Nyaachi v Rembo Shuttle Savings & Credit Co-operative Society (Cause 746 of 2017) [2023] KEELRC 3192 (KLR) (4 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3192 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 746 OF 2017

JK GAKERI, J

DECEMBER 4, 2023

BETWEEN

EDWARD OGEGA NYAACHI .... CLAIMANT

AND

REMBO SHUTTLE SAVINGS & CREDIT CO-OPERATIVE SOCIETY .... RESPONDENT

RULING

1. Before the court for determination is the Respondent/Applicant's Notice of Motion dated 4th October, 2023 filed under Certificate of Urgency seeking orders that:

    1. Spent.
    2. Spent.
    3. Spent.
    4. Spent.
    5. The Honourable Court be pleased to summon Edward Ogega Nyaachi for cross-examination on the contents of the consent signed by himself and the Respondent/Applicant on 16th September, 2017.
    6. The default judgment and all consequential orders against the Respondent/Applicant be hereby set aside unconditionally.
    7. The Court be pleased to order a de novo hearing.
    8. The Respondent/Applicant be granted leave to appear and file an amended Defence in accordance with order 8 rule 3 and freshly comply with Order 11 of the *Civil Procedure Rules,* 2010.

9. Cost be provided for.

2. The Notice of Motion is based on the grounds that set forth on its face and the Supporting Affidavit of Joseph Mwangi Chege sworn on 4th October, 2023.

3. The affiant deposes that he had worked with the Respondent since 2014 and was aware of the Claimant's suit for which the Respondent had instructed the law firm of M/s Billy Amendi & Co. Advocates and a response had been filed.

4. The affiant further avers that the parties entered into a settlement on 16th September, 2017 and the information was shared with its advocate on record who was instructed to file the consent in court.

5. That the Claimant was paid and received Kshs.220,000.00 as final dues.

6. That the affiant attended a court session on 14th July, 2017.

7. It is the applicant's case that in its view, the matter had been concluded and did not follow up and only learnt of the judgement on 7th September, 2023 and Warrants of Attachment were served on 2nd October, 2023.

8. That perusal of court records revealed that the consent was missing and the Respondent's counsel was last in court on 16th November, 2021.

9. That the Claimant's counsel had the Respondent's email address and could have served them directly if its counsel was unresponsive.

10. That it was apparent that the Respondent/Applicant's advocates abandoned the suit.

11. The affiant deposes that the ex parte judgment obtained by the Claimant/Respondent was irregular and the Respondent has a good and triable case.

12. That the Respondent stands to suffer irreparable loss if the irregular Judgment and Decree are not stayed and it is in the interest of justice that the application be allowed.

Response

13. In his Replying Affidavit sworn on 6th November, 2023 in opposition to the Notice of Motion, the Claimant's counsel deposes that the applicant had an advocate on record who filed a notice of appointment and the applicant's defence and the parties could not engage in an out of court negotiations without notifying their advocates or sign any consent.

14. That the alleged consent was never registered in court and did not exist.

15. Counsel deposes that all court notices were sent to the Respondent's counsel who did not attend the proceedings which was discourteous and should be compelled to pay the decretal sum.

16. That the applicant should have involved the advocates if it intended to settle the matter out of court.

17. That the mention slated for 14th July, 2021 for purposes of fixing the hearing date was notified to the parties via email on 9th July, 2021.

18. The affiant deposes that on 14th July, 2021, the Respondent's counsel and a 'Mr. Joseph' appeared in court. That Mr. Joseph told the Deputy Registrar that the matter had been settled and a further mention was slated for 26th July, 2021 for further directions.

19. That the court confirmed that there was no settlement and certified the suit ready for hearing and a hearing date was subsequently fixed by consent on 16th November, 2021.

20. The affiant deposes that he served all notices and court directions on the Respondent's counsel and the Respondent/Applicant was aware of the proceedings and the judgement was regular.

Applicant's submissions

21. As to whether the court has jurisdiction to entertain this application, counsel submitted that since the Claimant had already received Kshs.220,000/= from the Respondent, he approached the court with unclean hands and the court had been notified of the consent.

22. Reliance was made on order 10 rule 11 of the *Civil Procedure Rules* on the court's discretion to set aside or vary a default judgement as were the sentiments of Duffus V.P. in *Patel V East Africa Cargo Handling Services Ltd* (1974) EA 75 on the exercise of the court's jurisdiction.

23. It was submitted that the fundamental duty of the court was to do justice and parties should be accorded the opportunity to present their case and the judgement herein was irregular and should be set aside ex debito justiciae.

24. Sentiments of the court in *James Kanyitta Nderitu & another V Marios Philotas & another* (2016) eKLR, *Stephen Ndichu v Montys Wines & Spirits* (2006) eKLR, *Shah V Mbogo* (967) EA 106, *Richard Ncharpi Leiyangu V IEBC & 2 others, Shabbir Din V Ram Parkash -Anand* (1955) 22 EACA 48, *Mohammed & another V Shoka* (1990) eKLR and others were cited to reinforce the submission that the court had unfettered discretion to set aside ex parte judgements to avoid injustice or hardship occasioned by accident, inadvertence or excusable mistake or error as well as urge that the right to hearing is a constitutional imperative.

25. Counsel submitted that the provisions of order 10 rule 7 of the *Civil Procedure Rules* were not complied with and cited the sentiments of the court in *Patcliffe V Evans* (1892) 2 QB 524 and *Gideon Mose Onchwati V Kenya Oil Co. Ltd & another* (2017) eKLR to reinforce the submission and urge that a litigant ought not to bear the consequences of the advocate's default unless the litigant was privy to the default or it resulted from his failure.

26. In conclusion, counsel urged that the instant application was hinged on the principle of audi arterum partem or 'hear the other side' emphasized in legions of decisions in Kenya and other common law jurisdictions such as India and the UK.

Respondent's submissions

27. By 17th November, 2023 when the court retired to prepare this ruling, the Respondent/Claimant had not filed submissions. This was after an addition of 7 days on request after the initial 10 days after service.

Finding and determination

28. The singular issue for determination is whether the Respondent/Applicant's Notice of Motion is merited.

29. The applicant faults the Respondent/Claimant's judgement delivered on 16th March, 2023 for irregularity as the Claimant had been paid and accepted Kshs.220,000/= as final dues and thus came to court with unclean hands that it was unaware of the proceedings after its advocate's last attendance on 16th November, 2021 and its advocate's mistakes should not be visited on it.

30. The Claimant/Respondent on the other hand argues that it played its role by serving the requisite notices to the Respondent/Applicant's advocate on record and thus the Respondent was aware of the proceedings and the judgement was regular.

31. It is common ground that the Respondent's counsel did not participate in the proceedings after 16th November, 2022 and did not file an application to cease acting for the applicant and therefore the Claimant's counsel as correctly deponed could not serve notices on the Respondent/Applicant personally and in the court's view counsel discharged his obligation as by law required.

32. However, a brief history of this suit is worth recapitulating as it partly informs the outcome of the instant application.

33. The suit was filed on 19th April, 2017 and the Applicant's advocate on record filed its response on 7th June, 2017 having filed a Memorandum of Appearance and notice of appointment earlier.

34. The matter was scheduled for mention on 1st February, 2018 on the filing of agreed issues and directions were given by the learned Judge.

35. On 8th May, 2018, parties were directed to take hearing date at the Registry and similar directions were given by the Deputy Registrar on 25th September, 2019.

36. On 14th July, 2021, a Mr. Joseph, counsel's for the Claimant and for the Respondent were represented by other counsels holding brief before the Deputy Registrar. Mr. Joseph informed the court that on 4th August, 2017, they cleared with the Claimant from the SACCO, that the Respondent paid him terminal benefits and no case with him.

37. Mr. Otundo holding brief for Amendi informed the Deputy Registrar that his instructions were limited and they were supposed to fix a hearing date.

38. The Deputy Registrar scheduled a mention before the judge on 26th July, 2021 to confirm status and issue further directions.

39. On 26th July, 2021, the Claimant's counsel holding brief for Mr. Nyabena was present but the Respondent's counsel was not.

40. Counsel informed the learned Judge that the court had been informed of a settlement of the matter but they were unaware of the settlement.

41. With neither a settlement or consent on record or a contrary view, the court certified the suit ready for hearing and directed that a hearing date be taken at the Registry.

42. Both parties were represented on 16th November, 2021 and a hearing date was taken by consent. However, on the hearing date on 29th November, 2021 the Respondent's counsel was absent and the Claimant's counsel was not ready to proceed and sought an adjournment on the premise that there were unable to contact their client and hearing was postponed to 8th June, 2022 but counsel was not ready and a further hearing was scheduled for 25th October, 2022 when again counsel informed the court that he could not reach his client and proposed to proceed by way of written submissions and the court indulged him to ensure that the matter proceeded to next stage after the inordinate delay by counsel.

43. Parties were accorded 14 days a piece to file and serve submissions and the confirmation of compliance was slated for 5th December, 2022 when counsel confirmed compliance and a judgement date was set and judgement delivered on 16th March, 2023.

44. Records reveal that counsel for the Claimant/Respondent served court directions and notices on the Respondent/Applicant's counsel on record religiously and the Applicant was thus deemed aware the proceedings.

45. It is trite law that a litigant who is represented by an advocate is generally bound by the acts or omissions of the advocate in the course of the representation as held in Gideon Mose Onchwati V Kenya Oil Co. Ltd (Supra).

46. From the evidence on record, it is clear that the applicant's non participation from 16th November, 2021 was attributable to its counsel on record which culminated in the impugned judgement.

47. No doubt the applicant's participation in the proceedings would have fundamentally entered the dynamics and evidence of the alleged consent, if any, would have been canvassed.

48. The Claimant's counsel cannot be faulted for having requested the court to proceed by way of written submissions as opposed to a formal hearing, which effectively addressed the challenge of the unavailability of the Claimant for almost 12 months.

49. Needless to belabour, the Claimant's suit had been ripe for dismissal for non-attendance form 29th November, 2021, but the court accommodated him.

50. The principles governing the setting aside of a judgement are well-settled.

51. However, contrary to the applicant's counsel's submissions that the provisions of order 10 rule 7 of the *Civil Procedure Rules,* 2010 were violated, the court is of a different view.

52. This order and rule applies to interlocutory judgement where there are several defendants. In this case, there was only one defendant.

53. More significantly, order 10 of the *Civil Procedure Rules*, 2010 deals with consequences of non-appearance, default of defence and failure to serve and none of which applied to the instant suit.

54. Documentary evidence on record proves beyond peradventure that the Claimant's counsel served summons, the Respondent/Applicant filed a response and participated in the proceedings up to 16th November, 2021.

55. In the courts view the relevant order is order 12 of the *Civil Procedure Rules*, 2010 entitled, Hearing and Consequence of Non-attendance.

56. Order 12 rule 7 provides that;

> " Where under this order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

57. As aptly captured by Odunga J (as he then was) in *Mureithi Charles & another V Jacob Atina Nyagesuka* (2022) eKLR,

> " That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and 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. See Shah V Mbogo & another (1967) EA 116."

58. In the instant case, the applicant relies on the two grounds adverted to elsewhere in this judgement, namely, the Claimant approached the court with unclean hands as he had been paid Kshs.220,000/= as terminal and secondly, mistake of counsel should not be visited on the client as the Respondent was denied the opportunity to participate in the proceedings.

59. In *CMC Holdings Ltd v Nzioki* (2004) eKLR, the Court of Appeal expressed itself as follows:

> "In an application for setting aside ex parte judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously . . . In law the discretion that a court of law has in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error.
>
> It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake inadvertence accident or error. Such an exercise of discretion would be wrong principle.
>
> In the instant case, the learned trial Magistrate did not exercise her discretion properly when she failed to address herself also whether appellants unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit . . .
>
> The law is now well settled that in an application for setting aside ex parte judgement, the court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence is filed already or if draft defence is annexed to the application, raises triable issues.
>
> The court has wide discretion in such cases to set aside ex parte judgement...."

60. Similarly, in the words of Odunga J. (as he then was) in *Mureithi Charles & another V Jacob Atina Nyagesuka* (Supra),

> "In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge.

61. In this case, the applicant's failure to participate in the proceedings was because its counsel abandoned the suit without notice to the court or applicant and thus had no opportunity to present its defence filed on 7th June, 2017 and adduce evidence as well cross-examine the Claimant.

62. In a similar view, the Respondent had no opportunity to react to the Claimant's absence for the hearings scheduled on 29th November, 2021, 8th June, 2022 and 25th October, 2022 when directions on the filing of the submissions were given.

63. As adverted to elsewhere in this ruling, mistakes or errors of an advocate ought not as a general rule be visited on the client for the simple reason that the suit belongs to the client.

64. It is common ground that mistakes do occur in the course of litigation as exquisitely captured by the Court of Appeal in *Belinda Murai V Amos Wainaina* (1982) eKLR,

> "A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometime overrule".

65. Having considered the Applicant's Notice of Motion, the court is satisfied that the applicant's failure to appear for the mentions and hearing was occasioned by the counsel on record, an error or mistake not attributable to the applicant and it should not prejudice its case.

66. Having demonstrated that the applicant's non-participation in the proceedings was inadvertent, it is the finding of this court that the applicant has made a sustainable case for the court to exercise its discretion in its favour.

67. Consequently, the Notice of Motion dated 4th October, 2023 is granted in the following terms;

   a. The judgement delivered on 16th March, 2023 and all consequential orders against the Respondent/Applicant is hereby set aside.

   b. The Claimant's suit filed on 19th April, 2017 shall be heard de novo.

   c. The Respondent/Applicant has leave to file an amended Defence and comply with Order 11 of the Civil Procedure Rules, 2010.

   d. As the Claimant/Respondent is not to blame in the circumstances of this case, there shall be no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF DECEMBER 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 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 *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