



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 438 OF 2016**

**BENSIO NGOTA.....CLAIMANT**

**VERSUS**

**MARKET MASTERS LIMITED.....RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a notice of motion Application dated 6<sup>th</sup> June, 2021 for orders that:-

**1. Spent**

**2. This honourable Court be pleased to review and set aside its judgment and orders delivered on 24<sup>th</sup> May, 2021 in Employment and Labour Relations Court Case No. 438 of 2016 and the application be fixed for a fresh hearing.**

**3. The respondent be granted leave to file a response to the claim, list of witness statements and bundle of documents.**

**4. The costs be in the suit.**

2. The application is premised on grounds set out on the face of the application and in the supporting affidavit of K.M. Mwangi advocate, in conduct of the suit the gravamen of which is that the applicant has a valid defence to the suit. That the failure by the respondent to attend the hearing was not deliberate or out of disregard for the Court process. The failure was due to an inadvertent, mistake on the part of the office of the advocate for the applicant.

3. That at the time of termination, the claimant owed the respondent/applicant and the applicant herein is entitled to claim a set off in the improbable event that this Court finds that any amount is payable.

4. That the applicant entered appearance in the matter on 21<sup>st</sup> April, 2016. That the applicant filed a reply to the claim and a list of documents on 16/12/2016.

5. That the Court notes in its judgment at page 1 paragraph 2 that the respondent did not file any defence. That it would seem the defence was not on record at the time of the delivery of the judgment.

6. That an associate in the applicant's firm of advocates left the firm and did not properly hand over the matter. The claimant did not subsequently serve hearing notice in the matter and the advocates became aware of the matter upon delivery of judgment.

7. That the advent of COVID -19 pandemic in early 2020 further made it more difficult for the applicant to follow up the matter.

8. That the judgment sum is colossal and a grave injustice shall be occasioned the applicant if they are not allowed to defend the suit. That the application has been brought without undue delay.

9. That the application be allowed.

10. The respondent filed a replying affidavit dated 16<sup>th</sup> June, 2021 sworn to by the Advocate for the claimant, Joel Kabaiku in opposition to the application in which the respondent states that the applicant did not file a statement of defence and over six years have lapsed since the advocate for the respondent entered appearance in the matter on 21<sup>st</sup> April, 2016. That the application is an abuse of the process of the Court and is based on false allegations that a defence was filed and served on the respondent and that failure to attend the hearing was due to the occurrence of COVID-19 pandemic. The respondent prays the application be dismissed with costs.

## **Determination**

11. The Court has carefully perused the record and considered the deposition by the applicant and that by the respondent. The Court has also considered the submissions and authorities filed by the parties and makes the following findings of facts.
12. On 21<sup>st</sup> April, 2016, the applicant's advocate entered appearance in the suit filed on 18<sup>th</sup> March, 2016.
13. On 28<sup>th</sup> November, 2016, the parties' advocates appeared before Hon. L. Ndolo J. and the Court upon hearing both counsel directed the applicant to file a statement of defence within 30 days and the claimant to file a reply to the statement of defence within 7 days of service. The matter was then set down for mention to confirm compliance on 13/12/2016.
14. The matter was mentioned before the Deputy Registrar on 13/12/2016 and was re-allocated a further mention date on 6/3/2017.
15. On 6/3/2017, the matter was mentioned before Hon. Ndolo, J. and counsel for the claimant appeared in the absence of the counsel for the respondent/applicant.
16. The Counsel for the claimant informed the Court that the respondent/applicant had not filed a statement of defence and requested for a hearing date of the suit. The judge directed the suit to proceed to formal proof and a hearing date to be provided at the registry.
17. On 26/7/2017, the matter was allocated a hearing date on 23/7/2018. On 23/7/2018 the matter did not proceed and was allocated a further date for 29/11/2018. The matter was eventually allocated a hearing date on 25/11/2020 when it proceeded ex parte and the Court directed the claimant to file affidavit evidence together with written submissions. Judgment was then reserved on 27/1/2021 for 24<sup>th</sup> May, 2021.
18. The applicant purports to have attached alleged filed statement of defence to the application dated 6<sup>th</sup> June, 2021. The applicant deposes that the statement of defence and list of documents were filed on 16<sup>th</sup> December, 2016 and purports to annex copies to the application marked "KKM2."
19. The Court has perused the purported response to the claim and counter claim and it bears no Court stamp at all and the applicant did not provide any proof of the alleged filing and service of the same on the claimant.
20. Clearly, the counsel for the applicant has not been candid with the Court and the application is devoid of any tangible justification for the Court to set aside its judgment dated 24<sup>th</sup> May, 2021.
21. The applicant did not file any application to set aside the order by Ndolo, J. issued on 6/3/2017 directing the suit to proceed ex parte to formal proof in default of any statement of defence.
22. This application has been brought upon inordinate delay since the 6<sup>th</sup> March, 2017. Over 4 years have lapsed since then and neither the applicant nor its advocate have shown any reasonable grounds why that order made on 6/3/2017 should be set aside. That was the basis upon which the Court proceeded ex parte on 25<sup>th</sup> November, 2020 and proceeded to deliver a judgment on 25<sup>th</sup> May, 2021.
23. The applicant has clearly slept on its rights and equity cannot come to his aid.
24. The claimant is entitled to enjoy the fruits of his judgment. Justice delayed is justice denied.
25. In the final analysis, the application lacks merit and falls foul of the principles enunciated by the Court of Appeal in **Kenya Power and Lighting Company Limited –vs- Abdulhakim Abdulla Mohammed and Another (2017) eKLR** and in the case of **Tree Shade Motors Limited –vs- D.T. Dobie and Another (1995 -1998) IEA 324** relied upon by the applicant.
26. To the contrary, the justice of the case demands that the claimant proceed to enjoy the fruits of his judgment having waited for over six years to have the case heard and determined.
27. Accordingly, the application is dismissed with costs.
28. It is so ordered.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF DECEMBER, 2021**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Manasses, Mwangi & Associates for the Applicant

Kabaiku & Company Advocate for the Respondent

Ekale – Court clerk.