



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2231 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

AMALGAMATED UNION OF

KENYA METAL WORKERS

CLAIMANT/DECREE HOLDER

VERSUS

SOUTHEND MOTORS LIMITED

RESPONDENT/APPLICANT

RULING

1. The application before me for determination is a notice of motion dated 16th September 2020 brought under Order 10 Rule 11, Order 12 Rule 7 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act CAP 21 Laws of Kenya. The Applicant seeks the following orders THAT:-

i) Spent

ii) THAT there be stay of execution of the Judgment entered against the Respondent/Applicant (Judgment Debtor herein) on the 11th December 2020 and all other consequential orders pending the hearing and determination of this application.

iii) THAT the judgment entered against the Respondent/Applicant on 11th December 2020 be set aside.

iv) THAT alternatively this Court be pleased to grant leave to the Respondent to the suit to file their defence, list of witnesses, witnesses statements out of time as per the draft defence annexed to this application that raises cogent triable issues and to be heard on the merit.

v) That this suit be struck out for failure to serve summons to enter appearance.

vi) The cost of the application be provided for.

2. The Motion is premised on the grounds set out in the body of the application and is Supported by the Supporting Affidavit sworn on 16th December, 2020 by MARIE ATIENO LUSENO, the Managing Director of the Respondent/Applicant (Judgment Debtor herein).

3. The Respondent/Applicant contends that the Claimant/Decree Holder filed a suit and thereafter obtained an irregular judgment on 11th December 2020 as summons were never served on the Respondent/Applicant as by law provided under Section 20 of the Civil Procedure Rules.

4. The Respondent/Applicant further maintains that no request for judgment was made in accordance with Order 10 Rule 6 amounting to an error on the face of the record in violation of Article 50 of the Constitution of Kenya.

5. The Respondent/Applicant states that sometimes in the year 2018 the Claimant had intimated it had intentions of filing a suit in relation to the unprocedural and unfair termination of one Martin Wangila Ndalila but since the parties were negotiating the Claimant resolved not to file the same. Further the Respondent/Applicant states that at a later date the same issue was raised and the Respondent/Applicant sought for the Claimant to serve it with the Court documents so that it could take the necessary action.

6. The Respondent/Applicant states that the person purported to have been served namely Kennedy Luseno was not authorized to receive any documents on behalf of the Respondent/Applicant.

7. The Respondent/Applicant states that it did several letters to the Claimant seeking to be served with the pleadings and copied Court and on attempting to file the letters in the Court file, the same was not available.
8. The Respondent/Applicant states that the outbreak of corona virus hindered the Respondent/Applicant from instructing an Advocate until 9th December 2020 when an application was made to strike out the suit on the basis of non-service.
9. The Respondent/Applicant is apprehensive that the judgment entered is for a substantial amount and the Applicant has a strong case in its defence that raises triable issues and failure to allow the current application will condemn the Applicant unheard.
10. The Respondent/Applicant further states that the Claimant/Decree Holder will not suffer any prejudice that cannot be compensated by way of costs.
11. The Claimant opposed the application by way of a replying affidavit sworn by **Rose Omamo** the Secretary General of the Claimant on 14th January 2021. The affiant avers that the suit was filed on the 10th November 2017 and served on the Respondent/Judgment Debtor (the Applicant herein) through Kennedy Luseno who received service by rubberstamping and signing on the documents.
12. The Claimant/Decree Holder states that on the 1st April 2019, it served the Respondent/Applicant with a soft copy of the documents and maintains that the Respondent was properly served.
13. The Claimant/Decree Holder further states that on 30th September 2020 the Respondent/Applicant 's advocate appeared in Court when the matter was coming up for mention but could not address Court as they had not filed their notice of appointment. The claimant maintains that the Respondent/Applicant was all along aware of the existence of the suit but did not take any action to defend the suit and prays that the application be dismissed with costs.
14. Parties took directions to dispose off the application by way of written submissions.
15. The Respondent/Applicant relies on the case of **Philip Kiptoo Chemwolo and Mumias Sugar Co. Ltd v Augustine Kubende [1982] KAR 1036** on the principles for setting aside interlocutory judgment emphasizing that discretion is unconditional and when exercising it, the trial Magistrate exercised discretion judicially to avoid injustice or hardship caused by excusable mistake or error not to assist the Respondent to obstruct or delay the cause of justice.
16. The Respondent/Applicant submits that it had implored the claimant to supply it with the pleadings together with the summons to enter appearance which were never supplied, relying on the case of **Mbaki & Others v Macharia & Another (2005) 2 EA 206**, at page 210 where this Court stated as follows:

"The right to be heard is a valued right it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

17. The Respondent/Applicant submits that the Claimant/Decree Holder failed to serve summons and seeks the Court to strike out the claim or in the alternative to allow the Respondent to defend the claim. The Applicant relies on Order 10 Rule (2) of the Civil Procedure Rules which provides for Affidavit of Service upon non-appearance as follows: -

Where any Respondent fails to appear and the plaintiff wishes to proceed against such Respondent, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court.

