



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 276 OF 2018

JONAH MWAURA NGUGI..... CLAIMANT/RESPONDENT

-VERSUS-

SAFARICOM PLC..... RESPONDENT/APPLICANT

RULING

1. Before this Court for determination is the Respondent/ Applicant's application dated 10th May, 2021 seeking for Orders That; -

- 1) **This application be certified urgent and be heard on priority basis.**
- 2) **This Honourable Court be pleased to set aside, vary and or otherwise discharge the orders of this Honourable Court of 4th May, 2021 marking the Court file as closed.**
- 3) **That this Honourable Court be pleased to Reinstate the Respondent's Notice of Motion dated 18th August, 2020 for hearing and determination.**
- 4) **further to prayer 3 hereinabove, this Honourable court be pleased to make such others orders and or such directions as it considers appropriate for the proper, fair and effective determination of the Application before it.**
- 5) **The costs of and incidental to this Application be in the cause.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 10th May, 2021 by the, **Carolyne Kaunda**, the advocate ceased of this matter and based on the following grounds: -

- (a) That, when this matter came up for mention before this Court on 4th May, 2021, the Applicant's/Respondent's Advocate was indisposed and therefore did not attend Court.
- (b) This Court then proceeded to mark the file as concluded and the file was closed. Aggrieved by those Orders the Applicant brought this Application to set aside the orders of Court of that date.
- (c) The Applicant contends that there is an application dated 18th August, 2020 which is pending for hearing, which directions had been issued by this Court (Justice M Mbaru) on 24th August, 2020. The Applicant had complied with the said direction just awaiting to be heard.
- (d) It is stated that the purpose of the mention on 4th May, 2021 was to confirm compliance with the direction of the court issued on 24th August, 2021 which the Respondent/ Applicant had complied.
- (e) That prior to this, this Court delivered its judgment on 23rd September, 2019 and execution proceeding commenced thereafter which was stopped by his Court by a consent order entered by the parties on 25th January, 2020, which allowed the Respondent to file their response to the claim within some set timeline and to deposit the entire decretal sum together with costs in Court within 30 days failure to which execution could proceed.
- (f) The Respondent did not adhere to these timeline basing their excuse on Covid-19 pandemic that constrained their operation.
- (g) Failure to comply prompted the claimant/ Respondent herein to issue a proclamation Notice dated 11th August, 2020 and

warrants of attachment dated 7th August, 2020 and it is at that point that the applicant through its advocates on record released the decretal sum to the claimant.

(h) The Applicant therefore contends that they are still interested in pursuing the Application dated 18th August, 2020 and beseeched this Court to reopen this matter to enable it prosecute the said application.

3. In opposing the application, the claimant, **Jonah Mwaura Ngugi**, swore a replying affidavit on 7th, July, 2021 on the following grounds;

a) The claimant stated that this matter was filed on 7th December, 2018 and served the Respondent who failed to enter Appearance and the matter proceeded as undefended and judgment delivered on the 23rd September, 2019 when he was awarded compensation on Kshs 3,290,083.92 together with costs.

b) Upon execution the Respondent/ Applicant filed an application dated 30th January, 2020 seeking to stay the execution and for the matter to be heard *denovo* which application the parties compromised and recorded a consent to allow the applicant defend the claim on condition that the decretal sum plus costs was to be deposit in Court within 30 days and the applicant granted leave to file its response within 30 days' failure to which execution would proceed.

c) That after obtaining the said Orders, the Applicant failed to act on the said Orders and went to slumber land prompting the claimant to instruct auctioneers in August, 2020 to recover its decretal sum considering that the Orders were vacated by the failure to act on the consent within the stipulated time.

d) That awoken by the said proclamation, the Applicant deposited the said decretal sum on 20th August, 2020 and attempted talking to the claimant advocates to reconsider the proclamation,

e) That correspondences ensure thereafter between the parties, who agreed by consent to release the decretal sum of Kshs 3,594,663 deposited in Court to the claimant and a consent dated 24th August, 2020 was signed by advocates of the parties and the same adopted by the Court on the 28th August, 2020 and the Orders issued on 31st August, 2020. Subsequently the execution proceedings were called off.

f) On 18th February, 2021 the firm of Mohammed Mungai, acting for the Applicant herein, sought to have the matter mentioned on 4th May, 2021 and when the claimant's advocates learned of the said date, they attended Court awaiting the purpose of the mention however since the Applicant's advocate was absent the claimant advocate informed Court that the matter had been concluded and the file closed.

4. The parties herein disposed of the application by way of written submissions with the applicant filing submissions on the 30th August, 2021 and the Respondent on 8th October, 2021.

