



**Odenyo v Mwango Clearing Investments Limited (Cause  
58 of 2018) [2022] KEELRC 1330 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1330 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 58 OF 2018**

**JW KELI, J  
JULY 14, 2022**

**BETWEEN**

**HEZEKIAH OCHUKA ODENYO ..... CLAIMANT**

**AND**

**MWANGO CLEARING INVESTMENTS LIMITED ..... RESPONDENT**

**RULING**

1. The Ruling is on the Notice of Motion Application by Respondent dated 12<sup>th</sup> April, 2022 and received in court on even date seeking the following substantive orders:-
  - a. That this Court be pleased to grant leave to the firm of Murunga & Co. Advocates to come on record for the Applicant.
  - b. That this Court be pleased to order stay of execution of the judgment of Justice Radido delivered on the 29<sup>th</sup> November 2021 pending the hearing and determination of this application.
  - c. That this Honourable Court be pleased to grant the Applicant leave to file its defence and defend the suit albeit out of time as per draft defence annexed to its application that raises cogent triable issues.
2. The Application is based on grounds that the court was moved to enter default judgment in this suit and judgment was entered against the Respondent on the 29<sup>th</sup> November 2021, that no notice of entry of judgment was served upon the Respondent to make it aware of the judgment against it ahead of any execution proceedings thus opportunity to appeal against the said judgment. That the Respondent only became aware of conclusion of the suit when the auctioneer came knocking at its door, that the applicant faces unfair execution proceedings, based on a decretal sum unjustly and irregularly awarded to the Claimant who intentionally withheld materials facts for this Honourable Court and who has come to court with unclean hands. That the Applicant is apprehensive that it shall be grossly prejudiced



should the execution be allowed to proceed as presently intended. That the Application is brought in good faith and will not occasion to any prejudice to the Respondent(Decree holder).

The Application is further based on the supporting affidavit of Willy HSU sworn on 12<sup>th</sup> April 2022 and filed in court on even date, which in summary states that they had instructed Ikapel & Co. Advocates to represent them in the matter where they entered appearance on 23<sup>rd</sup> July, 2019. That they only learnt of the said Advocate's motion to cease acting for the them dated 4<sup>th</sup> September, 2019 through the judgment even though the said application was not prosecuted.

3. The Application is opposed by the Respondent vide Replying affidavit of Hezekiah Ochuka Odenyo (the Respondent) sworn on the 20<sup>th</sup> April, 2022 and received in court on the 21<sup>st</sup> April, 2022. In Summary the Respondent avers that the Application is in bad faith, frivolous, abuse of the court process and lacks merit and is incompetent and should be dismissed with costs. The Respondent submits that despite being served with Notice of summons on 3<sup>rd</sup> September, 2018, it was not until 23<sup>rd</sup> July, 2019 when the matter was fixed for formal proof that the Respondent filed a notice of appointment of Advocate in the matter, that on 23<sup>rd</sup> July, 2019 the court granted the Respondent(Applicant) 21 days leave to file and serve its response to the claim. That the defence was not filed but the Advocate on record filed Notice of motion dated 4<sup>th</sup> September 2019 to cease acting which Application was never prosecuted.
4. That as required by law the Claimant requested for default judgment and the court directed service of hearing notices on the Respondent which service was effected. That at the hearing neither the Advocate or the Applicant attended and the Honourable Court being satisfied with service heard the Claimant and Respondent's case was closed. That is not true the Respondent only became aware of conclusion of the suit at proclamation on 18<sup>th</sup> February, 2022.
5. That the Application is resjudicata in so far as it seeks leave of the court to defend the suit out of time the court having granted the Respondent in the suit such leave on 23<sup>rd</sup> July 2019 at the instance of the Applicant. That the Application is brought too late as it is almost 4 years since the Respondent was required to file defence. That the decree holder deserves to enjoy the fruits of his judgment in a timely manner and any further delay in alienating this objective will greatly prejudice his rights as a litigant. That the draft defence consists of mere denials and a knee jerk reaction to execution of the decree herein and only meant to delay the execution of proceedings.
6. The Application was placed before court under vacation rules and the court having considered the certificate granted the following substantive order on the 13<sup>th</sup> April, 2022 " A stay of execution against the judgment delivered in this matter on the 29<sup>th</sup> November 2021 is granted conditional on the Applicant depositing the decretal sum in court with 14 days of this order".
7. The court was not updated on compliance since the order sought was pending hearing and determination of this Application then it is considered as spent. The outstanding order is No. 4 which reads " That this Honourable court be pleased to grant the Applicant leave to file its defence and defend the suit albeit out of time as per draft defence annexed to this application that raised cogent triable issues."
8. The Application is brought under Section 1A,1B and 63 (c) and (e) of the *Civil Procedure Act*, Order 32 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules* ( Cap 21 Laws of Kenya).
9. The Application was canvassed by way of written submissions. The Applicant's written submission are dated 12<sup>th</sup> May, 2022 and received in court on 13<sup>th</sup> May, 2022.



