



Gongera v Mount Kenya University (Employment and Labour Relations Cause E958 of 2021) [2023] KEELRC 2713 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E958 OF 2021**

**K OCHARO, J
OCTOBER 19, 2023**

BETWEEN

PROF GEORGE GONGERA CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

Background

1. There are two live applications before this Court. The first one is a Notice of Motion Application dated 31st July 2023 brought by the Respondent and expressed to be under the provisions of articles 50 (1) and 159 (D) of the *Constitution*, sections 3 & 12 (3) (viii) of the *Employment and Labour Relations Court Act*, No. 20 of 2011; rule 33 of the *Employment and Labour Relations (Procedure) Rules 2016*, the inherent jurisdiction of the Court and other enabling provisions of law. The Respondent/Applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to set aside the ex parte judgment and decree delivered on July 27, 2023 for the Respondent to be given leave and allowed to file their response to the amended Statement of Claim dated January 24, 2022 out of time.
 - d. Costs be provided for.
2. The application is premised on the grounds on the face of it, and buttressed by those in the supporting affidavit sworn by one Deogratius Omondi Ocheing' on July 31, 2023.



3. In this application, the Applicant urges the Court to set aside the ex parte judgment delivered by this Court on 27 July 2013 for the reasons that:
 - a. The Respondent's Counsel failed to attend court when the matter came up for formal proof hearing on 2nd February 2023 following the indeliberate failure to diarize the matter as coming up for hearing on the said date. The hearing date was picked on 11th October 2022 when Counsel hadn't procured diaries for 2023.
 - b. Further the Respondent cites administrative lapses in the Respondent's counsel's offices as the reason for failing to attend Court. The Respondent states its Counsel's Administrative Assistant resigned from employment with immediate effect on 20th October 2022 before he could update the diaries and file the Respondent's response to the Claimant's Statement of Claim. The Respondent's counsel was therefore not aware of the hearing date. The Respondent implores this Court not to visit the consequences of an Advocate's mistake on an innocent litigant, who had every intention to defend their suit.
 - c. The Respondent will be greatly prejudiced if they are not allowed to defend this suit.
 - d. The Respondent has an arguable defence with triable issues that ought to be considered on its own merits.
 - e. The Respondent has a right to a fair hearing guaranteed by article 50 of the Constitution of Kenya 2010. Further, article 159 of the Constitution of Kenya 2010 requires that justice be administered without undue regard to procedural technicalities.
 - f. That the Respondent risks execution of the decree against it, injustice and hardship if the application herein is not allowed, considering that the decree is a product of ex parte proceedings flowing from an administrative lapse on the part of its Advocates.
 - g. The Claimant does not stand to suffer harm or damage if the judgment is set aside and the Respondent granted time to file their Response to Claim and the matter heard on its merits.
4. The Claimant filed a Replying Affidavit sworn on August 9, 2023 in reply to the Respondent's Notice of Motion dated July 31, 2023.
5. In response to the Respondent's application, the Claimant asserted that whereas in certain cases, the infractions of Counsel are not visited upon the client, every case must be considered in its peculiar circumstances.
6. It was contended that all through the Respondent has admitted its indebtedness to him for the services he rendered and continues to for the Respondent. Promises to liquidate the indebtedness, never came to fruition prompting him to institute the suit herein. Contrary to what is averred in the draft statement of response by the Respondent, he has never been paid.
7. The Claimant contends that it amounts to unfair labour practice for the Respondent for no justifiable reason to refuse and or neglect to pay him for services rendered including supervising undergraduate and postgraduate work.
8. The Respondent is undeserving of this Court's discretion. Besides, they have failed to disclose that they have been aroused from slumber by a letter from the Claimant's Counsel dated 31st July 2023 notifying them of the judgement.



29. He also filed his own Notice of Motion dated 29th August 2023 expressed to be brought under section 94 of the *Civil Procedure Act* 2010 and rule 32 (2) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, seeking: -
- a. Spent
 - b. That this Court permit execution before assessment of costs
 - c. That the costs of this application be provided for.
10. The application is supported by the Grounds on the face of it as well as the Supporting Affidavit of George Gongera sworn on 29th August 2023.
11. The Claimant states that he has school-going children and is pressed to meet their needs especially educational, which fact necessitates the execution of the Judgment and Decree of this Court, in advance of the assessment of costs.
12. The Respondent did not file a response to the Notice of Motion dated 29th August 2023.
13. The parties elected not to file submissions for and against the Application but stated that they wished to rely on their respective Affidavits.

Analysis and Determination

14. For good order, I shall consider the applications before me chronologically.

Notice of Motion dated 31st July 2023

15. The discretion of this Court to set aside its judgment is granted to it by order 10 rule 11 of the *Civil Procedure Rules 2010* which provides: -

“Setting aside judgment [Order 10, rule 11.]