Submissions

5. The Applicant submitted that this Court has powers under Order 12 Rule 7 of the Civil Procedure Rules to set aside or vary an Order issued *ex parte*. the basis upon which the Applicant prays for the orders to be set aside is that the applicant's Advocate Ms. Carolyn Mutio Kaunda was unwell and therefore could not attend Court on the said date, this according to the claimant is sufficient cause which the court ought to exercise its discretion and allow the application, they reinforced their argument by citing the case of **Wachira Karani v Bildad Wachira [2016] eklr**. It was argued that the powers given to this Court to vary its Orders is unfettered and cited the case of **Joswa Kenyatta – v- Civicon Limited [2020] eklr**.

6. The applicant submitted that their Application dated 18th August, 2020 has not been heard. It was argued that the issues in the said application ought to be heard to settle this matter once and for all. According to the Applicant, their right to hearing under Article 50 of the Constitution will be impeded if they are not given the opportunity to prosecute their application and urged this Court to reopen this matter for the purposes of hearing that application.

7. The Respondent on the other hand submitted on two main issue; whether the Court should set aside the orders making the file closed and whether the court should reinstate the Applicant application of 18th August, 2020.

8. On the first issue, the Respondent submitted that, this Court is *functus officio*. It was argued that the application seeks to reopen this claim and the applicant be allowed to enter appearance and file a defence out of time, stay execution of the judgment and to comply with order of 19th March, 2020. They argued that the applicant had earlier sought for similar orders in their application of 30th January, 2020 which was allowed by consent of the parties and the applicant had been directed to file its response and documents and to deposit the decretal sum within 30 days which the Applicant failed leading to the execution. To stop the execution proceedings, the Applicant herein paid the entire decretal sum therefore the matter is settled.

9. The Respondent maintained that the issue in this claim were fully determined and therefore this Court should not be persuaded to reopen an already moot matter. In this it cited the case of **Jersey Evening Post Limited v Al Thani [2002] JLR 542 at 550** and further reinforced by citing the case of **Evans Kidero V Speaker Nairobi County Assembly & Another [2015] eklr**.

10. On whether the application of 18th August, 2020 should be reinstated, the Respondent submitted that the application has been overtaken by events and should be struck out as the same is no longer capable of being awarded, since the matter was concluded and decretal sum

already paid to the Claimant. It was argued that litigation has to come to an end. In this he relied on the case of **Patrick Gathenya v Esther Njoki Rurigi and Another [2008] eKLR**.

11. The respondent further submitted that to allow the application and reinstate it for hearing would be an outright abuse of the Court process as the applicant consented to the finalization of this matter and to reinstate it would hoodwink the claimant. The claimant relied on the case of **Kivanga Estate Limited V National bank of Kenya Limited [2017] eKLR**.

12. The Respondent in conclusion urged this Court to disallow the application as it lack merit and grant the claimant costs of prosecuting this application.

13. I have examined the averments and submissions of the parties herein. The applicants herein seek orders to have orders of this court of 4/5/2021 marking this file closed varied so that they can prosecute their Notice of Motion dated 18/8/2020.

14. Indeed on 4/5/2021 this court marked this file as closed after the claimant informed this court that the matter had been concluded.

15. On 10/5/2021, the applicants filed this application contending that the matter should not be closed as they have some pending application dated 18/8/2020 which remains unprosecuted to date.

16. On 25/8/2020 this court considered this application and gave directions that the application be served upon the respondent who were to respond within 7 days of service. The parties were also expected to address the application by way of written submissions.

17. The claimant was expected to file their submissions in 21 days and serve upon the respondent. At lapse of the 21 days, the respondent was expected to serve a mention notice to confirm compliance of the court's direction and then the court was to allocate a date for Ruling.

18. From the court record, there seems to have been no action on the file as per the court's direction until 18/2/21 when the applicants sought a mention date.

19. They were allocated 4/5/21 as a mention date. On this date again, the applicants failed to attend court and this is when the court marked this file as closed.

20. From the above events in court the respondents in this claim indeed went to sleep after the direction of the court on 25/8/2020. They have blamed their inability to act on COVID 19 Pandemic.

21. From the court's direction the respondent/applicants were to serve the respondents in 7 days upon service, it is evident that the claimant respondents were served and they filed their replying affidavit on 17/11/2020.

22. From this date the applicants were expected to file their submissions in 14 days and claimant in 21 days upon service.

23. To date submissions on this application have never been filed. It appears that the respondent applicants herein compromised this application because on 17/11/2020, parties entered a consent adopted by court on 28/8/2020. The court allowed release of the decretal sum and taxed costs to the claimant.

24. Execution was stayed upon payment of the decretal sum and taxed costs.

25. It is apparent then that the application that the applicants insist is still pending was overtaken by events.

26. The decretal sum and costs have already been expended to the claimant respondent herein.

27. I do not find any reason to vary the order of this court 4/5/2021.

28. I therefore find this application unmerited. I dismiss it accordingly.

29. There will be no order of costs.

RULING DELIVERED VIRTUALLY THIS 26TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Arema holding brief Kanda for Respondent applicant – present

Abuya for claimants – present

Court Assistant – present