



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Concrete, Structural, Ceramic Tiles, Wood Plys and Interior
Design Workers Union v Intex Company Limited (Cause E559 of 2020)
[2022] KEELRC 12957 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12957 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E559 OF 2020
AN MWAURE, J
OCTOBER 24, 2022**

BETWEEN

**KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOOD PLYS AND
INTERIOR DESIGN WORKERS UNION CLAIMANT**

AND

INTEX COMPANY LIMITED RESPONDENT

RULING

1. By an application dated the 4th of April 2022, the Applicant /Respondent seeks the following orders from Court
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to reopen the application dated September 21, 2020 for the same to be heard on merit.
 - e. That this honourable Court be pleased to discharge/vary/set aside order (ii) of the Court orders dated March 24, 2022, to wit 'the Respondent/Contempnor Mr Vikas Gehlot or the duly recognized Directors of Intex Construction Ltd be compelled to purge the contempt'.
 - f. Cost of the Application be in the cause.
2. The Applicant in the Application states that the Honourable Court issued a ruling dated the March 24, 2022 by Hon Lady Justice Ngibuini Mwaure where the Respondent/Applicant's duly recognized Directors were cited for contempt of Court orders dated October 6, 2020.



3. The Respondent/Applicant was ordered to purge the contempt within 30 days and pay a fine of ksh 50,000/= within 15 days from the date of the ruling.
4. That on the October 6, 2020, the honourable Court issued final orders at an interlocutory stage- during a Mention for directions without affording the Respondent/Applicant herein a chance of being heard.
5. The Applicant says that this is a matter that involves the Claimant trade Union dues to be deducted and remitted to it for employees who are either no longer in the Respondent/Applicant's employ or who belonged to a different Trade Union to which union dues were duly deducted and remitted.
6. That it would be gravely prejudicial to the Respondent/Applicant's rights for it to be compelled to deduct and remit union dues twice for the same employees.
7. The Respondent/Applicant now seeks to re-open the application dated the September 23, 2020 for it to be heard on the merits since the orders that issued therefrom, and which gave birth to the contempt of Court proceedings, were mandatory interlocutory orders that issued without hearing the Respondent/Applicant.
8. The Respondent/Applicant is remaining with twenty (20) days from the date hereof to purge the contempt of Court failing of which its' directors stand the risk of being jailed for three 3 months in a matter where mandatory orders were given during a mention for directions without hearing the Respondent/Applicant.
9. The Application is supported by an affidavit deponed by Allan Rapando an advocate on behalf of the Respondent.

Claimant's Case

10. The Claimant has filed a ground of opposition brought under Rule 9 of the Advocates Practice Rules. It is stated that the rule prohibits advocates from appearing as an advocate in a case where he might be required to give evidence either by an affidavit or even orally. The affidavit sworn on behalf of the Applicant is fatally defective and that the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious issues. I have seen the Respondent submissions which are part of the grounds of opposition.
11. That the affidavit sworn by advocate Allan Rapando is covering contestable issues especially paragraph 13 and are likely to be matters in controversy and he may be required to take a stand for purposes of cross examination; he therefore submits that the entire supporting affidavit sworn should be struck out for reasons aforementioned.
12. The Claimants is also opposed to the Respondent's averments especially in paragraphs 7 & 8 urging the Court to grant prayers sought on grounds of " pending appeal" and yet they have only filed a notice of appeal which was filed on October 15, 2020 without any record of appeal filed to date.
13. The Claimant submits that the Respondent has disobeyed Court orders given on March 24, 2022 and so it does not have clear hand and should not be granted audience by the Court.
14. The Claimant Dishon Angoya on behalf of Kenya Concrete Structural Ceramic Tiles Wood Plys and Interior Design Workers Union concludes that the application is frivolous, malicious and an abuse of the Court process. They further aver that it does not satisfy the threshold for grant of interlocutory orders under rule 5(2)(b) of the [Court of Appeal procedure rules](#) 2016 as they have not established a *prima facie* case with a probability of success. He avers the same be dismissed with costs to the Claimant.



