



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 2388 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

VIOLET WANJIRU KANYIRI.....CLAIMANT/DECREE HOLDER

VERSUS

KUKU FOODS LIMITED.....RESPONDENT/APPLICANT

RULING

1. Before me for determination is the Respondent's Notice of Motion Application dated 16th March, 2021 seeking the following orders **THAT:**

- a) This Application be certified urgent and heard on a priority basis, and service thereof be dispensed with in the first instance for purposes of prayers 2 and 3 below.*
- b) This Honourable Court do issue leave in order for the firm of M/s Coulson Harney LLP Advocates be placed on record in place of M/s Nyandoro & Company Advocates on behalf of the Respondent.*
- c) This Honourable Court be pleased to stay the execution of the Judgment dated 6th November 2020 and all consequential orders pending the hearing and determination of this Application.*
- d) This Honourable Court be pleased to vacate, set aside and/or vary its judgment dated 6th November 2020 ex debito justitiae.*
- e) This Honourable Court be pleased to allow the Respondent leave to file its Memorandum of Defence out of time.*
- f) This Honourable Court be pleased to give further orders and directions as it may deem fit and just.*
- g) The costs of this Application be provided for.*

2. This Application is premised on the following grounds:

- i) The Respondent had previously instructed the firm of Messrs Nyandoro & Company Advocates to act on its behalf in this matter until Judgment was delivered on 6th November, 2020.*
- ii) The Respondent now wishes to change its Counsels on record from Messrs Nyandoro & Company Advocates to Messrs Coulson Harney LLP Advocates.*
- iii) The Respondent maintains that this matter proceeded as an undefended cause by way of documents only and judgment entered in favour of the Claimant on 6th November, 2020 in the sum of Kshs.2,845,713.62/-.*
- iv) It argued that it was never served with any mention and/or hearing notices in this matter and thus was condemned unheard.*
- v) The Respondent argues that it has a plausible and meritorious defence which raises triable issues and thus stands to suffer*

irreparably if condemned unheard. It further argues that it stands to lose a huge sum of money for a Claim it has a good defence for.

vi) The has reason to believe that the Claimant deliberately prevented it from participating in the proceedings in this matter by failing to serve its then Advocates on record with the various mention notices and were thus unable to secure their attendance in Court.

vii) There is no proof of service of any of the notices to the then Advocates on record and that the Court proceeded to give directions as to how the matter proceed in the Respondent's absence.

viii) The Respondent maintains that this action by the Court has greatly prejudiced it as it was denied, by this Honourable Court, an opportunity to make its case as against the Claimant herein.

ix) The Application is brought without undue delay and the same is made in good faith.

x) It is in the interest of justice that the prayers sought in the Application are not granted.

3. The Application is supported by the Affidavit of **ORGE GODANA**, the Respondent's Chief Finance Officer sworn on 16th March, 2021 in which she reiterates the grounds on the face of the motion.

4. In response to the Application the Claimant filed a Replying Affidavit sworn by **VIOLET WANJIRU KANYIRI**, the Claimant herein on 12th May, 2021 in which she avers that she filed this Claim on 1st December, 2017 seeking compensation for the alleged wrongful and unfair termination of her employment by the Respondent herein.

5. That the Respondent was properly served with the pleadings in this matter on 15th December, 2017 as evidenced by the Affidavit of Service of Boniface Karuga filed on 19th December, 2017.

6. Subsequently, the Respondent appointed the firm of Messurs Nyandoro & Company Advocates to represent it. The firm filed a Notice of Appointment dated 19th December, 2017 and attended the interpartes hearing of the Claimant's Application dated 4th December, 2017 on the 20th December, 2017.

7. The Claimant further averred that the Respondent failed to comply with Court directions to file its Defence despite being accorded a chance to do so.

8. The Claimant maintained that the Respondent was properly served with all the notices. She however stated that due to the outbreak of the Covid-19 Pandemic the matter did not proceed on the scheduled dates.

