REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISCELLANEOUS NO. E079 OF 2020

ROY TRANSMOTORS.....APPLICANT

VERSUS

1. JOSEPH MBILU ODHIAMBO

2. MBUSERA AUCTIONEERS.....RESPONDENTS

RULING

1. The Applicant filed a Notice of Motion Application dated 22nd December 2020 arising from **ELRC No. 1317 of 2014 - Joseph Mbilu Odhiambo *v* Roy Transmotors Limited**. The Applicant seeks for several Orders with the pending orders for consideration by this Honourable Court being that the judgment issued on 12th May 2020 be set aside; that the Respondents be restrained from proclaiming the properties of the Applicant; and that the cost of this application be borne by the Respondents. The Honourable Justice Nduma Nderi allowed the application in terms of prayers (c) and (e) of the motion and the Applicant was therefore permitted to change its advocates and an injunction was granted pending hearing of the application *inter partes*.

2. The Application is premised on the grounds that the suit was prejudicial from the onset as the 1st Respondent was not keen on prosecuting the same seeing that he never set it down for hearing after filing the matter on 8th August 2014. That when the matter was set down for mentions for directions before the Deputy Registrar on 6th June 2018, only the Applicant was represented while a similar pattern presented itself on 6th December 2018 and the matter was dismissed for non-attendance. Further, that Judgment in the matter was passed on 12th May 2020 when the country and the whole world was in the crisis of the Covid-19 pandemic and that the Applicant only became aware of this when it was served with a Warrant of Attachment and a Proclamation Notice on 17th December 2020 by the 2nd Respondent. The Applicant asserts that therefore the inadvertencies and omissions by the Counsel on record for the Applicant should not be visited on the Applicant Company. The Application is supported by the Affidavit sworn by the Applicant's Administration Manager, Joseph Mwaka Mutua who avers that the Applicant had vide a letter dated 5th July 2017 requested the 1st Respondent to collect his dues from the HR department but the Claimant has up to date intentionally refused/neglected to collect the same. He annexes to his affidavit copies of the warrant of attachment and a proclamation Notice and avers that unless this Honourable Court issues the Applicant with a restraining order, the Respondents and their agents and/or servants are likely to attach the property of the Applicant. Further, that no prejudice whatsoever will be occasioned and/or suffered by the Respondents upon issuance of the Order to the Applicant and that it is in the best interest of justice that the order is granted pending hearing and determination of this case.

3. The 1st Respondent's Advocate, Namada Simoni, swore a Replying Affidavit dated 15th February 2021 averring that the Applicant is misleading the Court by attempting to depict that action in the matter took place without the knowledge and representation of the Applicant. He urges the Court to refer to the court record to see that the first hearing of the case was on 6th September 2017 before this Honourable Court and where the Applicant (Respondent in *ELRC 1317 of 2014*) was duly represented and applied to adjourn the case. That the Applicant went on to change Advocates in April 2018 and parties appeared before the Deputy Registrar on 25th September 2018 for allocation of a hearing date which was rescheduled to 6th December 2018 by consent. That even though the case was dismissed on the said 6th December 2018, they managed and succeeded in their formal application to have it reinstated on 4th February 2019 in the presence of the Applicant's Advocate, Mr. Kiranga. He further annexes copies of an invitation letter to fix a hearing date 18th April 2019, the affidavits of service with the hearing, mention and judgment notices in support of his averments that the Applicant's advocates were all along aware and involved in the matter in *ELRC 1317 of 2014* up until Judgment was delivered. He asserts that on the date of delivery of Judgment the Applicant was duly represented by the Respondent's Advocate Mr. Karanja who took the Judgment and therefore questions the Applicant's claim that it was unaware of delivery of Judgment. He also annexes copies of the Ruling Notice on the bill of costs served upon the Applicant via email, the certificate of taxation and the decree dated 8th December 2020 to assert that the application is only meant to delay the 1st Respondent from getting what is rightfully due to him since 2014. That the Applicant has only woken from their slumber 6 months after delivery of judgment and instructed another Advocate to come on record and restrain the 2nd Respondent Auctioneers who have been instructed to execute the Decree. He avers that the case belonged to the Applicant and if there had been any difficulties between it and its Advocates then the same cannot vitiate the court process and that since the judgment is reasonable, there is no basis nor cause for the Court to interfere with it. Further, that the court cannot revisit matters of evidence at this stage and that the Application herein should be dismissed in its entirety with costs and allow the 2nd Respondent to continue with the execution.