Respondent/Applicants Submissions

15. The Applicant submits that the Court is clothed with ample powers under the law to grant the orders sought. Rule 17(7) of the *Employment & Labour Relations Court (Procedure) Rules* empower the Court to discharge, vary or set aside its orders.
16. The Applicant relies on the case of Samuel Mwinami versus Social Service League and Another 2016 where the Court in considering application seeking to have orders discharged cited the case of *Enock O. Kinara versus Postal Corporation of Kenya*, Cause No 2202 of 2016 where it is said that Rule 17(7) of the *Employment and Labour Relations (Procedure) Rules* 2016 that...such orders of discharge, variation, or setting aside can only be issued on good and sufficient grounds upon application by the Respondents for being dissatisfied with the same. The reason for such dissatisfaction must be set out by an applicant for the Court to vary, discharge or set aside existing orders.
17. The Applicant says its dissatisfaction is that order (ii) of the Court orders dated March 24, 2022 directing the Respondent to purge the contempt effectively condemn the Applicant unheard in a case where the Respondent has an arguable case that is worthy of being heard on merits.
18. The Applicant also cited, inter alia, the Court of Appeal case of *Olive Mwibaki Mugenda & Another* where it is said the Court held that if a Court is inclined to grant final orders at interlocutory stage, this can only be done in exceptional circumstances and the reason for granting such orders must be stated. The applicant says that no reasons whatsoever were advanced by the Court when it gave the orders of October 6, 2020. The applicant argues that the Court proceeded to grant major relief of the claim at an interlocutory stage and gave no reasons for the same which is extremely prejudicial to the rights of the Respondent. The applicant contends that this warrants that the orders sought be allowed.
19. The applicant also cited the case of John Nahason Mwangi versus Kenya Finance Bank Limited for the proposition that Courts should abide by the sacrosanct dictate of *the constitution* in dispensing justice and in particular article 50 of *the Constitution* of Kenya 2010 which guarantee fair hearing to all.
20. The Court has considered the respective pleadings in relation to the application dated 4/4/2022 and in particular prayers 4 and 5 relates to the setting aside of earlier orders issued by this honourable Court. Prayer 4 concerns the orders issued by the Honourable Radido on the 6/10/2020 whilst 5 is on the contempt orders given on the 24/3/2022.
21. Rule 17(7) states that “Any order for injunction may be discharged, varied or set aside by the Court on application by any party dissatisfied with such order”.
22. In my view what the *Rules* envisages the setting aside of orders based purely on the actions and inactions of the parties to the dispute. But the rule cannot be used to set aside orders of Court based on merits of the decision or what is believed to be an undoing of the Court that heard the application or suit. Indeed, in *Mobile Kitale Services Station versus Mobil Oil Kenya Limited & Another* 2004 ECLR cited by the Applicant, it is said that:

“An interlocutory injunction being an equitable remedy, would be taken away (discharged) where it is shown that the person’s conduct with respect to pertinent matters to the suit does not meet the approval of the Court which granted the orders.”
23. This, in my view, applies in relation to the setting aside of ex parte orders and as regards compliance. The Court was unable to come across an authority where an application or suit is reopened under the said rules based on the legal merits of the actions taken by the judge in the disposal of a matter.



24. Nor has the applicant brought to the attention of Court any authority allowing an application in similar circumstances. The case of *Samuel Mwanami versus Social Service League and Another* 2016 eKLR cited concerns ex parte orders and the Court in that case was clear that issues going to merits and demerits of the defence would be given chance in due time. The Court did not allow the subject application in the end.
25. The claimant has faulted an advocate for the applicant deponing the affidavit. The Court will not dwell much on that but finds there would be no reason to reject the affidavit as the facts deponed by the counsel were well within his knowledge.
26. As for the orders given by the Court on the 6/10/2020 the same were made when the applicant's advocate was in Court. The advocate made an oral application to file response within 14 days which the Court heard but deemed it fit to allow the subject application at that stage. The only course of action open after this was to appeal. The applicant filed it on October 19, 2020. The applicant has not filed the record of appeal since then and he has not demonstrated the reason for the inaction. In essence there is no order of stay to the orders given way back by Justice Radido on the 6/10/2020.
27. There is no justification to reopen the application considering the orders were delivered over two years ago and there has been no much effort made in proceeding with the appeal. As for prayer 5 asking the Court to vary, discharge or set aside the contempt orders which came as a result of the orders of the foreshadowed application which are now the subject of Appeal is not found to be merited. The said prayer is dependent on appeal in relation to prayers 4 being heard and being granted. As earlier observed the applicant has not filed the record of appeal and even if he has the same is not in the Court file. The upshot is that the application dated the March 4, 2022 is found to be lacking in merits and is dismissed with costs to the Claimant.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24TH OCTOBER, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

ANNA NGIBUINI MWAURE

JUDGE

