



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 394 OF 2018

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

OAK PLACE HOTEL LTD.....RESPONDENT

RULING

1. On 5th February 2021, **O.N Makau J** delivered judgment in favour of six (6) of the Claimant's members, who had been aggrieved by the termination of their employment, by the Respondent.
2. The Respondent subsequently moved the court by way of Notice of Motion under Certificate of Urgency dated 13th May 2021 and filed in court on 17th May 2021, seeking stay of execution and setting aside of the judgment. The Respondent further sought unconditional leave to defend the claim.
3. The Motion is supported by an affidavit sworn by the Respondent's Managing Director, David Mureithi and is premised on the following grounds:
 - a) That the matter proceeded *ex parte* and a judgment was delivered on 5th February 2021, in favour of the Claimant as against the Respondent;
 - b) That the Respondent was never heard despite having filed its Memorandum of Appearance on 4th April 2018, through its Advocates on record, M/S W.G Wambugu & Company Advocates;
 - c) That the Claimant, despite being served with the Memorandum of Appearance on 6th April 2018, chose to ignore the same and never informed the Respondent's Advocate on record of the mention dates for pre-trial and the hearing date;
 - d) That the Claimant had already filed a Party and Party Bill of Costs dated 22nd February 2021, which was scheduled for taxation on 20th May 2021;
 - e) That there is a real likelihood that the Claimant will proceed to execute for the respective awards granted to the Grievants;
 - f) That the Respondent stands to suffer substantial loss and damage should the Claimant proceed to execute the judgment and decree of the Court;
 - g) That the Respondent's draft Statement of Response raises serious triable issues and it will be in the interest of justice and fairness that the Respondent be granted leave to file the said Statement of Response to enable the Court to determine the matter on merit.
4. The Claimant's response to the Respondent's Motion is by way of a replying affidavit sworn by one of the Grievants, Tecla Musimbi Mativa.
5. Mativa depones that the Claimant Union was not served with any Memorandum of Appearance by the Respondent.
6. Mativa points out that once a party files a Memorandum of Appearance in court, the next pleading to be filed is the Defence and one does not need to be prompted to file their Response.

7. According to Mativa, the Respondent had been served with court process at its premises, on numerous occasions.
8. He adds that the Respondent was aware of the proceedings but neglected and/or refused to inform its Advocates on record and the Claimant should not be made to suffer delay because of the negligence of the Respondent and its Advocate.
9. Mativa further depones that it is clear that the Respondent had no intention of defending the suit and the Respondent's sole purpose was to delay its determination.
10. Mativa concludes that no proper reason has been given for failure to file and serve a Response within the prescribed time.
11. The single issue for determination in this Motion is whether the Respondent has made out a case for setting aside of the *ex parte* judgment entered on 5th February 2021.
12. In its written submissions filed in court on 27th September 2021, the Claimant made reference to the decision in *Shah v Mbogo & another [1967] EA 116* where it was held that the discretion to set aside an *ex parte* judgment:

“... is intended to be exercised to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.

13. According to the court record, the Respondent was served with Notice of Summons on 25th March 2018. The Respondent filed a Memorandum of Appearance on 4th April 2018 but did not take any further action until the present application, which was filed on 17th May 2021.
14. The Employment and Labour Relations Court (Procedure) Rules provide clear timelines in the litigation chain. Of relevance is Rule 13(1) which provides:

(1) If a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.

15. The Respondent accuses the Claimant of failure to notify it of court appearance dates but does not say anything regarding its own failure to respond to the claim within the time prescribed by the Rules of the Court.
16. The Respondent appears to have dumped a Memorandum of Appearance in the court file and thereafter ignored the Claimant's claim. No explanation has been given for this glaring lapse and the only conclusion to make is that the Respondent is a disinterested litigant, who has been woken up by the jeopardy of execution. This Court will not exercise its discretion in favour of such a party.
17. In the result, the Respondent's Motion dated 13th May 2021 is dismissed with costs to the Claimant.
18. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OCTOBER 2021

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JUDGE

Appearance:

MR. WANYANGA FOR THE CLAIMANT

MR. MUGO FOR THE RESPONDENT