Kenya Union of Commercial Food and Allied Workers v Premier Flour Mills Limited (Cause 271 of 2019) [2022] KEELRC 12899 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12899 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 271 OF 2019

MA ONYANGO, J

OCTOBER 6, 2022

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... CLAIMANT

AND

PREMIER FLOUR MILLS LIMITED ..... RESPONDENT

RULING

1. Before me for determination is the Respondent's Notice of Motion Application dated 11th May, 2022 filed under Certificate of urgency seeking the following orders:-

    a. Spent

    b. That this Honourable Court be pleased to grant leave to the firm of O. M Robinson & Company Advocates to come on record as acting for the Respondent in place of Kimani & Michuki Advocates.

    c. That Pending the hearing and determination of this Application inter-partes and hearing of this application herein this Honourable Court be pleased to issue a Stay of execution of the Judgment and the resultant decree herein and the resultant warrants issued through Mbusera Auctioneers (Spent).

    d. That this Honourable Court be pleased to set aside the Judgment against the Respondent together with all the consequential orders herein and allow the Respondent to unconditionally defend the suit.

    e. That the costs of this Application be provided for.

2. The application is premised on the grounds as set out on the face thereof and the supporting affidavit Diamond Hasham Lalji, the Respondent's director sworn on 11th May, 2022 in which the Respondent

states that it was not aware of progress in this matter as its erstwhile advocates who entered appearance on its behalf did not give the Respondent updates of the suit until it was served with warrants of attachment for Kshs.22,444,420/-. It states that it has a valid defence as is evident from the draft defence filed with the application.

3. The application is filed under Article 50(1) of *the Constitution* of Kenya, 2010, Rules 17 and 38 of the Employment and Labour Relations Court procedure Rules and Orders 10 Rule 10 and 11 of the *Civil Procedure Rules* 2010.

4. In response to the Motion, the Claimant filed a Replying Affidavit deponed by Peter Ngugi, its representative having conduct of this suit on 31st May, 2022. He depones that the Applicant was served and on 2nd July, 2019 the firm of Kimani and Michuki Advocates duly entered appearance on behalf of the Respondent.

5. That counsel on record for the Respondent did inform the Court on 29th November, 2021 that it had not received any instructions from the Respondent.

6. The Affiant deposes that all through the subsistence of this matter the Respondent herein failed and/or ignored to follow up the progress of this matter thus occasioning the grievants great loss.

7. Mr. Ngugi further depones that allowing the application herein will greatly prejudice the Claimant as well as the 57 grievants in this matter who have judgment entered in their favour.

8. Mr. Ngugi urged this Court to find the instant Application devoid of merit and to dismiss it with costs to the Claimant.

9. The application was disposed of by way of written submissions.

Respondent/Applicant's Submissions

10. In its submissions the Respondent maintained that it had met the threshold for the grant of the orders sought in its Application as provided under Rules 17 and 38 of the Employment and Labour Relations Court (Procedure) Rules, Order 10 Rules 10 and 11 of the Civil Procedure Rules, 2010 as read with Article 50(1) of *the Constitution* of Kenya, 2010. For emphasis the Respondent relied on the decision of the Court of Appeal in the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR where the Court held that blunders of counsel should not be visited upon a litigant by being denied a hearing on the merits of the case.

11. The Respondent/Applicant further relies on the provisions of Article 50(1) of *the Constitution* of Kenya, 2010 and submit that it has a right to have the dispute determine fairly and after hearing their reply. To buttress this argument the Respondent relied on the decision in the case of *John Peter Kiria v Pauline Kagwiria* (2013) eKLR.

12. The Respondent/Applicant further submitted that it has a good case as against the Claimant herein as its defence raises triable issues.

13. It further submitted that the Claimant's Claim sought for payment of unpaid wages in the period between February 2018 and October 2019, during which period the Respondent was not in operation, the same having ceased effective January 2018. That the Claimant is not entitled to the reliefs sought in the Memorandum of Claim by dint of the provisions of Section 17 of the *Employment Act*, 2007.

