



**Leo Design Limited v Maina (Cause E144 of 2021)
[2022] KEELRC 1385 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E144 OF 2021
NZIOKI WA MAKAU, J
JUNE 30, 2022**

BETWEEN

LEO DESIGN LIMITED APPLICANT

AND

HARRISON MACHARIA MAINA RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 14th October 2021 seeking to be heard for Orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to grant an order of stay of execution of the judgment delivered on 29th September, 2021 and the resultant decree.
 - iii. That pending the hearing and determination of this suit, the Honourable Court be pleased to grant an order of stay of execution of the judgment delivered on 29th September, 2021 and the resultant decree.
 - iv. That pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to set aside the judgment and resultant decree passed on 29th September, 2021.
 - v. That pending the hearing and determination of this suit, the Honourable Court be pleased to set aside the judgment and resultant decree passed on 29th September, 2021.



- vi. That the Honourable Court be pleased to order that the Response to Memorandum of Claim and Counterclaim as duly filed and, consequently, the Applicant be allowed to defend the matter and the matter be heard de novo.
 - vii. That in the alternative, pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to order Status Quo ante 29th September, 2021 to be maintained, to wit, the Claimant not to interfere with the operations of the Applicant.
 - viii. That in the alternative, pending the hearing and determination of this suit, the Honourable Court be pleased to order Status Quo ante 29th September, 2021 to be maintained, to wit, the Claimant not to interfere with the operations of the Applicant.
 - ix. That costs of this Application be provided for.
2. The Application is based on the grounds that on 8th October 2021 the Claimant/Respondent served the Applicant with the draft decree for approval, in anticipation of execution of the Judgment delivered on 29th September 2021. The Applicant had before then filed an Application seeking to set aside the ex-parte proceedings for 29th July 2021 and defend the matter but which application has never, to date, been heard or any directions thereto given by the Honourable Court. The Respondent asserts that the Applicant stands to suffer irreparable harm and loss should the said delivered Judgment and the resultant Decree not be set aside, as the Claimant will proceed with execution and affect the financial liquidity of the Applicant herein. That there will also be a miscarriage of justice should the Applicant be denied an opportunity to present its case before a final determination can be made and that the Applicant has a triable Defence and Counterclaim that the Court should first hear on its merits before making any final determination. That the Applicant is ready and willing to abide with any orders/ directions issued by this Court and the Application has been made without any inordinate delay. That unless the orders sought herein are granted, the Applicant stands to suffer irreparable loss which cannot be compensated whereas no prejudice incapable of recompense will be occasioned to the Claimant/ Respondent if this Application is heard and determined on its merits.
3. The Application is also supported by an affidavit sworn by Enrico Dolciemi who reiterates the grounds of the Application and avers that the triable issues raised in the Respondent's Response and Counterclaim include:
- a. Who is the registered, insured and/or beneficial owner of Motor Vehicle Registration Number KCC 470L;
 - b. Whether the Claimant has any equitable rights over Motor Vehicle Registration Number KCC 470L as against the Respondent;
 - c. Whether the Claimant has returned Motor Vehicle Registration Number KCC 470L to the Respondent;
 - d. Whether the Claimant was authorized to conduct any servicing and/or repairs on Motor Vehicle Registration Number KCC 470L by the Respondent;
 - e. Whether the Respondent was the sponsor and manager of Lamoc Welfare Group;
 - f. Whether the Respondent owes the Claimant any monies and shares and/ or contributions in Lamoc Welfare Group;



- g. Whether the Claimant's resignation amounts to wrongful termination;
- h. Whether the Claimant utilized all his leave days, public holidays and off days.
4. In response, the Claimant/Respondent filed a Replying Affidavit averring that the Applicant is not being honest and has always been aware of the Judgment delivered on 29th September 2021 as demonstrated in paragraphs 2, 3 and 6 of the Supporting Affidavit sworn on 25th August 2021 by Julius Opini Advocate. He avers that the stated earlier application by the Respondent/Applicant was in bad faith, bad in law and an abuse of court process as it meant to waste judicious time and delay and obstruct the court proceeding. That nevertheless, the Respondent/Applicant refused to enter appearance or file a Response to the Claim until about six (6) months later on 25th August 2021 and this is despite him and his advocates having been served with Summons to enter appearance. The Claimant/Respondent further denies that the draft Response to Claim and Counter-Claim raise any triable issues. He avers that should this Honourable Court indulge the Applicant, then the Applicant should pay thrown away cost and further deposit the total decretal sum as security in the joint interest-earning bank account of the advocates of both Applicant and Respondent.
5. It is the Claimant/Respondent's case that the Applicant has not demonstrated to this Court sufficient reason for the Court to set aside its Judgment. That the Applicant did not enter appearance or file defence despite participating in the proceedings and being served properly with the Summons, Memorandum of Claim and all mention and hearing notices. He avers that the Applicant does not therefore deserve the exercise of judicial discretion in its favour considering its outright intention to delay and obstruct his right to realize the fruits of the Judgment.
6. The Respondent/Applicant then filed a Further Affidavit sworn on 2nd December 2021 by Enrico Dolciami who avers that the Affidavit sworn by Julius Opini, Advocate was overtaken by events upon delivery of the Judgment in the matter. He reiterates that the Applicant only learnt of the terms of the Judgment upon being served with the decree. That the Claimant/Respondent has not demonstrated to the Court that he is a man of means capable of returning the decretal amount should the Applicant's suit be successful. That the Claimant/Respondent has also not tendered any evidence to demonstrate that he has been applying for jobs without success. He further denies that the instant Application is aimed at delaying justice and avers that it is for this Court to administer justice fairly to all parties as enshrined in *the Constitution* of Kenya, 2010.
7. Applicant's Submissions
- The Applicant submits that according to the Blacks' Law Dictionary, 9th Edition at page 1644, the given meanings for "triable issues" and "the trial" are to the effect that triable issues are those that are subject to judicial examination in a Court, for determination on their merits. That this Court should thus hold that the Applicant's draft Response to Statement of Claim and Counterclaim raise triable issues that need to be ventilated before any judicial decision can be taken. The Applicant cites several authorities on triable issues including the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR where the Court of Appeal observed that a bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial and does not need to be an issue that would succeed but just one that warrants further intervention by the Court. That it is therefore settled that a defence on the merits does not mean the defence that must succeed and the Applicant should be granted an opportunity to defend the matter.
8. It is the Applicant's submission that it has demonstrated to this Honourable court that it has a triable defence in their counterclaim against the Claimant and thus the Application dated 14th October, 2021 ought to be allowed. That Section 3A of *Civil Procedure Act* Cap 21 Laws of Kenya empowers this



