



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

COURT NAME: ELDORET LAW COURT

CAUSE NUMBER: ELRC.C/283/2017

CITATION: KENYA NATIONAL PRIVATE SECURITY WORKERS UNION VS BOB MORGAN SECURITY SERVICES LTD

RULING

1. By a Motion dated 5th November, 2020, the respondent sought orders among others that there be a stay of execution of the Judgement delivered on 14th November, 2019 and further that the respondent's application dated 3rd January, 2020 be reinstated.
2. The application was based on the grounds among others that the honorable Court delivered its judgement on 14th December, 2019 allowing the Claimant's claim against the respondent and that the respondent had instructed the firm of Neriko and Company Advocates to act for it in the matter but the said firm did not act to defend the respondent's interest in the matter. The matter proceeded ex parte without hearing the respondent's response to the claim hence the respondent was condemned unheard. The applicant further stated that despite instructing an advocate to act for it in the matter, the Claimant kept effecting service upon the respondent and not upon the respondent's advocate.
3. The application was further supported by the affidavit of one rose Kosgey who deponed on the main that: -
 - i. THAT I work with Respondent/Applicant as a Manager in its Eldoret Branch fully conversant with issues touching on employees stationed at the Eldoret and have been authorized by the Respondent/Applicant's Board to swear this affidavit and therefore competent to swear this affidavit.
 - ii. THAT I am aware that Claimant /Respondent filed a Statement of Claimant against the Respondent /Applicant on 15th February, 2017 and proceeded to effect service upon the Respondent /Applicant.
 - iii. THAT I am equally aware that on 2nd March, 2017 the Respondent /Applicant instructed David Neriko Advocates of Neriko and Company advocates to act for the Respondent/Applicant in the matter.
 - iv. THAT having instructed an Advocate to act for it in the matter the Respondent /Applicant expected the advocate to defend its interests in the matter y not only entering appearance but by also filing the necessary pleadings in response to the Statement of Claim and is actually aware that the advocate filed a Memorandum of Appearance dated 8th march, 2017 on 8th March, 2017.
 - v. THAT having an advocate on record, the Respondent/Applicant expected the Claimant/Respondent to indeed be effected service of court processes upon the Respondent's advocates but the Claimant/respondent kept serving the Respondent /Applicant and the Respondent /Applicant was of the view that the Claimant /Respondent had equally served the advocates with the documents.
4. The application dated 3rd January, 2020 sought orders among others that the ex parte judgement herein be set aside and that the execution of the decree and all consequential orders pursuant to the judgement delivered on 14th November, 2019 be stayed and that the respondent be granted leave to defend the suit by filing its defence within 14 days from the date of the application.
5. This application was supported by the affidavit of one D. Michieke who deponed on the main that:
 - i. THAT I am the administration Manager of the defendant company duly conversant with issues pertaining to this suit and with the requisite authority to make this affidavit on behalf of the company.
 - ii. THAT we forwarded the same to our advocate to enter appearance and file defence on our behalf on 2nd March, 2017.
 - iii. THAT our advocate on record filed the memorandum of appearance on 8th/03/2017.

iv. THAT our advocates on record have never been served with hearing notices till when were served with the bill of costs that is when our Advocate on record informed us that they have never been served.

v. THAT we have a good defence that raises serious triable issues.

6. Mr. Odima for the Claimant filed a replying affidavit to the application dated 3rd January, 2020 (although he erroneously referred to the same as dated 22nd January,2020). He stated among others that: -

i. THAT I am a male adult of sound mind and I am the current branch secretary of the claimant Union herein with authority to swear this affidavit.

ii. THAT the dispute herein was filed in Kisumu Employment and Labour Relations Court on 15th February, 2017 as cause number 44 of 2016 before being transferred to Eldoret as cause number 283 of 2017.

iii. THAT the judgement was delivered on 14th November, 2019 at Eldoret Employment and Labour Relations Court before Hon. Justice Abuodha Jorum Nelson.

iv. THAT, the Respondent applicants claimed that they entered appearance on 8th March, 2017 which is not true.

v. THAT, the Claimants in this case have been serving the court documents to the Respondent branch Manager in Eldoret who had been acknowledging.

vi. THAT we now urge this honorable court to disallow the Applicant as its lacks the merits in the law.

7. The Motion dated 3rd January, 2020 was first listed for hearing on 11.2.2020. From the record, it is not clear what happened on 11th February, 2020.

8. On 14th February ,2020 the respondent listed the application for hearing on 24th March, 2020. Once again there is nothing on record over what happened on 24th March, 2020 however the Court takes judicial notice that around this time COVID-19 had been declared a pandemic and Court operations might have been slowed down and or suspended.

9. On 8th October, 2020, the matter was mentioned online and one Adongo appeared holding brief for Neriko for the respondent /Applicant. Mr. Odima for the Claimant was absent on that day.

10. The Court on this day directed that the respondent/Applicant files submissions in support of the application and serves the Claimant who was to respond within 7 days. The matter was then scheduled for mention on 22nd October 2020 for allocation of ruling date.

11. On 22nd October, 2020 when the matter came up as directed by the Court only Mr. Odima for the Claimant was present. Mr. Neriko for the respondent/Applicant was absent and no one present was holding his brief. Further no submissions had been filed as per the court's directions given on 8th October, 2020. The Court consequently dismissed the application dated 3rd January, 2020 for want of prosecution.

12. The application dated 5th November ,2020 to which this ruling relates, seek more or less similar orders as the one dated 3rd January,2020 except that it further seeks reinstatement of the application 3rd January, 2020.

13. If the court were to grant an order of stay of execution of the judgement delivered on 14th November, 2019, of what purpose would be application of 3rd January, 2020?

14. Counsel for the respondent has not attempted to explain under what circumstances there was failure to comply with the directions of the Court regarding filing of submissions on the application of 3rd January, 2020 as directed by the Court on 8th October, 2020.

15. Further the respondent's counsel has not explained or offered any excuse for his absence before Court on 22nd October, 2020 when the matter came up for mention to confirm filing of submissions by the respondent/applicant on that application of 3rd January, 2020.

16. The foregoing having been said, on the merit of the two applications, this ruling relates to the one of 3rd January, 2020. The main thrust of the two applications was that the previous advocate on record did not competently defend the respondent when it failed to file a defence hence the respondent was condemned unheard and further that the mistakes of an advocate should not be visited upon the client. The respondent further stated in both applications that the Claimant continued to serve the respondent directly with documents and notices yet they had an advocate on record.

17. Stopping here for a moment, would it be right for the respondent to continue to sustain the contention that they had no knowledge of the developments in the claim herein pending before court? I think not. The fact that the Claimant continued to directly serve the respondent with court documents and notices may have been unprocedural but there is nowhere in the two applications where the respondent alleged any form of protest to the action by the Claimant in serving them directly while they had an advocate on record.

18. The Claimant on its part justified the direct service on the respondent on the fact that they had never been served with any memorandum of appearance from any advocate since they first served the respondent with summons to enter appearance,

19. The respondent ought to have taken cue from the act of the claimant persisting to serve them with Court papers and contacted their counsel on record to find out why they continue receiving correspondence and documents with regard to the case yet he was on record.

20. Whereas the respondent seems to blame the previous advocate on record for not effectively representing it, the respondent is equally guilty of laxity in not following up on their case with the Claimant when they ignored to find out why they continued to be served with documents yet they had an advocate on record.

21. In the case of B. Mach Engineers Limited v. James Kehoro Mwangi (2011) eKLR the Court of Appeal held that :-

“It is not enough to simply accused the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not an excusable mistake which the court may consider with sympathy. The client has a remedy against such an advocate.

22. Further in the case of Habo Agencies Ltd.v. Wilfred Odhiambo (2015) eKLR the Court of Appeal held that: -

“It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgression in the conduct of litigation. Courts have always emphasized that parties have a responsibility to follow up their cases even when they are represented by Counsel”

23. Guided by the above decisions of the Court of Appeal and having carefully considered the two applications, that is the present one dated 5th November, 2020 and the one of 3rd January, 2020 sought to be reinstated. I am not persuaded that there is any merit in both applications. They are hereby dismissed with costs.

24. It is so ordered.

DATED AT ELDORET THIS 22ND MARCH, 2021

DELIVERED AT ELDORET THIS 22ND DAY OF MARCH, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

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