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

16. The setting aside must therefore be affected “upon terms that are just”.
17. The discretionary nature of the court’s authority to set aside a judgment and the factors that it must consider in doing so were emphasized in the case of *James Kanyita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, the Court of Appeal held thus: -

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the



intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & another v Shab (supra)*, *Patel v E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173). (Emphasis Mine).

19. Similarly, the grounds for setting aside *ex-parte* judgment were considered at length in the case of *Wachira Karani v Bildad Wachira* [2016] eKRL, the Court held: -

“Also relevant is the case of *Ongom v Owota* [8] where the court held inter alia that the court must be satisfied about one of the two things namely:-

- (a) either that the defendant was not properly served with summons;
- (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me: - "Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case."

20. The Court in *Wachira Karani* (supra) explored the meaning of the term "sufficient cause" as set out in *Ongom v Owota* and concluded that: -

“The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean." The Court of Appeal of Tanzania in the case of the *Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others*[9] discussing what constitutes sufficient cause had this to say:-

“It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted, however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant”

In *Daphene Parry v Murray Alexander Carson* [10] the court had the following to say: -

“Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy...”

21. The approach of the courts, therefore, is that in setting aside judgment the Court must have regard to substantive justice.
22. In the present case, the ex parte judgment delivered on July 27, 2023 would be categorized as a regular default judgment according to the parameters set out in the *James Kanyiiita Nderitu case (supra)*, as the Respondent was duly served with the Statement of Claim dated 19th November 2021, did indeed



entered appearance and filed a preliminary objection but failed to file a substantive response to the said claim or attend the consequent formal proof hearing. As a result of the failure an *ex parte* judgment of this Court ensued.

23. Having said this, it becomes imperative for this Court at this point to consider whether it can exercise its unfettered discretion in favour of the Respondent as sought. The factors that I must consider are those set out in the James Kanyiita case (*Supra*). The Respondent herein cites a mistake of counsel as the reason for failing to file its response and attend the oral hearing of the case. Would this constitute sufficient cause?
24. In the case of *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR, the Court of Appeal, faced with circumstances where a mistake of an advocate was the basis on its discretion was sought in an application for an extension of time for filing an appeal out of time, held:

“What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court’s rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is *bona fide*, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.”

25. The Respondent herein has explained the mistake which resulted in the failure to file a response and failure to attend Court on February 2, 2023. They attribute the mistake to administrative lapses occasioned by the resignation of their Administrative Assistant on October 20, 2022, shortly after the Court appearance of 11th October 2023. I have seen the copy of the resignation letter of Lilian Nduku Paul dated 20th October 2022 marked as Exhibit “D004” attached to the Respondent’s Supporting Affidavit sworn on 31st July 2023.
26. While I am obligated to censure Counsel for the Respondent for their failure to put in place efficient administrative systems in their law firm to ensure that their clients are properly served, and not inconvenienced, I am cognizant of the fact mistakes are bound to happen, and where the court is convinced that they are *bonafide*, they shouldn’t be allowed to be the reason for pushing a party off the seat of justice. I am persuaded that the mistake by Counsel was a *bona fide* mistake and should not be visited on the Respondent. I, therefore, return that the Respondent has established sufficient cause to attract the exercise of this Court’s judicial discretion in its favour. The *ex parte* judgment delivered on 27th July 2023 is hereby set aside.
27. In further support of my finding hereinabove, I note that the draft Statement of Response to the Claimant’s Statement of Claim, which is marked as Exhibit “D005” and attached to the Supporting Affidavit sworn on 31st July 2023, raises triable issues such as whether there was a procedure for claiming dues owed after work done; whether the Claimant followed this procedure before filing suit; and whether the Claimant was paid his full dues as enumerated in his Contract of Service. The Respondent brought this application promptly, that is merely 4 days after delivery of the judgment on July 27, 2023.
28. In conclusion, I hereby allow prayer 3 of the respondent’s notice of motion dated July 31, 2023. I order the respondent herein to file the response to the Statement of Claim within seven (7) days of the date of this Ruling. I direct that this matter be granted a hearing date on a priority basis.
29. The Respondent is to pay thrown away costs of Kenya Shillings Thirty Thousand [KShs. 30,000] to the Claimant within 14 days of the date of this ruling. In the defaulting the judgment to revert.



Notice of Motion dated 29th August 2023

30. Under section 12 (3) of the [Employment and Labour Relations Court Act](#) and section 94 of the [Civil Procedure Act](#) 2010, this Court has the authority to order for execution of its decree before assessment of costs as sought by the Claimant herein.
31. However, having set aside the *ex parte* judgment delivered on July 27, 2023, and the decree emanating therefrom, the substratum of the claimant's notice of motion dated August 29, 2023 no longer exists.
32. Consequently, I dismiss the claimant's notice of motion dated August 29, 2023. Costs shall be in the cause.
33. It is so ordered.

READ, DELIVERED AND SIGNED THIS 19th DAY OF OCTOBER, 2023.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Nyakundi for the Claimant

Mr. Nyakangi for the Respondent

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