## Determination

10. The Applicant addresses the following issue:
  - i. Whether the Applicant is entitled to file a defence out of time.  
The Respondent addresses the following issues in its submissions:-
    - i. Whether the suit is competent
    - ii. Whether the Respondent deserved the prayers sought.
11. The Court having considered the pleadings by the parties and the issues addressed in their respective submissions is of the considered opinion that the issues for determination in the instant Application are as follows:-
  - a) Whether the Application by way of Notice of Motion dated 12<sup>th</sup> April, 2022 is competent.
  - b. Whether the Applicant is entitled to the prayer to file defence out of time .
  - c. Who bears the costs of the Application

### **Whether the Application by way Notice of Motion dated 12<sup>th</sup> April, 2022 is competent.**

12. The Application is brought under provision of Section 1A,1B 63(b) and e) of the [Civil Procedure Act](#) and Order 32 Rule 6 and Order 5 Rule 1 of the [Civil Procedure Act](#) ( Cap 21 Laws of Kenya).
13. The Applicant submits that the said provisions of the law are not relevant to the Application. That Order 32 Rule 6 of the [Civil Procedure Rules](#), make provision for receiving property on behalf of minors. That the relevant provision of the Law are Order 10 rule 10 and 11 and Order 12 Rule 7 which provide the law on consequences of default Judgment for lack of defence and non attendance and setting aside judgment.
14. That the order for leave to file defence out of time and defend suit is not available for the Respondent before the exparte judgment is set aside.
15. It is true the Applicant has not sought a prayer to set aside the exparte judgment. The defence was closed and final judgment delivered . Parties are bound by their pleadings and courts cannot grant orders not sought in the pleadings. I uphold the Court of Appeal decision in *Nairobi City Council -vs- Thabit Enterprises Ltd* Civil Appeal No. 264 of 1996 2 EA 231 where the court of Appeal held that, ‘a court should not grant a counter claim unless pleaded and that strange results would follow if a judge were free to determine issues not properly before him. According to the court the granting of a relief not sought in the plaint but mentioned in the Affidavit is a fundamental breach of the rules of pleadings and that the plaint should specify the relief sought by the plaintiff either simply or in the alternative as the plaintiff is not entitled to relief not sought.’ The reason for this was given as being that some pleadings inform the parties of the real issues in dispute, a Judge has no powers or jurisdiction to decree an issue not raised before him. (“para 15 ).
16. The foregoing is the law and this court is bound by the said position of the court of Appeal(supra). In the instant Application the Applicant sought stay of execution pending the Application and leave to file defence out of time and defend suit out of time. It did not seek to set aside the judgment in the claim. It follows then its Application is incompetent for seeking grant of leave to file defence out of time before setting aside the exparte Judgment. Such an order would be super flous and in vain. A court will not issue orders in vain.



