



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.358 OF 2016

CRESENCO CLEOFAS.....CLAIMANT

VERSUS

LANTECH AFRICA LIMITED.....RESPONDENT

RULING

The respondent, Lantech Africa Limited filed application dated 7th September, 2021 under the provisions of the Judicature Act, Article 159 of the Constitution, section 16 and 20 of the Employment and Labour Relations Court Act, Order 12 Rule 2 and 7, Order 51 Rule 1 of the Civil Procedure Rule and seeking for orders that;

1. ...

2. *The court be pleased to grant stay of proceedings including the taxation of the Party & Party bill of costs scheduled for taxation on 21st September, 2021;*

3. *The court be pleased to review, vary and or set aside upon just terms the ex-parte default judgement and all consequential orders hereto entered against*

the respondent / applicant on 28th June, 2021 and the claimant and which the applicant became aware of on 30th August, 2021.

4. *The applicant do attend court on or tender his passport for examination.*

5. *The court be pleased to grant leave to the respondent/applicant to defend and or be heard in the case on merits rather than on procedural technicalities.*

6. *Costs be in the cause.*

The application is supported by the affidavit of Aquinas Wasike and the on the grounds that on 28th June, 2021 the court entered default judgement irregularly against the respondent who was never properly served whether electronically or otherwise and could not attend court for hearing on 20th May, 2021 or at the mention date on 31st May, 2021. The respondent was not served with the written submissions before judgement was entered.

In this Affidavit, Masike avers that he is the chief executive officer of the respondent and that no notice was issued that judgement had been entered against the respondent before the hearing of the matter. It was not until the 30th August, 201 when the respondent learnt of the default judgement herein when they were served with the bill of costs.

The respondent is apprehensive that the claimant who is a foreigner in the Philippines proceeded to give virtual evidence outside the court jurisdiction and without the express permission of the court and the ex-parte judgement therein is irregular and should be varied, reviewed and or set aside.

In reply, the claimant filed his Replying Affidavit and avers that the court fixed the matter for hearing on 25th November, 2020 and on 12th October, 2020 when the respondent was served with a Hearing Notice with respect to the matter scheduled of 25th November, 2020 and failed to attend. The matter was fixed for hearing on 9th February, 2021 and the respondent was served on 1st December, 2020 and there are returns to confirm service save there was no attendance by the respondent.

The claimant also avers that the respondent was at all material times aware of the hearing date on 9th February, 2021 but refused to attend court. There is no good cause demonstrated for such failures.

When the court rescheduled the hearing to 20th May, 2021 the respondent was served but failed to attend. The court received oral evidence via video conferencing and with the advent of COVID-19 pandemic, virtual proceedings have become the new normal and augmented by the Practice Directions of 20th March, 2020.

The claimant also avers that while on 9th February, 2021 he was in Philippines and was unable to make a clear connection via video conferencing and requested for adjournment, this was put into account and allowed.

The execution process has not commenced for the respondent to invoke the provisions of Order 22 Rule 6 of the Civil Procedure Rules. The Chief Justice on 20th March, 2020 issued Practice Directions on Electronic Case Management to allow evidence taking through video conferencing as a measure to address the COVID pandemic.

The judgement herein addressed all pleadings including the response by the respondent and the absence from court was without good cause and the application should be dismissed with costs.

Mr Wasike filed a Further Affidavit and avers that one Robert Mugoha Lidweye who is said to have effected service was not licenced for the year 2020 and hence not authorised to serve pleadings as alleged and contrary to the Supreme Court (General) Directions 2020.

That the stamps on the Hearing Notices are different and not the official stamp of the respondent's advocate.

The court is only authorised to take video evidence from a witness within its jurisdiction unless there is express permissions to do so from the territorial jurisdiction of the court.

Robert Mugoha Lindweye filed a Supplementary Affidavit and avers that he is a licenced process server and he served the various notices and the Affidavits of Service to confirm service upon the respondent.

