Obonyo v China Aero Technology International Engineering Corporation (Cause 1703 of 2015) [2022] KEELRC 3975 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3975 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1703 OF 2015

K OCHARO, J

SEPTEMBER 20, 2022

BETWEEN

REUBEN OWINO OBONYO ..... CLAIMANT

AND

CHINA AERO TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION ..... RESPONDENT

RULING

1. This matter came up for directions before the Deputy Registrar of this court on the July 21, 2021 in the presence of counsel for the parties, when she directed that the matter be heard on the August 12, 2021.

2. When the matter was placed before me for hearing on the above stated date, counsel for the claimant / respondent and his client, the claimant were present, however, neither the respondent's witness nor its counsel were in attendance of court. Informed by the fact that the hearing date had been picked by consent, and absent of any explanation as regards their non-attendance, the court directed the matter to proceed their absence notwithstanding.

3. Consequent to the above stated direction, the claimant testified and the matter got reserved for judgement for and delivered on the October 8, 2021.

The Respondent's/Applicant's Application.

4. Subsequent to the judgment the respondent/applicant filed a notice of motion application dated February 7, 2022 seeking for t orders that;

    a. This honourable court be pleased to set aside the judgement and decree of October 8, 2021, by Ocharo Kebira J, for the hearing of this matter to proceed "*de novo*".

    b. The ruling to the claimant's bill of costs scheduled for February 8, 2022, be arrested.

c. Pending the hearing and determination of this application interpartes this honourble court be pleased to stay execution of the judgement delivered on October 8, 2021 together with all the subsequent orders.

d. The costs of this application be awarded to the respondent/applicant.

5. The application is premised on the grounds obtaining on the face of it and those in the supporting affidavit sworn by one Harrison Wambui, the applicant's administrator, on the February 7, 2022.

6. The applicant stated that this matter was mentioned on July 21, 2021 before the Hon Daisy Mutai, when the she directed that the same would proceed for hearing on August 12, 2021. That the matter got listed fora virtual hearing before this court. To them the hearing did not proceed due to technical/ connection challenges on the court's part.

7. It was further stated that it later on dawned on the applicant's counsel upon reviewing the entries on the e-filing portal, that apparently the matter proceeded for hearing on August 12, 2021, exparte and a judgement date of October 8, 2021 issued. The judgment was delivered on this date as was scheduled.

8. The applicant contended that contrary to what the law requires, no judgement notice was issued to it or its counsel. The respondent's counsel came to learn later from the entries on the e-filing portal that the matter came up for taxation of the claimant's bill of costs before Hon Noelle Kyany'a on January 18, 2022, in their absence as no taxation notice or bill of costs was ever served on them by the claimant's advocates, and that a ruling thereof was slated for the February 8, 2022.

9. It was asserted that all through the claim herein was contested by the applicant as can be discerned from the reply to memorandum of claim dated August 29, 2016, filed on behalf of the respondent. The failure by the applicant's counsel to be present in the virtual court session was beyond his control, and the court wouldn't have proceeded to hear the matter exparte.

10. The applicant further contends that it has a good defence to the claimant's claim, defence which raises triable issues, which can only be fairly adjudicated upon full hearing of all the parties. It has a right to a fair hearing under article 50 of the *Constitution*. It should be allowed to be heard in its case.

11. The applicant argues that if the Honourable Deputy Registrar proceeds to deliver a ruling on the claimant's bill of costs, it shall be at the detriment of the respondent/applicant, thereby depriving it of its right to a fair hearing, guaranteed under article 50 (1) of the *Constitution* of Kenya, 2010.

12. The respondent will not suffer any prejudice if the orders sought by the applicant through its application herein are granted.

The Claimant's/Respondent's Response.

13. The claimant /respondent opposes the application anchored on the grounds obtaining on the replying affidavit sworn by his counsel Linet Atieno Opiyo, on the February 16, 2022. According to the claimant/respondent the matter proceeded virtually on August 12, 2021 whereupon the court took the testimony of the claimant and closed the respondent's case for non-attendance.

14. The claimant / respondent further stated that the applicant's/ respondent's counsel knew that the matter proceeded exparte from as early as the November 24, 2021 when their firm was served with the decree, the bill of costs and a taxation notice, several months before the instant application was filed.