9. The Affiant maintained that the matter was later fixed for mention on 27th July, 2020 for purposes of taking directions on hearing. The mention notice was duly served upon the then Advocate on record for the Respondent and an Affidavit of Service filed to confirm service.

10. She averred that in the absence of the Respondent's Advocate, the Claimant's Counsel requested that the matter proceeds as undefended the Respondent having failed to file its defence.

11. The Court gave directions that the matter proceeds as an undefended claim and that the Claimant files her witness affidavit and submissions for consideration by the Court.

12. The Claimant averred that Judgment in this matter was delivered on 6th November, 2021. She maintains that the application filed by the Respondent only seeks to frustrate and/or bar her from enjoying the fruits of the judgment entered in her favour as against the Respondent.

13. The Claimant therefore urged this Court to find the Application devoid of merit and to dismiss it with costs to the Claimant.

14. In a brief rejoinder the Respondent/Applicant filed a Supplementary Affidavit sworn by **ORGE GODANA**, the Respondent's Chief Finance Officer on 23rd November, 2021 in which she avers that failure on the Respondent's part to file its Defence was an error on the part of the Advocates on record and should therefore not be visited upon the Respondent who is ready to defend this matter.

15. The Respondent maintains that it has an arguable defence against the Claimant and should therefore not be condemned unheard contrary to the rules of natural justice.

16. The Respondent urged this Court to exercise its discretion and allow the instant application in terms of the reliefs sought therein.

17. Parties agreed to dispose of the application by way of written submissions.

Respondent/Applicant's Submissions

18. The Respondent/Applicant submits that it has met the threshold as provided under Order 9 Rule 9 for the firm of Coulson Harney LLP to come on record in place of Nyandoro & Company Advocates on behalf of the Respondent. To buttress this argument the Respondent relied

on the case of **Alice Wambui Nganga v John Ngure Kahoro (2021) eKLR**.

19. The Respondent further submitted that the prayer for leave for Coulson Harney LLP to be placed on record for the Respondent has not either been disputed or contested and it is in the interest of Justice that the Application be allowed.

20. The Respondent further submitted that this Court has unfettered discretion to vary and/or set aside the Judgment and/or orders given. For emphasis the respondent relied on the case of **Pithon Waweru Maina v Thuku Mugiria (1983) eKLR**, **Patel v EA Cargo Handling Services Ltd (1974) EA 75** and **Shah v Mbogo (1967) EA 116** where the Courts pronounced that Judges' have discretion to give directions and further that the discretion must be exercised judiciously.

21. The Respondent submitted that the Mention Notice for 27th July, 2020 was never served upon it and that there is no evidence on record to support the assertion. For emphasis the Respondent relied on the cases of **Sugow Aden Abdi v Kamil Dagane Abdi & Another (2017) eKLR** and **Pangaea Holdings Limited v Hacienda Development Holdings Limited (2012) eKLR** where the Courts held that proper service was necessary for the Court to exercise its discretion.

22. The Respondent further submitted that the Court proceedings on 6th February, 2020, 4th May, 2020 and 27th July, 2020 are a nullity for want of service and ought to be set aside by this Court.

23. The Respondent/Applicant further submitted that it has met the threshold for setting aside/varying of the Court's Judgment delivered by this Court on 6th November, 2020. To buttress this argument the Applicant relied on the findings in the case of **Mungai v Gachuhi & Another (2005) eKLR**.

24. The Respondent/Applicant further submitted that it did not deliberately and/or intentionally pass the chance to be heard as contended by the Claimant. It argued that its failure is attributed to failure on the part of the Claimant to serve the former Advocates on record for the Applicant.

25. The Applicant maintained that it has a defence that raises triable issues and urged this Court to exercise its discretion and set aside the judgment. For emphasis the Applicant relied on the Court findings in the cases of **Muthaiga Road Truest Company Limited v Five Continents Stationers Limited & 2 Others (2003) eKLR** and **Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (1986) eKLR**.