Court to make such order as may be necessary for the ends of justice and this power has been donated by Article 159(2) of *the Constitution* of Kenya. The Applicant humbly beseeches Your Lordship to employ the principle that the right to be heard is a fundamental right that must not be denied.

9. Claimant/ Respondent's Submissions

The Claimant/Respondent submits that setting aside regular judgment is at the discretion of the Court but there must be sufficient cause for setting aside a regular judgment/decree. That in this case, the Respondent/Applicant has not offered any sufficient cause as it has not established any accident, inadvertence or excusable mistake or error to enable this Honourable Court exercise its discretion in its favour. That the prior and subsequent conduct of the both Respondent/Applicant and its advocates and facts of the case overwhelmingly demonstrate that there are inordinate delay, no valid reasons, no triable issues and therefore the Claimant/Respondent will be greatly be prejudiced if the Court interferes with its Judgment of 29th September 2021 He relies on the case of *Robert Nyagwansa Miruka v Presbyterian University of East Africa* [2019] eKLR where the court observed that discretionary powers bestowed upon the Court are to be exercised judiciously and not whimsically and are also not intended to aid a party out to obstruct or delay justice when it comes to setting aside an ex-parte judgment.

10. He further submits that it is important to note that the default judgment in question is a regular judgment and not an irregular judgment as both the Respondent/Applicant and its advocates were duly served with the Summons to enter Appearance whilst the Applicant refused, ignored and failed and/or to enter appearance or file defence until after a period of seven (7) months. That this Honourable Court is now called upon to determine whether or not the Respondent/Applicant has a justifiable cause for not filing a Memorandum of Appearance and Defence and further whether its draft Defence raises any triable issue. As regards "sufficient cause", the Claimant/Respondent submits that the same has been applied to situations where no negligence, or inaction or want of bona fides is imputed to the Applicant as was similarly defined in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR. He submits that in the instant case, the Applicant and its advocates on records are liable for negligence and inaction to diligently prosecute their case and this should not be visited on the Claimant/Respondent. Furthermore, the Applicant's failure to provide any valid reason for not filing the defence in time does not warrant exercise of the court's discretionary power to set aside the judgment. That discretionary power to set aside judgment should sparingly be used only to avoid injustice or hardship as affirmed in the case of *Francis Mwangi Chege v Shepherd Catering Limited* [2020] eKLR while citing the principle of setting aside judgment in *Wachira Karani v Bildad Wachira* [2016] eKLR and *Esther Wamaita Njibia & 2 Others v Safaricom Ltd* [2014] eKLR. It is the Claimant/Respondent's submission that the Applicant must demonstrate that it was prevented from filing a Memorandum of Appearance and Defence by a sufficient cause. That in the case of *Kennedy Makasembo v Kenya Union of Post Primary Education Teachers* [2017] eKLR, the court observed that even though every person has a right to defend themselves, *the Constitution* does not require the court to bend backwards to accommodate a party who after being given an opportunity to defend itself, deliberately fails to do so.

11. As to whether the Applicant has raised any triable issues, the Claimant/Respondent submits that the alleged triable issues are either mere sham, admission or agreed issued by both parties in their pleadings. That the Court in the case of *K-Rep Bank Limited v Segment Distributors Limited* [2017] eKLR reiterated the principle in *Patel v East Africa Cargo Services Ltd* [1974] EA 75 that the court will usually set aside a regular judgment unless it is satisfied that there is a defence on the merits. It is the Claimant's submission that the Applicant has thus failed to meet the legal threshold to set aside the regular judgment as no sufficient cause with valid reason and triable issues has been advanced and no



evidence has been produced for the alleged sickness and mis-diarizing by the Applicant's advocates. He thus urged the dismissal of the application by the Respondent.

12. The Respondent/Applicant slept on its rights when it declined to participate in the proceedings despite being served. No cogent reason was given for the refusal to participate in the suit. The Respondent now seeks the Court to reverse a judgment on the merits calling it an ex parte judgment. Failure to provide any valid reason for not filing the defence in time does not warrant exercise of the court's discretionary power to set aside the judgment. As held in the case of *Kennedy Makasembo v Kenya Union of Post Primary Education Teachers* (supra), even though every person has a right to defend themselves, *the Constitution* does not require the court to bend backwards to accommodate a party who after being given an opportunity to defend itself, deliberately fails to do so. The Judgment delivered herein was procedural and having failed to surmount the threshold for review the inevitable outcome for the Respondent/Applicant's notice of motion is dismissal with costs to the Claimant/Respondent who should proceed to execute to enjoy the fruits of his judgment.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