15. It was contended that the applicant's supporting affidavit is full of falsehood. Judiciary has automated the e-filing system and law firms receive short message notifications from the court about cases whenever an activity takes places in a file.

16. The applicant's contention that there was no notice of judgement issued to it as required is as a result of a misapprehension of the law. A notice of entry of judgment is only required under the proviso to *order 22 rule 6*, where there is an exparte judgement against a party who neither entered appearance nor filed a defence which notice must be served before execution of decree.

17. Contrary to the allegation by the applicant, the bill of costs and a notice of taxation were served on its counsel as evidenced by the affidavit of service on record. The respondent has not been interested in this matter and merely filed the instant application to forestall the taxation and impending execution since the applicant never took any action for more than 2 months after being served with both decree and notice of taxation.

18. In the circumstances of this matter, the constitutional provisions cited by the applicant cannot come to their aid as they cannot be used to further an abuse of the court process.

The Respondent's / Applicant's Submissions.

19. The applicant identifies two issues as those that emerge for determination by this court on the instant application, thus,

    a) Whether the respondent was not accorded a fair hearing.

    b) Who is entitled to costs?

20. On the first issue it was submitted that the respondent was never accorded a fair hearing during the hearing of this matter on August 12, 2021. The right to a fair hearing is provided for under article 50 (1) of the *Constitution*, 2010, which provides thus: -

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body."

21. On what amounts to a fair hearing, reliance was placed on Njoki Ndungu, SCJ. elaboration in the case of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, Petition no 18 of 2014 as consolidated with Petition no 20 of 2014 eKLR, thus;

    (257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of *audi alteram partem* (hear the other side or no one is to be condemned unheard) and *nemo judex in causa sua* (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."

    258. What then are the norms or components of a fair hearing? The Supreme Court of India, in Indru Ramchand Bharvani & others v Union of India & Others, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing Bal Kissen Kejriwal v Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460).

259. That court in Union of India v J.N Sinha & Another, 1971 SCR (1) 791 and C.B Boarding & Lodging v State of Mysore, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In Mineral Development Ltd v State of Bihar, 1960 AIR 468, 160 SCR (2) 909 the court further observed that the concept of fair hearing is an elastic one and "is not susceptible of easy and precise definition."

260. The Court of Appeal at Kampala in Uganda in Obiga v. Electoral Commission & Anor, Election Petition Appeal No 4 of 2011 [2012] UGCA 29 (Obiga) held that in order to determine whether a party received a fair hearing, the Court has to look to the statutes, case laws, and regulations that govern the decision that the Court made.

261. It is important to restate that a literal reading of the provisions of the *Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the european court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court." (See Steel and Morris v United Kingdom, [2005] ECHR 103, paragraph 59).

22. Further reliance was placed on the Court of Appeal case of *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [20161 eKLR, wherein the court observed;

> " As observed earlier, unlike in the old constitutional dispensation, the right to fair trial is now among four other rights that enjoy an eminent special place in the current constitution as an inderogable right. This is the more reason why the court must ensure that the said right is jealously guarded.
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> (76) Article 50 (1) of the *Constitution* imposes a twofold obligation in the dispute resolution process. These are independence and impartiality on the part of the adjudicator, and fairness in the resolution procedures."

23. It was further submitted that this court's decision to proceed with the hearing of the claimant's claim exparte and subsequently delivering judgement on October 8, 2021, in the absence of the respondent and with no proof of judgement notice issued, amounted to condemning the respondent unheard.

24. It was submitted that the technical/connection challenge was an act beyond the respondent's counsel's control, which could not have been used against the respondent. To fortify this submission reliance was placed on the stipulations of article 159 (2) (d) of the *Constitution* of Kenya, 2010, which enjoins the courts and tribunals to administer justice without undue regard to procedural technicalities.

25. As regards who should bear the costs of the application, the applicant submitted that the claimant/ respondent should, considering that it was never given an opportunity to be heard and that the claimant failed to issue a judgment notice for the October 8, 2021. Additionally, the claimant proceeded to draw and fix his bill of costs for taxation before the Deputy Registrar on January 18, 2022, in the absence of its advocates yet no taxation notice or bill of costs had been served them by the claimant's advocates.

The Claimant's/ Respondent's Submissions.