26. The Respondent/Applicant further submitted that it had a substantive justification for terminating the Claimant's employment and that due process was followed as provided by both its internal policies as well as the Employment Act, 2007.

27. The Applicant submitted that the Claimant's termination was on the basis that she controverted the Respondent's policy; which in the Respondent's view was tantamount to gross misconduct on the Claimant's part.

28. It is on this basis that the Respondent submitted that it has a good case against the Claimant and that its defence raises triable issues thus urging this Court to exercise its discretion in allowing the instant Application.

29. The Respondent submitted that any inconveniences that may be caused to the Claimant may be remedied by way of payment of costs and that the inconvenience cannot be compared with the Applicant's loss should the orders sought in the instant application not be granted.

30. The Respondent/Applicant urged this Court to be guided by the decision in the case of **Jeremy Kirimi Rithaa v Technical University of Kenya (2020) eKLR** and exercise its discretion to set aside the Judgment and grant it unconditional leave to file a defence in this case.

31. The Applicant further submitted that this Application has not been made in bad faith and with a view to obstruct justice as contended by the Claimant maintaining that it has a good case against the Claimant and should therefore not be condemned unheard.

Claimant's Submissions

32. The Claimant on the other hand in opposition to the Application dated 16th March, 2021 submitted that the Application is incompetent and untenable, the Applicant having invoked the wrong and inapplicable provisions of the law.

33. The Claimant further submitted that the same cannot be termed as a mere technicality as provided under Article 159 of the Constitution arguing that the error goes to the root of the matter. She argues that the error renders the Application incurably defective and therefore ought to be dismissed with costs to the Claimant. For emphasis the Claimant relied on the cases of **Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 Others (2013) eKLR** and **Moses Mwicigi & 14 Others v IEBC & 5 Others (2016) eKLR** where the Courts held that procedure is closely intertwined with substance of a case and as such any error therein cannot be termed as a mere technicality. the Courts went on to state that where such errors are noted it will not hesitate to declare the pleadings incompetent.

34. The Claimant further submits that the Respondent was properly served with all the Court processes as evidenced by the Affidavits of Service filed in Court.

35. She further submits that being a stranger to the Advocate- Client relationship between the Applicant and their Advocates on record she ought not be affected by the transactions between the Applicant and its advocates.

36. The Claimant submits that the assertion that the Respondent's Advocate on record was not served cannot be supported in evidence as no

Affidavit was sworn by the firm of Advocates confirming the same. The Claimant therefore urged this Court to disregard this assertion.

37. The Claimant submitted that the Respondent's Advocate's actions were tantamount to professional negligence and that she should not be condemned to suffer for such negligence as it was up to the Respondent to ensure its case was properly presented by their Advocates on record. To fortify this argument the Claimant relied on the Court findings in the cases of **Charles Omwata Omwoyo v African Highlands and Produce Co. Ltd (2002) eKLR** and **Alice Mumbi Nyanga Vs Danson Chege Nyanga & Another (2006) eKLR** where the Courts held that where a litigant files a suit it is up to him to follow up and check on the progress failure to which he cannot come to Court to claim he was let down by the Advocate when an adverse decision is made against him.

38. In conclusion the Claimant urged this Honourable Court to find the Application dated 16th March, 2021 devoid of merit and to proceed and dismiss it with costs to the Claimant.

Analysis and Determination

39. Having considered the application, affidavits, submissions and authorities relied upon by the parties, the issues for determination are:

- (a) Whether the firm of Coulson Harney LLP Advocates should be granted leave to come on record for the Respondent in place of the firm of Nyandoro & Company Advocates.
- (b) Whether the Applicant has met the threshold for setting aside and/or varying of the Court's Judgment of 6th November, 2020
- (c) Whether the Application dated 16th March, 2021 is merited.

40. On the first issue whether the firm of Coulson Harney LLP Advocates should be granted leave to come on record for the Applicant post judgment, Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

41. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi v Veronica Muehlmann (Supra)** where the judge observed as follows:

"...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him..."