18. The Applicant/Judgment Debtor further submits that Order 10 Rule 11 provides for setting aside of judgment entered under Order 10. It relies on the decision in **Al Bin Khamis v Salim Khamis Korobe & 2 Others, [1956] 23 EACA 195**, where it was held inter alia that an order made without service of summons to Enter Appearance is a nullity which must be set aside ex debito justitiae.
19. The Respondent/Applicant submits that the claimant failed to serve and if served the process was flawed. As such it urges the Court to allow the application as prayed.
20. The Claimant/Decree Holder did not file submissions

Analysis and Determination

21. Having carefully considered the notice of motion application, the response and the submissions filed by the Respondent/Applicant the issues for determination is whether the Respondent/Applicant was properly served with summons to enter appearance and whether the application is merited.
22. This matter proceeded before the Court as an undefended claim and judgment was entered on the 11th December 2020.
23. The Respondent/Applicant filed the application before this Court on 22nd December 2020 barely 10 days after the delivery of the judgment seeking to set aside the judgment.
24. The Court has discretion to set aside Ex-parte judgment. However the same must be done on terms that are fair to both parties. The Court is guided by the decision in **Philip Kiptoo Chemwolo and Mumias Sugar Co. Ltd v Augustine Kubende [1982] KAR 1036**.

25. The Court is further guided by the decision in **Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76, Sir William Duffus P** held:

“The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

26. In **Shah v Mbogo**, the Court of Appeal of East Africa held that –

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from 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.”

27. Again in the case of **CMC Holdings Limited v James Mumo Nzioki [2004] eKLR**, 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 to as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.”

28. In the instant case, the claim was first reported to the Ministry of Labour where a Conciliator was appointed. There is evidence on record that the Respondent/Applicant was served with notices to attend conciliation meetings but failed to do so. As a result, the Conciliator issued a certificate dated 22nd October 2017 to the effect that conciliation was not successful and parties were at liberty to escalate the dispute as provided under Section 69 of the Labour Relations Act.

29. In the affidavit of Marie Atieno Luseno in support of the instant application, she states as follows at paragraphs 3, 4, 5, 6 and 7 –

“3. THAT sometime in 2018, while interacting with a Representative of the claimant Benjamin Ogamo in negotiations of the welfare of staff and the renewal of a collective Bargaining Agreement, he intimated to me that the claimants intended to file suit in relation to the unprocedural and unfair termination of Martin Wangila Ndalila but that since parties were negotiating and also due to the economic downturn of the Respondents business the claimant resolved not to file suit.

4. THAT at a further informal meeting in 2010 the subject was brought up again thus the Respondent formally wrote to the claimant and copied the court in a letter dated 30th March 2019 asking the claimant to kindly avail the Court documents in order to allow the Respondent take action in this matter.

5. THAT the Claimant in a letter addressed to myself dated 1st April 2019 reiterated its assertion of having served upon ourselves and also acknowledging the possibility of serving the same upon us to which we responded in a letter dated 2nd April 2019 indicating that the officer of the Respondent whom they allege to have served by the name Kennedy Luseno was not authorised to accept service, and that an officer named Vera Belinda was authorised to receive the unserved documents or any future pleadings.

6. THAT out of abundance of caution and in an effort to unravel the mystery of the suit the Defendant/Applicant copied both letters to court probably seeking the court attention to the predicament facing the Defendant.

7. THAT am reliably informed that the representatives of the Defendant/Applicant who delivered the Court letter to the court registry attempted to locate the file at the registry so as to ascertain the existence of the suit was unable to trace the file.”

30. Further, in the affidavit of service dated 22nd November 2018, Benjamin Ong’amo states that –

“2. THAT on 10th November, 2017, I received two copies of Memorandum of Claim, Verifying Affidavit and annexures therein from the Claimant with instructions to serve the same upon the Respondent.

4. THAT, on the same day, I proceeded to the Offices of the Respondent which I had previously known where on arrival, I introduced myself and the purpose of my visit.

5. THAT, I then served them and in particular, Mr. Kennedy Luseno, with the said copies which he acknowledged receipt by rubber stamping on my copy.”

31. In correspondence between the Respondent/Applicant and Claimant/Decree Holder, between 1st April 2019 and 3rd April 2019, the Claimant/Decree Holder sent to the Respondent/Applicant soft copies of the pleadings. Specifically, the letter dated 2nd April 2019 from the Respondent/Applicant states as follows –

“02nd April, 2019

Ms. Rose Omamo

The General Secretary

Amalgamated Union of Kenya Metal Workers,

P. O. Box 73651 – 00200,

Nairobi

Dear Madam,

Re: EMPLOYMENT AND LABOUR RELATIONS CASE NO. 2231/2017

Your letter dated 1st April in response of ours of 30th March 2019 refers,

Kindly but urgently, furnish us with pleadings in the matter to enable us act accordingly.

Our Mr. Kennedy Luseno informs us that he has not received any summons or court pleadings and will put you to strict proof on the same at the appropriate time, your letter referred to herein, has no annexure as implied by you on paragraph 2 of the same letter.

Take Note: Mr. Kennedy Luseno or any other members of staff is not authorized to receive service on behalf of Southend Motors Limited. Any such documents/ correspondence and service to be done on the undersigned or her able assistant Ms. **Vera Belinda**.

Yours faithfully,

SIGNED

Marie A. Luseno

Managing Director”

32. The response from the Claimant/Decree Holder was that –

“Fw: CAUSE 2231 OF 2017

From: AMALGAMATED UNION OF KENYA METALWORKERS (amalgamated.union@yahoo.com)

To: marieluseno@yahoo.com

Date: Wednesday, April 3, 2019, 12:05 PM GMT+3

Kindly take note that the annexures dated 1st April, 2019 were not accompanied in the hard copy letter but same annexures are in the attachment sent to you via email in the soft copy.

Regards,

Rose

----Forwarded Message-----

From: AMALGAMATED UNION OF KENYA METAL WORKERS <amalgamated.union@yahoo.com>

To: Marie Luseno <marieluseno@yahoo.com>

Sent: Monday, April 1, 2019, 11:21:09 AM GMT+3

Subject: CAUSE 2231 OF 2017

Dear Madam,

Kindly find herein attached the copy of our letter plus all the annexures related thereto in response to your letter dated 30th March 2019.

Regards

ROSE MAMO”

33. From the foregoing, it is clear that the Respondent/Applicant was aware of the proceedings herein and had copies of the pleadings as early as April 2019, long before the suit was first placed before the Court for directions on 29th April 2019 but did not bother to even just enter appearance.

34. In the draft defence filed with the instant application, the Respondent/Applicant pleads as follows at paragraphs 2, 3 and 4 –

2. The Respondent deny each and every allegation contained in paragraph 3.1. 3.2. 3.3. 3.4 and 4.1 of the claimant’s statement and in particular deny owing the claimant a total sum of Being in respect of alleged allowances related expenses, terminal benefits 3 months’ salary in lieu of notice and unpaid pension contributory or any other sum or at all and shall at the hearing hereof put the claimant to strict proof at the hearing hereof.

3. The defendant shall at the hearing hereof contend that the claimant claim if any was fully settled in the sum of through the claimant account No. via electronic money transfer at Co-operative Bank Branch through the respondent national office and that no balance remains unpaid and this claim is therefore an abuse of the court process and the same ought to be dismissed.

4. The Respondent shall further at the hearing hereof contend that the claimant was being paid his salary by the respondent inclusive of his pension contributions to the director of pension and therefore the respondent deny being liable to pay the claimant any alleged pension contributed as alleged.”

35. The same has blanks which are not filled. Further, the same

does not address the issue in dispute which is the unfair, verbal dismissal of the Grievant. Paragraph 4 of the draft defence is particularly baffling as it has no relevance to the issue in dispute. There is no evidence of the averments of settlement of the claim annexed to the application. The draft defence thus raises no triable issues that would merit the Court to reopen the suit to hear the Respondent/Applicant defence.

36. The words of Alnashir Visram J. (as he then was) in **Civil Appeal No. 530 of 2002 Francis Gichuki v Martin Leposo Tamoo** aptly capture the circumstances of this case. Judge Visram stated as follows –

“However, did the facts in the case before this Court giving rise to the default Judgment arise from “accident, inadvertence, or excusable mistake or error”?

I think not. The Appellant here was tardy and disinterested in the outcome of his case. Default Judgment was entered herein because of the failure of his advocate to attend Court on several occasions. Even then he did nothing to set aside that Judgment. He fully participated in the hearing for formal proof, and then waited for a full two years after Judgment was passed, to make an application for setting aside.

*This is definitely not the kind of litigant who deserves the discretion of this Court. In fact, this is the kind of litigant envisaged in **Shah vs Mbogo (supra)** as “a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”*

It is a cardinal principle of justice that there must be an end to litigation. The Plaintiff’s conduct in this case is an affront to that principle. He cannot be allowed to drag the litigation forever. If that is caused by his Advocate, it may achieve more justice if he were to have recourse against the Advocate than to vex the Defendant with this suit indefinitely.”

[Emphasis added]

37. I entirely agree with the findings of Visram J. in above case. Like the Learned Judge did, I find no issues raised in the draft defence filed in Court. I further find that the Respondent/Applicant was properly served with pleadings herein and was thus aware of the suit but did nothing. I find that the actions of the Respondent/Applicant (Judgement Debtor herein) were deliberately intended to delay the suit herein and that it is therefore not deserving of the discretion of this Court.

38. I accordingly dismiss the application with costs assessed at Kshs.10,000/= to the Claimant/Decree Holder.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE