



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. 470 OF 2017**

**ROSE MATUNDA.....CLAIMANT**

**-VERSUS-**

**HI-TECH OPTICIANS.....RESPONDENT**

**RULING**

1. This ruling is in respect of the Respondent/applicant's application dated 15<sup>th</sup> December, 2021 filed in this court on 16<sup>th</sup> December, 2021 through the firm of Obura Mbeche & Company Advocates pursuant to section 1A, 1B & 3A of the Civil Procedure Act, Order 10 Rule 11, Order 50 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law, seeking the following orders;

a) **Spent.**

b) **The Judgement delivered on 2<sup>nd</sup> November, 2021 against the Applicant/Respondent and all orders and proceedings subsequent thereto be stayed pending interpartes hearing of this Application.**

c) **The Judgement delivered on 2<sup>nd</sup> November, 2021 against the Applicant/Respondent and all orders and proceedings subsequent thereto be vacated to enable the Applicant Respondent to present its case prior to the determination of this matter.**

d) **That the direction do issue to open the Applicant/Respondents case for issues between the Respondent/Claimant be determined on merit.**

e) **That any other Order the Court may deem fit and just to grant.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 15<sup>th</sup> December, 2021 by **Jayaram Ankala**, the director of the Respondent and based on the following grounds: -

(a) That, the firm of Obura Mbeche has now come on record for the Respondent pursuant to the consent between the firm of Obura Mbeche and the firm of Aminga, Opiyo and masese dated 9<sup>th</sup> December, 2021.

(b) Prior to the change of advocate, the Respondent had instructed Aminga, Opiyo and Masese advocate to take conduct of this case on their behalf on the 20<sup>th</sup> December, 2017. The Advocate then filed a memorandum of appearance on the 22<sup>nd</sup> December, 2017 but failed to file a response to claim till time lapsed.

(c) A response to claim was then filed on 10<sup>th</sup> August, 2018 without leave of Court. Realizing the mistake, their advocate tried regularizing the situation by seeking leave of Court which was granted on the 21<sup>st</sup> July, 2021, albeit in the absence of the Respondent and their advocate and mention slated for 21<sup>st</sup> September, for further directions.

(d) The matter was then mentioned twice and since the Respondent's advocate was absent judgement was delivered on the 2<sup>nd</sup> November, 2021 in favour of the Claimant as against the Respondent.

(e) The Respondent is aggrieved by the judgment of this court which he later learnt of on 7<sup>th</sup> December, 2021 through a letter addressed to their then advocate by the firm of Ooga and company Advocates.

(f) The Respondent stated that it will be immensely prejudiced and urged this Court to allow it defend this suit and as such re-open the respondent's case for hearing.

(g) That his former firm of advocates failed to inform him of the progress in this matter and prayed that the application be allowed as prayed.

3. In opposing the application, the Claimant **Ms. Rose Nyaboke Matunda**, swore a replying affidavit dated 3<sup>rd</sup> January, 2022 based on the following grounds;

- a) That the application is vexatious, frivolous and an abuse of Court process only meant to obstruct the court of justice and deny her fruits of judgement.
- b) That the Respondent had earlier failed to comply with pretrial direction and sought leave of this Court vide the application dated 23.10.2018 which court allowed on 21.7.2021.
- c) That when the Ruling was delivered neither the Respondent nor its advocate was in Court despite the date having been taken in presence of both parties.
- d) That the court then fixed the matter for direction on the 21.9.201 which date the Claimant's advocate served the Respondent and a return of service filed in court. Despite being serve with the mention notice, the Respondent's advocate failed to appear in Court.
- e) That when the Respondent failed to appear and the claimant having previously testified, the previous testimony in the proceedings were adopted by the court and claimant directed to file submissions. The matter proceeded undefended and judgment delivered.
- f) That the current application therefore is an abuse of Court process and she urged this Court to disallow the Application and let execution proceedings commence.

4. The application was disposed of by way of written submission with the applicant filing on 7<sup>th</sup> March, 2022 and the Respondent filed their on 4<sup>th</sup> March, 2022.

#### **Applicant's submissions**

5. It was submitted for the Applicant that judgment in this matter was occasioned solely on the failure of its previous advocate to attend Court and file submission on its behalf therefore that the matter proceeded as undefended when the Applicant had instructed an advocate to take conduct of the matter on his behalf. That the failure of the advocate to participate in the hearing of this case occasioned immense prejudice on the Respondent/ Applicant herein and that that mistake was solely done by the Applicant's Advocate which mistake should not be visited upon the Applicant. In this they relied on the case of **Macharia V Mcharia (1987) KLR 16** and the case of **Securicor (K) Limited V Owino [1993] eklr**

6. The applicant then urged this court in the interest of justice to consider its application and allow it defend this suit and the matter be decided on its merit.

#### **Respondent's submissions.**

7. The Respondent on the other submitted on whether the orders sought should issue. It then submitted that the Applicant had earlier slept on their right and the matter proceeded as undefended only for this court, upon the application of the claimant, to allow them file their documents and comply with pretrial directions out of time.

8. It was submitted that the Applicant has not given a good reason for this Court to exercise its discretion and allow the application. In this she relied on the case of **CMC Holdings Limited V Nzioki [2004] eklr**.

9. It was then argued that the only reason given by the applicant is based on the fact that their advocate failed them when the case before court belongs to the applicant and therefore the blame on his advocate is not justified. In support of this argument the claimant cited the case of **Savings & Loan Ltd v Susan Wanjiru Muritu Nairobi Milimani HCC 397/02** where the Court held that; -

**“A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”**

10. Accordingly, it was submitted that the Applicant, being the litigant failed in pursuing its case and cannot be allowed to merely blame his advocate.

11. The Respondent then submitted that the Applicant in this application is wasting precious judicial time and urged this Court to dismiss the application. She then cited the case of **Fran Investment Limited V G4S Security Service Limited [2015] eKLR**.

12. I have examined the averments of the parties herein. The course of action in this matter occurred way back in 2017 and this claim was filed accordingly.

13. It was not until 2018 that this case was finally heard exparte. The respondents filed an application to be allowed to prosecute their case.

14. This application was never prosecuted since 2018 till 2021 May.

15. Vide a Ruling of this application on 20/7/21, the application of 2018 was allowed. The court allowed the respondents to re-open the case and cross-examine the claimant.

16. The matter was then fixed for direction again on 21/9/2021. The respondents though served failed to attend court. The court then directed that the matter proceeds undefended and Judgment was thereafter delivered on 2/11/2021.

17. I have given the above chronology of events to illustrate how the respondents counsel or the respondents themselves were laxed in defending this case.

18. Since 2018, the respondents had an application they failed to prosecute for 3 years.

19. Whereas it is true that a client should not be condemned for the mistakes of counsel, the respondent also had a duty to follow up their own case and ensure its defence.

20. The respondents failed and so did their counsel. The claimant got her Judgment and she should not be denied the privilege of enjoying the fruits of her Judgment.

21. Litigation must come to an end and this court will not aid the indolent.

22. I therefore decline to grant the order sought.

23. I dismiss this application accordingly.

**RULING DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Mbeche for Applicant – present

Ooga for Respondent – present

Court Assistant - Fred