42. From the Application filed in Court there is no indication that the firm of Coulson Harney LLP Advocates served the firm of Nyandoro & Company Advocates with its application dated 16th March, 2021. No mention has been made of any attempts to obtain consent of the said firm which was declined. There is further no affidavit of service of the application upon the further advocates. The Respondent/Applicant has not met the threshold as set out in Order 9 Rule 9 of the Civil Procedure Rules, 2010. This is sufficient reason to dismiss the application. I will however also consider the substantiative prayers in the application.

Whether the Applicant has met the threshold for setting aside and/or varying of the Court's judgment of 6th November, 2020

43. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

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.

44. This Court has unfettered discretion to set aside and/or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations. In **Patel v East Africa Cargo Services Ltd (1974) EA 75** this principle was expressed as follows:

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

45. The Applicant attributes the failure to file Defence to the failure on the part of the Advocate on record for the Respondent is Nyandoro & Company Advocates. The Applicant further attributes this failure to failure on the part of the Claimant to properly serve the Advocates on record with notices thus directions were taken in their absence.

46. The Applicant further avers that there was no proof of service availed to the Court and that the Respondent was condemned unheard.

47. The Claimant on the other hand maintains that the Respondent was properly served with all the Court processes as evidenced in the Affidavit of service sworn by Boniface K. Karugi on 18th December, 2017 whose contents was not disputed by way of Affidavit from the firm of M/s Nyandoro & Company Advocates disputing service.

48. The Court record does not reflect that this matter was not before this Court on the dates the Respondent claims that it was not properly served with the mention notices save for 27th July, 2020. On 6th February 2020, the Claimant's representative took a date at the Registry while there is no evidence of any proceedings having taken place on 4th May 2020.

49. This Court further takes note from the record that the Respondent was granted 30 days leave to file its response to the Claim on 20th December, 2017, when Ms. Olando was present holding brief for Mr. Nyandoro.

50. On the same date, the Court directed the Respondent to settle the Claimant's terminal dues in the sum of Kshs.221,576.00, an order which the Respondent admits to have been aware of and complied with by issuing the Claimant with a cheque of Kshs.224,730/- being admitted terminal dues. It is on the same date that the Applicant was granted leave to file defence within 30 days which it did not.

51. In the case of **Shanzu Investment Ltd v the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR**, the Court held that –

“The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgement is varied, it must be done on terms that are just”.

52. Similarly, the Court held as follows in the case of **Shah v Mbogo (1967) E.A 166 at page 128B:**

“This discretion to set aside an ex-parte judgement 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.”

53. The Applicant has submitted that it has a defence that raises triable issues and prays that it be allowed to defend with the suit on merit.

54. The Applicant further submits that it would be in the interest of justice to allow its application and that the Claimant will not suffer any prejudice upon the grant of the orders sought.

55. The Claimant on the other hand maintains that the Application has been made in bad faith and is only meant to delay her from enjoying the fruits of the judgment entered in its favour. She submits that the Respondent was actually given a chance to defend this case on 20th December, 2017 when the Court granted it 30 days leave to defend the cause but has to date failed to file its response.

56. The Respondent did not file a defence. It has not even with the instant application filed a draft defence that the Court can consider to determine if it has a valid defence. In the case of **Alice Mumbi Nyanga v Danson Chege Nyanga & Another (Supra)** the Court held that:

“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 the 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..”

57. Further, in the case of **Patel v East Africa Cargo Services (supra)** the Court held that the Court will not usually set aside judgment unless it is satisfied that there is a defence on the merits. The Respondent ought to have in the least filed a draft judgment for consideration by the Court.

58. In view of the fact that the Court has not granted leave to Coulson Harnelly LLP to come on record for the Respondent, there is no valid application for consideration by the Court as the application on record is filed by a stranger. The same is accordingly struck out. The Applicant will pay Claimant's costs of the application.

59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE