



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 487 OF 2018

KOLLENGODE VENKATACHALA LAKSHMINARAYAN.....CLAIMANT

VERSUS

KSC INTERNATIONAL LIMITED.....RESPONDENT

(on behalf of the Liquidator)

RULING

1. This ruling relates to the Respondent's Notice of Motion dated 17.9.2020 which seeks the following orders:

- a. This Application be certified as urgent and be heard ex parte in the first instance.
- b. The delivery of the judgment in ELRC NO. 487 of 2018 Kollengode Venkatachala Lakshminarayan vs. KSC International Limited (in Receivership) on 8th October, 2020 before the Hon. Justice Makau be stayed.
- c. The Reply to the Memorandum of Claim dated 29th July, 2020 be deemed duly filed and served.
- d. In the alternative to prayer 3 hereinabove, the Applicant to be granted leave to file a Response to the Claimant's memorandum of claim in ELRC No. 487 of 2018 Kollengode Venkatachala Lakshminarayan vs KSC International Limited (in Receivership) within such a period that the Honourable Court deems fit.
- e. The case be set down for hearing
- f. Costs of this Application be in the cause.

2. The application is supported by the affidavit sworn by Mr. Kereto Marima on 17.9.2020.

3. The Claimant has opposed the application by filing the Notice of Preliminary Objection (P.O.) dated 23.10.2020 and Grounds of Opposition dated even date.

APPLICANT'S CASE

4. The applicants case is that its Receiver saw the suit on the cause list on 29.6.2020 and on 30.6.2020 he notified his current Advocates; that the Advocates filed Notice of Appointment in the matter on 6.7.2020 and attended court virtually on 23.7.2020 and sought leave to file defence; that the counsel believed that the leave was granted and the court fixed the matter for mention on 30.7.2020; that the counsel filed defence on 29.7.2020 but on 30.7.2020 the court indicated that no leave to file defence was issued and proceeded to fix the matter for judgment on 8.10.202.

5. The Applicant contends that if the application is declined, it will suffer prejudice because it will be condemned unheard. It further contends that it has a defence which raises triable issues that it is in the interest of justice that the application be allowed. Finally it believes that the Claimant will not be prejudiced by the granting of the orders sought.

For emphasis it relied on case of **Pinnacle Projects Limited v Presbyterian of East Africa, Ngong Parish & Another [2019]eKLR and George Buoro v. Kenindia Assurance Company Limited[2018]eKLR** where the courts discussed the right to hearing where an intended defence raised triable issues.

CLAIMANTS CASE

6. The Preliminary Objection by the Claimant is grounds that instant application is res judicata and the court is *functus officio* in view of the denial of a similar application on 23.7.2020.

7. In addition the Claimant opposed the application on grounds that the applicant is asking the court to reopen the matter without seeking to set aside the existing proceedings; and that the application is fatally and imminently convoluted and if allowed the court will find itself in paralysis.

8. He submits that the service of summons has not been denied and the delay to file defence for 2 years has not been explained. Finally he submits that the facts of this case are distinguishable from that in the case of **George Buoro v. Kenindia Assurance Company Ltd** [supra] because in this case the blame is on the Respondent personally while in the later case the mistake was on the part of the counsel and as such the court could not visit on the innocent client the mistakes of its counsel.

9. In the Claimant's view the Claimant slept on its right to file defence for 2 years without any just cause and as such the application should be dismissed with costs. For emphasis he relied on **Wayua James & another v. Daniel Kipkorong Tarus** and **Another[2014]eKLR** where the court dismissed a similar application because of delay and inaction by the applicant which was found to be inexcusable.

ISSUES FOR DETERMINATION

10. There is no dispute that the Respondent was served with summons to enter appearance and the claim herein. The issues for determination are:

- a. Whether the application is res judicata
- b. Whether the application is incapable of being granted.
- c. Whether the leave sought should be granted and the suit set down for hearing.

Res judicata

11. It is trite law that a matter is res judicata if the same has been adjudicated upon and conclusively determined by a Court of competent jurisdiction. In this case the Claimant stated that the applicant orally made a similar application in court on 23.7.2020 and the same was dismissed.

12. I have perused the court record for 23.7.2020 and found no determination of verbal application for leave to file defence or to have the one filed deemed as properly on the record. After listening to the counsel for the two sides the court fixed the matter for mention on 30.7.2020 for further orders.

13. On 30.7.2020 the defence counsel told the court that she had filed defence but the Claimant maintained that the trial had closed and no defence could be filed without the leave of the court. No leave application was sought that day and the court reserved the matter for judgment on 8.10.2020 since the Claimant had filed final submissions.

14. In view of foregoing flash back on the chronology of events from the court record, I find that the court did not hear and conclusively determine similar application to the instant one as alleged. Consequently I hold that the Preliminary Objection by the Claimant is unfounded and proceed to overrule it.

Is the application incapable of being granted.

15. The Claimant contended that since the application does not seek for setting aside of the proceedings that led to reserving the matter for judgments the order sought is incapable of being granted. The Respondent did not respond to the said assertion.

16. It is trite law that parties are bound by their own pleadings and the court does not exist to aid any party who makes poor pleadings. I will hasten to say that in this case it is clear in my mind that the applicant is asking the court to admit its defence that was filed out of time or in the alternative permit the filing of a fresh defence. It is also clear that the applicant is craving for an opportunity to be heard on its defence.

17. However it has not sought for any order of the court to set aside the orders and proceedings that led to the pending judgment. I agree with the Claimant that there is interlocutory judgment entered on 23.5.2019 by which the court directed the Claimant to fix the matter for formal proof because there was no defence on record.

18. I further agree with the Claimant that the hearing was closed by the order issued on 29.6.2020 when the court accepted the Claimant's proposal to dispose the suit by written statement and written submissions.

19. Finally the applicant has not sought for setting aside the order of the court issued on 30.7.2020 by which reserved the suit for judgment on 8.10.2020. All what the applicant sought was for stay or what is commonly called, arresting of the judgment. In view of the proceedings and orders on record, which have not been challenged, I agree with the Claimant that the orders sought vide the instant application are incapable of being granted. Nevertheless I will consider its merits.

Whether leave sought should be granted.

20. The Claimant contend that the Respondent was served with summons to enter appearance plus the claim but failed to take action for two years and no explanation was or has been given. He contended that the default is on the part of the applicant personally and not its counsel.

21. The applicant's response is that it saw the matter in the cause list on 29.6.2020 and acted swiftly by instructing its counsel who entered appearance and filed defence. There is no explanation offered for the inaction from 26.10.2018 when the Respondent was served with summons and the Claim, according to the Affidavit of service on record sworn by Mr. Felix Omondi Owino on 29.10.2018.

22. In **Wayua James & Another V. Daniel Kipkorong Tarus & Another [2014]eKLR**. The court expressed itself as follows in a similar application.

“The order sought is discretionary and convincing submission must be made to satisfy the court that the applicant is deserving of this court's discretion. The delay and inaction by the applicant is found to be inexcusable and not justified and court have never assisted an applicant who was indolent. I am guided by the equitable maxim “equity aids the vigilant not the indolent.”

23. Likewise in this court I find that the applicant has not explained its inaction for about 2 years from the time it was served with summons by the Claimant. It follows that with the said inexcusable delay in filing defence, the application for leave to file defence out of time is denied of merits and it is not in the interest of justice. Consequently, the application is dismissed with costs.

24. As a parting shot I would add that the parties are at liberty to negotiate the matter further and if an agreement is reached, to file it and bring it to the attention of the court through the Deputy Registrar before the date reserved for the judgment. The Respondent is also at liberty to file written submissions within ten days from the date hereon. If it decides not to pursue the matter for its defence.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19TH DAY OF AUGUST, 2021.

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE