



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1516 OF 2014

PETER MUCHA GACHOKA CLAIMANT

VERSUS

PROTOCOL SOLUTIONS LIMITED RESPONDENT

RULING

The respondent, Protocol Solutions Limited filed application dated 3rd May, 2021 and seeking for orders that;

1. *Spent.*
2. *Spent.*
3. *A stay of execution proceedings be granted in relation to any judgement entered herein against Protocol Solutions Limited and its former and current directors Tony Keter and Job Maxwell Ochieng' Ndege respectively pending the hearing and determination of this application.*
4. *In the alternative, pending the inter parties hearing and determination of this application this court be pleased to suspend the Notice to Show Cause dated 31st March, 2021.*
5. *The court be pleased to grant leave to the respondents to file a Notice of Appeal out of time.*
6. *In the alternative the court be pleased to suspend, review and or set aside its judgement dated 30th January, 2017 and order a retrial in the matter.*
7. *Costs of this application be provided for.*

The application is supported by the affidavit of Tony Ketter and on the grounds that he is the director of the respondent has have never been aware of these proceedings nor has he ever given consent to any law firm to represent him in this matter. He is a resident of South Africa and previously carried out business in Mauritius and was never served with summons herein and the director Job Maxwell lacked the capacity to grant consent to any law firm to act on the respondent's behalf save through aboard resolution which was not the case here.

In his affidavit, Ketter avers that he is a director of the respondent and only became aware of these proceedings upon being served with execution notice and letter to show cause on 7th April, 2021 and only learnt then judgement was delivered on 30th January, 2017 and the respondent had been represented by a firm of advocates who had no instructions form him and the director attending had no board authority/resolution to represent the respondent company. All records submitted by the respondent were done without authority.

Mr Ketter also avers that he does not have hands on control over the respondent and was never notified of these proceedings. When the claimant was hired, he was not a director and he was not within the jurisdiction of the court and only visited the country in the year 2018 to be registered as a director without material disclosure of on-going litigation.

It is Mr Ketter's averments that the claims made by the claimant are not justified and without evidence. In October, 2012 the claimant agreed to come to the respondent as a founding member of the company and could not report to work until November, 2012 due to his then employment with Iway Africa Limited employment only commenced between November, 2012 to April, 2013.

The claimant deceived the court and failed to address material facts. The proceedings and judgement herein if allowed to proceed will be a great injustice to the respondent and will allow an illegality. The claimant is benefiting from a miscarriage of justice and from lack of proper participation of the respondent in these proceedings.

In reply, the claimant filed his Replying Affidavit and avers that the application by the respondent is only meant to delay execution of the judgement herein and should be dismissed with costs.

Summons herein were served on 10th September, 2014 and there was appearance and response filed on 18th September, 2014. The matter was heard and upon judgement taxation was done with the full participation of the respondent and through their appointed advocates.

The claimant also avers that Mr Ketter was served pursuant to a court order to advertise the hearing notice through the print media for the examination of the directors and Job Maxwell Ochieng being one of the directors of the respondent was represented by an advocate during the hearing where he testified and denied the claims made and the application has no basis.

There is no action commenced against advocates attending for the respondents, the firm of T.O. K'Opere Advocates if they had no instructions to represent the company as alleged.

Mr Ketter has not disputed that he is a co-director of the respondent and the other director attended court and testified as the then managing director and the orders sought are not deserved.

Both parties filed written submissions.

The respondent as the applicant submitted that the judgement herein should be stayed and set aside together with the notice to show cause based on the court discretion as held in **Esther Wamaitha Njhia & 2 others v Safaricom Ltd Civil Case No.62 of 2011**. Where there is an *ex parte* judgement the court must question whether the respondent was properly served and whether the respondent failed to attend court at the hearing for sufficient cause. The principles governing setting aside of interlocutory judgement as addressed in the case of **Patel v EA Cargo Handling Services Ltd [1974] EA**.

The respondent also submitted that there exists a good cause to justify the grant of the orders sought together with costs.

The claimant submitted that the respondent was properly served with summons and has at all material times been represented by an advocate which matter is not challenged. The respondent was fully aware of these proceedings and participated and filed response and a director, Job Maxwell Ochieng was called and testified during the hearing. In the case of **RM Patel & Partners v Rift Valley Agricultural Contractors Limited & another [2021] eKLR** the court held that it is improper for a respondent to drag internal affairs of the company into court.