### **Whether the Applicant is entitled to prayer to file defence out of time.**

17. The court has already found it could be in vain to issue such an order while the *exparte* judgment has not been set aside.
18. The court further finds that the presiding Judge in the claim satisfied themselves service of the hearing Notice for the formal Proof leading to the Judgment had been effected on the Respondent directly. In paragraph 3 of the *exparte* Judgment by Radido Judge dated 29<sup>th</sup> November 2021 it is recorded that the firm of Ikapel & Co. Advocates filed a Notice of Appointment to act for Respondent on the 23<sup>rd</sup> July 2019 and on the same day the court granted it leave to file response on behalf of the Respondent within 21 days. In paragraph 4 the court states that the order has not complied with. That instead the law firm of Ikapel and Co. Advocates on 4<sup>th</sup> September 2021 applied to be granted leave to cease acting but the motion was never prosecuted. In paragraph 6 of the *exparte* judgment it is recorded that the court directed the Claimant to serve the Respondent directly with further court process. In paragraph 7 the court records that the Claimant served a hearing Notice upon the Respondent physically on 2<sup>nd</sup> June 2021.
19. The Applicant has cited several decisions to support its case on his issue. In *James Kanyिता Nderitu & Another -vs Marios Philotas Gbikas and Another* (2016) the court of Appeal defined regular default judgment as where the defendant duly served with summons to enter appearance or to file a defence resulting to a default judgment. In this case this was a regular default judgment as Defendant appointed Advocate and failed to file defence despite being granted leave to do so.
20. The court of Appeal in *James Kanyिता Nderitu case* (supra) then found that the defendant is entitled Under Order 10 Rule (1) of the Civil Procedure Rules 10 to move the court to set aside the default judgment and to grant him leave to defend the suit.
21. In the instant Application the court already found that the Application is incompetent for not seeking to set aside the default judgment. The court of Appeal in *James Kanyिता Nderitu case* (supra) listed the factors the court would consider if there was a competent application exercising its unfettered discretion namely:- ‘the reason for failure by the defendant to file his memorandum of appearance or defence, the length of time that has lapsed since the default judgment was entered, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment.....’.
22. The Applicant in submissions alleges that the amounts at formal proof were exaggerated in seeing the salary was kshs. 25,000 and not kshs. 85,000. The court perused the affidavit by WILLY HSU and no such averments. Counsel cannot adduce evidence in submissions.
23. The Respondent says the prayer is resjudicata leave having been granted earlier for Respondent to file defence and relies on the decision of the court in *Kennedy Mokha Ongiri -vs- John Nyasende Mosioma & Florence Nyamoita Nyasende* (2022) eKLR where the court concluded that, “the Respondent by bringing Application after application on the same issue at different one after another is hell bent to frustrate the Appellant from realizing the judgment as awarded by the lower court and unless something is done, the Appellant will forever be left baby-sitting his barren decree....”.
24. The court agrees with the above conclusion considering the finding that the Application is incompetent for not seeking to set aside the *exparte* judgment the prayer for leave to file defence out of time and defend suit is superflous. The court cannot act in vain and issue a superfluous order. The court is also satisfied that the Applicant had Notice of the hearing at formal proof hence the averments



by Willy HSU are misleading. This finding on notice of formal proof hearing having been served on the Applicant is in the judgment of the court under paragraph 7.

25. In conclusion the court finds that the Application dated 12<sup>th</sup> April, 2022 is incompetent and without merit so the same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED IN OPEN COURT IN BUNGOMA THIS 14<sup>TH</sup> DAY OF 2022**

**J. W. KELI,**

**JUDGE.**

**In the presence of :-**

Court Assistant : Brenda Wesonga

Applicant: Kimathi h/b for M/S Muriungi

Respondent:-Maloba Advocate

**Later**

**Respondent**

I pray for release of deposit

**Applicant-** offline

**Court order**

The court not in a position to make the order as it has no information on the funds. The Decree Holder to make a formal application.

It is so ordered.

**J.W. KELI,**

**JUDGE.**

**14<sup>th</sup> July 2022**

