



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1646 OF 2016**

**KENYA ENGINEERING WORKERS UNION.....CLAIMANT**

**VERSUS**

**TONONOKA ROLLING MILLS LIMITED.....RESPONDENT**

**RULING**

1. Notice of Motion application dated 12<sup>th</sup> March, 2018 was filed to set aside judgment of the Court delivered on 5<sup>th</sup> August, 2018.
2. The application is premised on grounds set out on the notice of motion to wit; that the respondent had instructed the firm of Taibjee and Bhalla Advocates to act on their behalf on 14<sup>th</sup> September, 2016. That the firm of advocates failed to file a defence to the detriment of the Respondent. That the respondent only became aware that a defence had not been filed and judgment entered against the respondent upon receiving letter from the claimant dated 17<sup>th</sup> February, 2018 inviting the respondent to honour the judgment dated 5<sup>th</sup> February, 2018.
3. That the respondent has a valid defence to the claim.
4. That the claimant will not suffer any prejudice if the cause is heard interpartes but the respondent will suffer great prejudice if the claimant proceeds with execution in respect of the matter where the respondent had no opportunity to defend.
5. That the respondent is willing to meet any terms placed by the Court. The application is supported by the affidavit of one Dharmesh Savla, sworn on 18<sup>th</sup> March, 2018 in which he deposes that he received the letter dated 17<sup>th</sup> February, 2018 in respect of the Court judgment dated 5<sup>th</sup> February, 2018.
6. That there was no communication from their advocates prior to this date. That upon perusal of the judgment, it became clear that their advocate had not filed a defence to the suit. That the respondent has a good defence to the suit. That it is in the interest of justice that the judgment be set aside and the matter be heard interpartes.
7. The application is opposed by the claimant/respondent who has since filed an application for execution of the decree of the Court by compelling the Director of the Applicant to recognize the union as directed by the Court in its judgment dated on 5<sup>th</sup> August, 2018 and dated on 16<sup>th</sup> August, 2018.
8. From the Judgment of the Court, it is clear that the suit was served on the respondent and the respondent entered appearance through its advocates on 14<sup>th</sup> September, 2016.
9. The respondent only blames its advocates for the failure to file a defence against the suit but has not demonstrated any action on its part to ensure that the suit was defended. Indeed, no draft statement of defence has been attached to this application and the respondent has therefore not demonstrated that it has an arguable defence in this matter.
10. Courts have time and again ruled that whereas, it is not right to visit the negligence of an advocate on their client, it is trite that the respondent must also demonstrate that it was not indolent and that it was not itself guilty of inaction.
11. Since notice of appearance was entered on 14<sup>th</sup> September, 2016, the respondent has not demonstrated it took any step at all until judgment was delivered on 5<sup>th</sup> February, 2018 and only arose from its slumber when steps to execute the judgment were taken by a letter dated 22<sup>nd</sup> February, 2018.

12. The applicant has failed to satisfy the Court that it is entitled to the Court's use of discretion to set its judgment aside in respect of a matter that was filed against the respondent in the year 2016 and did not take any step until the matter was heard and determined.

13. Accordingly, the application dated 12<sup>th</sup> March, 2018 lacks merit and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearance**

Mrs Nyaicha for Respondent/Applicant

Mr. Haraka for claimant/respondent

Ekale – Court Assistant