26. The claimant/ respondent submitted that the applicant did not address this court on the principles governing an application seeking to aside a regular judgment, yet it was imperative that it does. Courts have unfettered discretion to set aside and or vary their orders or judgments. However, the exercise of that discretion has to be within the principles that have been developed over time through various court decisions. The principles to set aside an exparte judgement were aptly captured in the case of *Patel v East Africa Cargo Handling Services Ltd* [19741 EA 75 where William Duffus, P stated; -

> " 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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

27. The claimant further cited the case of *Shah v Mbogo* [1967] EA 116, wherein the court expressed itself on the principles, thus;

> " The discretion 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 course of justice".

26. Like any other discretion exercised by court, discretion to set aside and or vary a judgement should be exercised judiciously with reason and not caprice, whim or sympathy. The power should be exercised "with great caution" in view of the public interest in the finality of legal proceedings.

27. The claimant submitted that two days after the hearing, parties received notifications through the e-filing portal on the progress of the case. Despite these notification from the court system, from August 14, 2021 to service of the taxation notice by email on November 24, 2021 the respondent/ applicant did not bother make an application to set aside even though the messages confirmed the matter had proceeded. To the contrary, the respondent attended court for the first time in this matter on February 8, 2022 when it attempted to forestall the ruling on taxation of the bill of costs. On this date the respondent/applicant alleged that it had not been served with the taxation notice which position was not true. Following the respondent's allegation, the Deputy Registrar who was ready to deliver the ruling deferred the ruling to February 14, 2022 for her colleague, and for whom she was stepping in on that day, to handle. The record will confirm that on February 14, 2022, the respondent did not attend court once again and the ruling on the bill of costs was delivered. The respondent/ applicant has deliberately failed to disclose this fact as it is prejudicial to their case.

28. The respondent/applicant has not demonstrated any good and sufficient reason to attract an exercise of the court's discretion in its favour. The application herein was brought five months after judgement notwithstanding that immediately subsequent to the delivery of the judgement, there was notification that the judgement had been delivered. The respondent is an indolent party only intending to delay and obstruct the course of justice.

29. It was further submitted that the applicant's contention that no notice of entry of judgement was served upon them, is premised on a misapprehension of the law. Notice of entry of judgement is a creature of *order 22 rule 6*, which provides thus:

> " Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No 14 of Appendix A:
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> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."
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> It is discernible from the provision that it relates to execution process in cases where there is a default judgement. Where a defendant or respondent has not entered appearance by filing a memorandum of appearance or defense. Where a decree holder wishes to proceed with execution in such cases after obtaining default judgement; the proviso of this rule commands him to serve the defendant or respondent with a notice of entry of judgement, 10 days before commencing an execution process. In the circumstances of this case the provision is not applicable.

30. In response to the applicant's submissions on the right to fair hearing under article 50 (1) of the *Constitution*, the claimant submitted that in determining whether a party's right to fair trial has been violated or threatened, the court ought to consider whether the two justiciable elements of fair hearing, to wit, an opportunity to be heard and whether the opportunity was reasonable were fulfilled. In this case there is no doubt that the applicant was given an opportunity to be heard and the same was reasonable, reliance was placed on the case of *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* (2021) eKLR.

31. It was submitted that article 159(2) of the *Constitution* cannot come to the aid of the respondent's case. The provision is not a panacea for every default.

Determination

32. Considering the application, the grounds upon which the same is anchored, the supporting affidavit, the replying affidavit and the submissions by both counsel for the parties, I distil one broad issue for determination, is the applicant entitled to the orders sought? In determining this broad issue this court has to interrogate whether; in the circumstances of this matter this court can halt the taxation proceedings before the Deputy Registrar as sought; the applicant was served with a notification for delivery of judgement, and if not, what is the impact thereof on the judgment of this court and; the applicant has demonstrated that in the circumstances of the matter it is entitled to setting aside of the judgment herein.

33. The applicant seeks in limb three of the application that the ruling to the claimant's bill of costs that was scheduled for February 8, 2022, be arrested. This is sought on the premise that neither the claimant's party and party bill of costs nor a taxation notice was served on it or its advocate. The claimant in response to this asserted that the bill of costs, the taxation notice and copy of the decree were on the November 23, 2021, served upon counsel for the respondent/applicant via email. I have noted that there is an affidavit of service on record testament to the service. Further, the affidavit of service plus the

documents foretasted were made annextures to the replying affidavit, yet the applicant didn't find it necessary at all to assail their being and the service. If indeed they were not served as alleged, one would expect the applicant to demonstrate that they were not through, a further affidavit. It is curious that even in its submissions, the applicant totally ignored to address this issue.