Parties filed written submissions which are addressed and in issue is whether the court should stay proceedings herein; whether the court should review, vary and/or set aside the judgement delivered on 28th June, 2021; whether the court should direct the applicant to tender his passport for examination; and whether the applicant should be allowed to defend the claim.

The taxation of the bill of costs was scheduled for the 21st September, 2021 which has since been overtaken by events following this application and which removed the matter from the Taxing Master back to this court.

An applicant seeking to review, vary and or have the judgement of the court set aside is regulated under the provisions of section 16 of the Employment and Labour Relations Court Act, 2011 and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and which directs an applicant to do the following under Rule 33(1);

33. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

Hence there must be discovery of new matter, a mistake on the record, need for clarification and a good cause.

Rule 33(3) further requires an applicant to;

(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.

In the entirety of the respondent/applicant application, there is no matter that there is new matter which has been discovered to justify a review, that there is a mistake on the record that requires the court to address or that there is need for a clarification of the judgement.

With regard to sufficient cause or good cause, an applicant has the burden to demonstrate why his/her/its request must be granted or an action excused. There must exist a reasonable and justified reason(s).

In the case of **The Hon. Attorney General v the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011**; sufficient cause was defined to be;

“Sufficient cause” or “good cause” in law means: “... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.

The explanation should not leave unexplained gaps in the sequence of events.

And in the case of **Wachira Karani v Bildad Wachira [2016] eKLR** the court held that;

Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions

In this case on 22nd November, 2019 the claimant through his advocates attended at the registry and was allocated a hearing date for 25th February, 2020. A Hearing Notice was served and received on 24th January, 2020 and there are returns filed to confirm service.

On the due date the respondent failed to attend and the court directed parties to secure new hearing dates at the registry.

On 9th October, 2020 the claimant attended at the registry and was allocated a hearing date for 9th February, 2021 and a Hearing Notice was served on 1st December, 2020 and received by the respondent through the appointed advocates.

On the appointed date there was no attendance.

On 18th February, 2021 the claimant secured another hearing date for 20th May, 2021 and served the respondent, and again there was no attendance. The court satisfied that there was proper service heard the claimant pursuant to the Chief Justice Practice Directions, 2020.

Mr Masika, through advice from his advocates at paragraph 5 of his Supporting Affidavit dated 7th September, 2021 that the hearing did not proceed on the 9th February, 2021 as scheduled and the court fixed the hearing for 20th May, 2021 on which dates the advocates and the respondent were completely unaware of on account of improper service and or lack of valid service of the hearing notice and the reasons he gives for such assertions is that the Process Server, Robert Mugoha Lindweye did not possess a licence to practice in the year 2020. Such averments have since been disapproved; the Process Server had a valid licence of the year, 2020 and authorised to carry out service of any court process.

Even where the respondent was under the mistaken belief that the process server did not have a valid licence, which is not the case here, where service was effected and the hearing date was found not suitable, proper practice allowed the respondent to attend court as directed and urge its case. To sit back and wait for judgement to issue and then rush seeking to review, vary or have the same set aside is abuse of court process.

Through his Affidavit, it is apparent to the court that Mr Wasike the Chief Executive Officer was privy to matters on-going herein but opted not to attend court for the scheduled hearing as required. He cannot purport to state that this was the mistake of counsel.

Far from it. the court finds there was proper service of Hearing Notice. the respondent failed to attend and the claim was heard on the merits.

The court finds no good cause that is sufficient to justify the review and or setting aside of the judgement delivered on 28th June, 2021. The judgement herein is proper and valid.

On the last issue requiring *The applicant do attend court on or tender his passport for examination*, application dated 7th September, 2021 is filed by the respondent as the applicant. Where the intention was to have the claimant/respondent attend instead, this is not apparent from the way the orders sought are couched.

The order thus seeking *The applicant do attend court on or tender his passport for examination* to attend and the findings above and the finding that the judgement herein is valid, such order to summon the *applicant to tender his passport for examination* would serve no legitimate purpose.

Accordingly, application dated 7th September, 2021 is dismissed in its entirety. Costs to the claimant.

DELIVERED AT NAIROBI IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE