is ordered as follows;
- a. The Claimant’s case closed on 4<sup>th</sup> May, 2023 shall not be re-opened.



- b. The Respondent is granted leave to file its Defence, List and Bundle of Documents and witness statement within 10 days failing which the Respondent's case shall be deemed closed.
- c. Costs shall abide the outcome of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**DR. JACOB GAKERI**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

