



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT MOMBASA**  
**APPEAL NO. 30 OF 2020**

**(Being an appeal from the entire ruling and order of Hon. C.N Ndegwa, Senior Principal Magistrate, delivered on 07.12.2020 at Mombasa in Employment and Labour Relations Cause No. 460 of 2018 in the Chief Magistrates' Court at Mombasa, Andrew Mwasame –Versus- Unigroup Transporters Limited)**

**UNIGROUP TRANSPORTERS LIMITED....APPELLANT**

**- VERSUS -**

**ANDREW WANYONYI MWASAME.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> April, 2021)

**JUDGMENT**

The appellant filed the memorandum of appeal on 18.12.2020 through Matata & Mwabonje Advocates LLP. The appeal is against the Ruling by Hon C.N Ndegwa delivered on 07.12.2020. The appellant sets out the grounds of appeal that the learned trial Magistrate erred in law and fact:

- a. in dismissing the appellant's application dated 18.02.2020;
- b. in not considering that the appellant had deposited the entire decretal sum plus costs in a joint interest earning account of both advocates;
- c. by not allowing the appellant's case to be heard on merit yet the respondent had misled the court into getting a judgment in his favour;
- d. in not allowing the case to be heard on merit yet the appellant had shown that it had a triable case;
- e. by disregarding the appellant's evidence set out in the affidavits showing why the respondent was not able to participate in the hearing of the case; and
- f. by disregarding and ignoring the submissions of the appellant.

The appellant prays for orders:

- a. Spent.
- b. That the Honourable Court be pleased to set aside the judgment of the lower court delivered on 27.11.2019.
- c. That the appellant be granted leave to file a response to the respondent's memorandum of claim.
- d. That costs of the appeal be borne by the respondent.

The circumstances of the appeal are as follows. The respondent instructed M/S Otieno Asewe & Company Advocates to serve a demand notice dated 11.10.2020 upon the appellant with respect to claims about the dismissal of the claimant by the respondent from employment. Subsequently the Advocates filed suit and served the summons and the memorandum of claim upon the appellant on 11.12.2018. The appellant acknowledged service by stamping and signing. The appellant did not enter appearance or file a statement of response to the

memorandum of claim. On 19.03.2019 the appellant was served a mention notice and acknowledged service but failed to attend Court on 01.04.2019 as was fixed, and, the suit was fixed for hearing on 29.08.2019. The appellant was served with the hearing notice but failed to attend Court on the hearing date. The hearing proceeded ex-parte on the scheduled date.

The trial Court delivered judgment on 27.11.2019 for the respondent against the appellant. The trial Court found that the respondent was employed by the appellant on 18.08.2017 and the employment terminated on 02.06.2018 and the last monthly salary was Kshs.20, 000.00. It was further found that the respondent went on sick leave with the approval of the appellant's Human Resource Manager but when the respondent returned back to work he was told that the management had terminated his employment. The respondent had testified to support his case and the trial Court found that he had proved his case to the required standard and granted prayers (a), (b), and (c) of the memorandum of claim dated 29.11.2018.

The appellant filed a notice of motion on 18.02.2020 seeking to set aside the judgment delivered on 27.11.2019 admitting the service of the summons and the memorandum of claim on 11.12.2018 and alleging it immediately instructed Tom C. Ambwere Advocates to act in the matter but unfortunately, the said advocates did not file any pleadings in defence of the case. It was urged that the appellant would suffer substantial loss if the judgment was not set aside and the orders sought be granted in the interest of justice. The application was based on the supporting affidavit of Mercy Njoroge, the appellant's Human Resource Manager. The affidavit exhibits a letter by the advocates dated 15.04.2019 where the advocates mention the case between the parties herein. It was stated that the appellant was desirous of defending the suit and that it had a defence which disclosed compelling issues for trial. The affidavit did not exhibit a proposed statement of response to the claim or state the facts of the alleged triable issues subject of the alleged triable issues.

The trial Court considered the appellant's application and delivered the ruling on 07.12.2020. The trial Court, in dismissing the application with costs stated as follows:

**“It is common ground that the respondent was served with summons to enter appearance and the memorandum of claim but it did not enter appearance and/or file a defence/response to the claim within the time stipulated in law. The respondent was also notified of every step in the litigation including the date when the matter came up for hearing on 29/8/2019. The judgment that was delivered on 27/11/2019 is therefore regular and can only be set aside if there is a defence on merit as was held in the case of Shah-Vs- Mbogo [1976] EA 116. No draft defence has been attached to the application. It would therefore be meaningless to set aside a regular judgment when there are no triable issues to go to trial.”**

The Court has considered all material on record in this appeal including the submissions filed for the parties. The issue for determination is whether the trial Court erred in fact or law in finding that the appellant's application to set aside the judgment lacked merits.

The point urged for the appellant in the submissions appears to be that as was held in **Mbeki & Others –Versus- Macharia & Another [2005] EA 206**, the right to be heard is a valued right, and, it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. The appellant does not dispute the finding by the trial Court that in the instant case, the appellant had been afforded an opportunity to be heard because service had been duly effected upon the respondent but the appellant had failed to take steps to participate in the Court processes and proceedings. Thus the law being as per the case cited for the appellant, the Court finds that in the circumstances of the present case, the authority does not aid the appellant's case.

The appellant also cites **Martha Wangari Karua –Versus- IEBC, Nyeri Civil Appeal No. 1 of 2017** where it was held that the rules of natural justice require that the Court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be. However, the Court has found that in the instant case the appellant did not raise any particular triable issue, even a weak one in that regard. Thus the Court finds that the appellant's case fails to meet the test set in the cited authority.

The Court further finds that as submitted for the respondent, it was not enough that the appellant had instructed an advocate to act in the matter who then let the appellant down by failing to take steps in the case. The material before the trial Court shows that the advocates the appellant says had appointed to act in the suit never filed a notice of appointment of advocates and the appellant was personally and directly served with all the Court processes and papers. As urged for the respondent, the Court finds that it was therefore unfounded for the appellant to sit back and fail to take charge of the pending case under the pretext that it had appointed an advocate to act. The Court further returns that the advocates having never filed a notice of appointment before the trial Court and all processes in the suit having been personally served upon the appellant, it was misconceived for the appellant to allege mistake by counsel whereas the record shows that in fact the appellant was personally in charge of the suit and had not appointed counsel to act. The Court finds that the private communication between the Advocate and the appellant did not amount to matters on the trial Court's record as constituting the required notice of appointment of the Advocate to act in the matter.

The appellant urges that under section 3A of the Civil Procedure Act, nothing in the Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. For the respondent it is submitted that the Court's duty is to do substantive justice to the parties without undue delay as espoused in Article 159(2) (b) and (d) of the Constitution and sections 1A, 1B and 3 of the Civil Procedure Act. Further, justice does not aid the indolent. The Court has considered the parties' respective positions and it is clear that section 3A of the Civil Procedure Act provides for inherent powers of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the court's process. In the instant case the appellant has not demonstrated a single triable issue and had further failed to appear and attend before the trial Court despite relevant service having been effected directly upon the appellant. The Court therefore finds that the prayers for setting aside the trial Court's judgment, if granted, would thereby entrench an abuse of Court process. In particular, the Court recalls that section 3 of the Employment and Labour Relations Court Act, 2011 provides that the principal objective of the Act is to enable the Court to facilitate the just, expeditious and proportionate resolution of the disputes governed by the Act. Further, the section provides that the parties and their representatives shall assist the Court to further the principal objective and to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court. The Court finds that the appellant's conduct in the instant case was inimical to the stated statutory principal objective and the appeal is found lacking in merits.

In conclusion judgment is hereby entered for the respondent against the appellant for the dismissal of the appeal with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 23<sup>RD</sup> APRIL, 2021**

**BYRAM ONGAYA**

**JUDGE**