14. In conclusion the Respondent/Applicant urged this Court to find its application dated 11th May, 2022 with merit and to allow it as prayed.

Claimant's Submissions

15. The Claimant on the other hand submits that judgment in this matter was entered following the Respondent's failure to file its defence in line with the provisions of Order 10 Rule 4 as read with Rule 15(3) of the Employment and Labour Relations (Procedure) Rules, 2016. It further submits that the judgment was regular as the Respondent was properly served with the Court process. For emphasis the Claimant relied on the decision of the Court of Appeal in the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR.

16. The Claimant further submitted that the Respondent having been aware of the matter failed to communicate with its counsel on record on the progress of the matter. That it has further failed to show any steps it took to prosecute the matter and is therefore estopped from blaming its advocates on record. To buttress this argument the Claimant relied on the decision in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR where the Court held that each party has a responsibility to show interest in and to follow up its case even when it is represented by counsel.

17. The Claimant further submitted that Counsel on record for the Claimant at the inception failed to conduct this matter diligently and to execute the instructions diligently and is therefore guilty of professional negligence. The Claimant submits that it is entitled to enjoy the fruits of the judgment entered in its favour. For emphasis the Claimant relied on the cases of *Water Painters International v Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries* [2014] eKLR, *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS (2002) and *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR where the Courts held that a litigant is under a duty to follow up his case to be aware of the proceedings therein.

18. The Claimant further submitted that no evidence has been tendered by the Respondent/Applicant showing interest to prosecute this matter to warrant grant of the reliefs sought in the instant application.

19. The Claimant submits that the application is a waste of judicial time and is only meant to deny it the enjoyment of the fruits of the judgment entered in its favour.

20. The Claimant submits that there is no plausible reason given by the Applicant to warrant the grant of the reliefs sought. To buttress this argument the Claimant relies on the case of *Prime Bank Ltd v Paul Otieno Nyamondi* [2014] eKLR where the Court held that for it to set aside interlocutory judgment, the Applicant must offer a plausible reason and/or explanation for its failure to enter appearance and file defence in the manner prescribed under the Civil Procedure Rules, 2010.

21. The Claimant submits that there is no grounds given to warrant the exercise of this Court's discretion in setting aside the default judgment entered herein in line with the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010 and that all court processes were duly served upon the Respondent thus the default judgment was regularly entered.

22. The Claimant further argues that the draft defence attached to the Respondent's application does not raise any triable issues and can therefore not form a basis of setting aside of the default judgment entered in its favour. For emphasis the Claimant relied on the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) KLR where the Court held that for a default judgment to be set aside an applicant must demonstrate that it has a defence on merit.

23. The Claimant further submits that the allegations as raised in the draft defence have not been proved by the Respondents and in particular that the issue of constructive dismissal of the grievants does not

arise as the Respondent failed to notify the grievants of any changes as a result of which they continued reporting for duty as required under law.

24. The Claimant avers that the Defence as raised by the Respondent is therefore unsustainable, discloses no defence in law and is only meant to delay the cause of justice. The Claimant urged this Court to accordingly dismiss the application with costs to the Claimant.

Analysis and Determination

25. I have considered the application, affidavits, submissions and authorities cited by the parties. The issues for determination are: -

    a. Whether the firm of M/s O.M. Robinson & Company should be granted leave to come on record for the Respondent in place of the firm of M/s Kimani & Michuki Advocates;

    b. Whether the Applicant has met the threshold for setting aside and/or varying of the Court's judgment to allow it unconditionally defend this suit;

    c. Whether the Application dated 11th March, 2021 is merited.

26. On the first issue whether the firm of Coulson Harney LLP Advocates should be granted leave to come on record for the Applicant post judgment, Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

27. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of S. K. Tarwadi v Veronica Muehlmann (Supra) where the Judge observed as follows:

> " ...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

28. From the Application filed in Court there is no indication that the firm of O.M. Robinson & Company Advocates served the firm of Kimani & Michuki Advocates with its application dated 11th May, 2022. There is no affidavit of service of the application upon the former advocates.

29. The Respondent/Applicant has therefore not met the threshold as set out in Order 9 Rule 9 of the Civil Procedure Rules, 2010. This is sufficient reason to dismiss the application. I will however also consider the substantive prayers in the application.

    Whether the Applicant has met the threshold for setting aside and/or varying of the Court's judgment and to further be allowed to unconditionally defend this suit

30. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

> [Order 10, rule 11.] Setting aside judgment
>
> Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

31. From the foregoing this Court is bestowed with unfettered discretion to set aside and/or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations. In Patel v East Africa Cargo Services Ltd (1974) EA 75 this principle was expressed as follows:

> " 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 ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

32. The Applicant in the instant application attributes the failure to file defence to an inadvertent error on its part that was occasioned by lack of communication between the Applicant and its then counsel on record Kimani & Michuki Advocates. The Applicant further contends that it only became aware of the progress of this matter when it was served with warrants of attachment.

33. The Respondent further contends that it is ready and willing to defend this matter and should not be punished for the mistakes of its Advocates. It states that it has an arguable defence and should therefore not be condemned unheard.

34. The Claimant on the other hand maintains that the Respondent was properly served with all the Court processes and that Counsel on record for the respondent duly attended Court but failed to file the appropriate responses as required under the law.

35. The Claimant further avers that the Respondent's failure to follow up its case is inexcusable and is only meant to delay it from enjoying the fruits of judgment entered in its favour.

36. In the case of *Shah v Mbogo* (1967) E.A 166 at page 128B the Court held –

> " This discretion to set aside an ex-parte judgement 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 cause of justice."

37. The record of the Court shows that Counsel for the Applicant was in Court on 29th November 2021 and informed the Court that he had lost touch with the Applicant. It proposed to be given time to file an application to cease acting which application has never been filed.

38. It is further on record that on 13th December 2018 when parties met before the Conciliator appointed by the Minister for Labour to reconcile the parties under Section 62 of the *Labour Relations Act*, the Respondent was categorical that although the company closed down, the workers had neither been terminated or declared redundant. There are several letters on record where the Respondent promised to settle outstanding wages, among them a letter dated 24th January 2019 addressed to the Claimant at page 12 of Claimant's bundle.

39. The Applicant's argument that it was its Counsel's fault that that it did not file defence to the claim is therefore not plausible since it is the Advocates who lamented to Court that the Respondent could

not be traced. As was stated in the case of Savings and Loans Limited v Susan Wanjiru Muritu (supra) a case belong to a litigant and not her advocate. It is the duty of the litigant to constantly check with Counsel. We cannot have a case where Counsel laments that the client cannot be reached while the client blames Counsel for not getting in touch with him. As rightly observed by the Court in that case:

> " For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant."

40. I also agree with the Claimant that the draft written statement of response is a sham, the Respondent having admitted to owing outstanding wages in several correspondence, including the letter dated 24th January 2019 at annexure 12 of the Claimant's bundle. The draft defence consists of mere denials and does not justify reopening of the case.

41. I find that no sufficient reason has been given by the Respondent for its failure to file defence despite taking part in the proceedings.

42. This Court is a Court of equity. Equity aids the vigilant not the indolent. From the reasons advanced for failure on the part of the Respondent to file defence, it is clear that the Respondent is not keen to defend this matter and slept on his rights. It is the view of this Court that the Respondent deliberately sought to delay or obstruct the course of justice by failing to properly instruct is Counsel or file defence. It can therefore not rush to Court at this point in time to seek the Court's indulgence.

43. I accordingly find no justification to exercise my discretion in favour of the Applicant with the result that the application is dismissed with costs to the Claimant.

44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF OCTOBER 2022

MAUREEN ONYANGO

JUDGE