34. I am persuaded to agree with the submissions by counsel for the respondent that the ignorance was because the facts would militate against the applicant's application.

35. I have gone through the record, it comes out that on the February 8, 2022, when the matter came before Honourable Deputy Registrar, Ms Mutai for delivery of the ruling on the party and party bill of costs, she got constrained to adjourn the same to the February 14, 2022, following an issue raised by counsel for the applicant. On the 14th the respondent's/applicant's counsel was not in attendance of court; the ruling was delivered. It is concerning that despite these premises, the applicant did not at all in its application mention the proceedings of February 8, 2022 in sufficient detail and those of February 14, 2022. I have no reason not to believe that this was deliberate, and state that this is a sad practice exhibited by the respondent's/ applicant's counsel.

36. The ruling was delivered on the February 14, 2022, there is nothing to be arrested.

37. The applicant contended that it was not served with any notification for attendance of court for delivery of the judgment that was slated for the October 8, 2021. The claimant did not adequately or at all respond to this raised issue. The notification that the applicant is talking about in his application is not that contemplated under order 22 rule 6 of the *Civil Procedure Rules*, notice of entry of judgment. The applicant has raised the issue in a very clear manner, I have found considerable difficulty to understand how the claimant would be off mark in his response and submissions on the issue. I agree with the position taken by the applicant that good practice required that the notification be issued, and that notwithstanding this, the claimant's /respondent's counsel did not effect service of the notice.

38. Having stated as I have hereinabove, the question that needs to be answered is then, what is the effect of the non-notification of the judgement date to the applicant? Put in another way, can the failure by the claimant to notify the applicant of the judgment date be a ground for setting aside a regularly entered judgment? Certainly, the answer is in the negative. Effect can only be had on processes post judgment, for instance the execution process, a party who was not served can use the failure as a ground for an application for stay of execution of the decree, pending some action. It can be a ground to deprive of the offending party costs or condemn it to pay costs in regard to processes post the judgement. In the context of a judgment delivered without issuance of a notice to one of the parties, it is difficult to understand the assertion that the right to be heard of the applicant was breached.

39. Courts have the discretion to set aside and or vary its judgements or orders. However, the discretion should be exercised for the sole purpose of avoiding injustice or hardship arising from accident, inadvertence, excusable mistake or error. See *Shah v Mbogo* [supra]. It is a discretion that has to be exercised therefore to aid proper administration of justice as between the parties. However, sight should not be lost of the fact that in exercising the discretion consideration of the applicant's is central. It shall never be exercised in favour of an applicant whose conduct is testament that he is a party who is deliberately or otherwise evading or obstructing the course of justice. The exercise must keep in view the public policy demand for finality of litigation.

40. Where a judgment was as a result of non-attendance of court by the defendant in a matter, a positive exercise of the discretion for the applicant can only be where he or she is able to demonstrate that he or she was prevented to attend court owing to a sufficient and genuine reason. The applicant contends that on the hearing date the court had a connectivity challenge and therefore matters never proceeded. I do not find the contention honest. Where the courts get into connectivity challenges to an extent that

it cannot continue with its virtual hearings, matters are adjourned and the reason for the adjournment recorded as such. This court cannot exercise its discretion in favour of a party who has deliberately decided to be uncandid and dishonest to the court. Consequently, I hereby find that the applicant hasn't demonstrated any sufficient and genuine reason for its non-attendance of court.

41. Considering the circumstances of this matter, it is clear that the applicant was given an opportunity to be heard, and that the opportunity was reasonably so given. The two justiciable elements of fair hearing were present. The court invited the parties for a mention to pick a hearing date, the date was picked by consent, but for a reason known to the applicant and its counsel, the applicant did not turn up for hearing. A party who has been accorded an opportunity to be heard but nonetheless decides not to seize the opportunity, cannot be heard to contend that he was not heard in the matter.

42. By reason of the foregoing premises this court concludes that the applicant's application herein lacks merit and it is hereby dismissed with costs.

READ SIGNED AND DELIVERED THIS 20TH DAY OF SEPTEMBER, 2022.

OCHARO KEBIRA

JUDGE