The respondent has fully participated in these proceedings and the instant application is only meant to delay execution proceedings and should be dismissed.

Determination

From the Supporting Affidavit of Mr Ketter dated 2nd May, 2021 in support of the instant application he avers that proceedings herein were conducted without his authority and there is no company resolution giving consent to the advocates attending to represent the respondent and so the judgement herein should be set aside and or reviewed and the respondent be allowed to defend the suit.

Under the applicable rules of the court as of 2014, the Industrial Court (Procedure) Rules, 2011 Rule 11 required service of summons upon a respondent and where the respondent is a corporate body such as the respondent herein, Rule 12 thereof applied in the following terms;

12. (1) Service on a corporate body may be effected-

(a) On the secretary, director or any other principal officer of the corporate body;

(b) Where the process server is unable to find any of the officers of the corporate body mentioned in subparagraph (a), by-

(i) Leaving the pleadings at a conspicuous place at the registered office of the corporate body;

(ii) Sending the pleadings by registered courier service to the registered office of the corporate body;

(Hi) Leaving the pleadings at a conspicuous place where the corporate body carries out business; or

(iv) Sending the pleadings by registered post to the last known postal address of the corporate body if it does not have a registered office or postal address.

2) Notwithstanding anything contained in this Rule, a party may, with the leave of the Court, effect service of process by any other method.

There are returns to confirm service upon the respondent company on 10th September, 2014 with a stamp and receipt thereof.

The averments by Mr Ketter that such receipt of summons required prior company resolution and his authority, such are internal governance requirements for the company different and separate from the conduct of proceedings before this court.

Upon the respondent being served, there was appointment of advocates to represent the interests of the company and who attended and participated in these proceedings up and until the execution stage. Where such advocates attended without authority, consent of Mr Ketter or any other director without passing a resolution, such are internal administrative matters for the company to address and cannot be visited against the claimant to address. To invite the court to make a finding that there was no consent between advocate and one director to enter appearance and represent the company herein would be to invite the court to address intimate and internal workings of the company, which is a matter far removed from the jurisdiction of this court.

Under the Rules, there is proper service open the respondent, there was appearance and attendance. The change of advocates is an option available to the respondent company. Such cannot be regulated by the court.

Where there was misconduct by a company director or the appointed advocate, such are matters which any director can address before the appropriate forum far removed from this court.

On whether the court should set aside or stay the judgement herein, the respondent has urged the court to apply its discretion on the grounds that the *ex parte* judgement was entered without proper service and that failure to attend court was for good cause.

Firstly, there is no *ex parte* judgement herein. The respondent was served with summons, there was appearance and defence filed. Secondly, the respondent was present in court at all material times when this matter was prosecuted. The matter is now at the execution stage.

Properly served and having attended proceedings, there is no justification in seeking the setting aside of the judgement herein. There is no interlocutory judgement.

The Notice to Show Cause dated 31st march, 2021 issued and was published to ensure attendance by the respondent.

On the face of the judgement herein, the execution proceedings now in motion, to suspend such notice would be to visit injustice upon the claimant for no good cause. Such notice is procedural, regular and requires compliance.

With regard to the leave sought to file Notice of Appeal out of time, the right of appeal against judgement, ruling and orders of this court is secured in law.

The discretion to enlarge time for such purpose is denied of this court.

On the orders sought seeking to suspend, review and or set aside the judgement of 30th January, 2017 on the findings that the judgement herein was entered with the full knowledge and participation of the respondent, any application seeking review or a variation ought to have been addressed without delay and before execution commenced which is now at an advanced stage.

The delay to apply for review since 30th January, 2017 to date is not explained save for Mr Ketter to urge the court that he is resident outside the country and only returned in the year 2018 to be registered as a director and the fact of this case was not disclosed to him. far from it, internal matters of the respondent cannot serve as a legitimate ground for review of the judgement herein.

The current or former directors of the respondent company were at all material times represented in these proceedings.

The court finds no material to justify the instant application save it demonstrate abuse of court process. The decision in **Mary Wangari Kiarie v Safaricom (K) Limited [2021] eKLR**well resonates here;

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive ...

Accordingly, the application dated 3rd May, 2021 is found in abuse of court process and is hereby dismissed with costs to the claimant.

DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.

M. MBARU

JUDGE