4. The Applicant submits that the matters contained in the 1st Respondent's Replying Affidavit are matters within the knowledge of the Applicant's previous Advocate on record and not the Applicant in this case. That the duty of the court is to administer justice through the procedures laid down and that while a litigant is at the mercy of their advocate who puts up the case on their behalf, a litigant should not suffer due to the mistakes and errors of their Advocate. It further submits that it has shown the desire to prosecute its case upon being served with a decree and proclamation notice by instructing another firm of advocates to take over the matter. It relies on the case of **Richard Nchapi Leiyangu *v* Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** where the Court of Appeal stated that

it would be unjust and indeed a miscarriage of justice to deny a party who has expressed desire to be heard, the opportunity of prosecuting his case. The Applicant submits it has clearly stated in its application that it indeed tried to get in touch with its previous Advocate on record through mails but all was in vain and that said Advocate was indolent. It relies on the case of **Omwoyo *v* African Highland & Produce Co. Limited [2002] 1 KLR** where it was held that time had come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavor. The Applicant further relied on the Court of Appeal case of **Martha Wangari Karua *v* Independent Electoral Boundaries Commission & 3 Others [2018] eKLR** where the Court of Appeal 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 their case may be. It thus urges this Honourable Court to set aside the judgment delivered on 12th May 2020 and give the Applicant a chance to be heard in the main suit.

5. The 1st Respondent submitted that the Applicant has from the onset of the case been represented by advocates of their choice and that it is illogical for it to run to this Court after determination of the case to create an impression that the same proceeded without their knowledge. That he has demonstrated that the Applicant was aware of court proceedings from the outset to the end but chose to ignore them including all the notices served upon its Advocates. He further submitted that the legal threshold to consider before exercising the discretion to set aside an *ex- parte* decision or proceedings is whether the applicant has demonstrated a sufficient cause for not attending court per **Wachira Karani *v* Bildad Wachira [2016] eKLR** and that considering all the circumstances, the facts and evidence on record, the Applicant has miserably failed to explain to this Court the reasons for their non-attendance on 18th July 2019 when the case was set for hearing and Claimant's case was heard and closed. That the Applicant should not blame its former Advocate as the Respondent personally has a duty to follow up on his matter in court, such perusing the court file at the registry and knowing the position. That this is a case of a party out to deliberately evade, obstruct, delay and frustrate judicial process and that there is further no new evidence before the Court or evidence that the Court did not consider the materials on record by the Respondent, the Applicant herein.

6. The 1st Respondent submitted that the Application herein does not have any merit to warrant the exercise of the court's discretion to set aside the said judgment and that it is trite law that orders and judgments are not made for cosmetic purposes. He invited the Court to see through the delaying tactic employed by the Respondent/Applicant to deny the Claimant the enjoyment of the fruits of the judgment. The 1st Respondent submitted that litigation must come to an end. He further urged this Honourable Court to be guided by the case of **CMC Holdings Limited *v* James Mumo Nzioki [2004] eKLR** where the Court stated:

> "The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues." (Emphasis added)

7. The 2nd Respondent did not file any replies or any submissions in respect of the Application herein. The Applicant herein, Roy Transmotors Limited, was a party in Nairobi ELRC Cause No. 1317 of 2014 - Joseph Mbilu Odhiambo *v* Roy Transmotors Limited. A decision therein was rendered after a full hearing where the Respondent in that suit was absent. At all times in the material suit, the Applicant had been represented by a law firm M/s Simiyu Opondo Kiranga & Company Advocates of Upperhill Gardens Block D11, 3rd Ngong Avenue, Off Bishop Road Nairobi. The Applicant now asserts that it was not notified of the matter coming for hearing by its former advocates. This is perhaps a basis for a different action between the Applicant and the former advocates but is not sufficient to dislodge the 1st Respondent from the seat of justice. Having been seized of the case, it was the responsibility of the Respondent to keep tabs on the case and ascertain its progress in the courts. Taking into account all the circumstances, the facts and evidence on record, the Applicant has miserably failed to explain to this Court the reasons for its non-attendance on 18th July 2019 when the case was scheduled for hearing. In conclusion, as no basis has been laid for this Court to exercise its discretion in favour of the Applicant, the motion dated 22nd December 2020 is dismissed with costs to the Respondents. Execution may proceed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE