



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 588 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

KELVIN OTIENO RAPONDI.....CLAIMANT

VERSUS

BAGDAS AUTO SPARES LIMITED.....RESPONDENT

RULING

1. The application dated 4th October, 2021 is filed by the Respondent who is making the following prayers:-

(i) That there be a stay of execution of the Judgment dated 30th September, 2021 pending the hearing and determination of this Application.

(ii) That the ex-parte proceedings hearing of 6th August, 2021 and resultant judgement be set aside and application be set aside and application be allowed to defend the suit and be heard on merit.

(iii) That the costs of this application be provided for.

2. The Claimant states that this suit proceeded ex-parte for non-attendance by the Respondent advocates on 6th August, 2021 and subsequently judgment was delivered on 30th September, 2021.

3. It is the Respondent's averments that they came to learn that the matter was heard ex-parte when they checked their old emails which they had changed from kerandimanduku@yahoo.com to kerandimandukuadvocates@gmail.com.

4. He states that immediately he found the case had been heard in the absence of the Respondent he filed this application and without any delay.

5. He says the failure to attend the hearing was inadvertent and not intentional due to the mix-up of emails.

6. He further says the application dated 15th September, 2021 was overtaken by events because it was not placed before the trial Judge before the delivery of Judgment.

7. He says that the trial Judge informed him the file had not been placed before her and so she could not deal with the application. She then proceeded to deliver the judgment on 30th September, 2021.

8. That the application dated 15th September, 2021 was overtaken by events and so he filed the application dated 4th October, 2021.

9. The Claimant response to replying affidavit states that the Respondent's advocates were served with the mention notice and the hearing notice for 6th August, 2021, the submissions and mention notices through their office emails kerandimanduku@yahoo.com as provided through their documents filed in court on 13th August, 2021.

10. That the Respondent did not exercise diligence in providing the court or the Claimant with any updated/current or alternative emails.

11. That the Judgment delivered on 30th September, 2021 was anchored on merits of both the Respondent's defence and further that it would be absurd to open up the matter for determination and possible conflicting finding by a Judge of concurrent jurisdiction.

12. He also says the Respondent has no known assets in the country as its assets have been acquired by Isuzu East Africa Limited from May, 2021.

Further that the Directors of the Respondent's company may leave the jurisdiction of this court and move to India and United States.

13. The Claimant further states that this application is made in bad faith to frustrate the realization of this court's judgment as Respondent transfers his assets.

14. The Claimant further prays that if this application is allowed the Respondent be ordered to deposit the judgment amount being Kshs.325,000/= along with costs and interest amounting 250,000/= all totaling Kshs.570,000/= in court within 7 days.

15. That the suit be set for hearing not later than 14 days from the date of Court's Ruling.

DETERMINATION

16. The court has considered the submissions by the respective parties, the supporting and the replying affidavit as well as the submissions of the parties and the pleadings.

17. The evidence by the Claimant's advocate is to the effect that on 6th August, 2021 the hearing proceeded ex parte because the hearing notice was sent to the advocate's old email. They had not served the Claimant's advocate with the new email. At the same time they had not taken the initiative to check for emails in their old emails.

So the Claimant had done their part and had served the hearing notice with the email in their possession.

18. When the case proceeded for hearing and it was closed, the Claimant again served the Respondent's with their submissions and a mention notice.

The Respondent's advocates claims they failed to turn up for the hearing inadvertently and they accuse technological mishap.

19. The court however finds it was not a technological mishap but it was negligence on the part of the Respondent's advocates. The minutes they changed their email address they should have taken the initiative to inform both the Claimants and the court of their new email address. The court places the blame for this predicament squarely on the Respondent's advocates.

20. The gist of this argument is that the trial proceeded ex-parte and judgment was regularly entered in favour of the Claimant.

21. Having said so, I observe that authorities provide room to grant leave where there are triable issues in the defence.

I have read the Respondent's reply to memorandum and I find that there are arguable issues which can only be deliberated in a full hearing. This is of course consistent to the right to a fair hearing under Article 50(1) of the Kenya Constitution 2010.

22. In the case **DAVID KIPTANUI YEGO VS BENJAMIN RONO & 134 OTHERS** The learned judge held that there were triable issues raised in the defence and it would be in the interest of justice if the parties were heard fully on the merit of their respective claims.

23. In the case of **ELIZABETH KAVERA & ANOTHER VS LILIAN ATHO & REAL TIME CO. LIMITED CIVIL CASE 1 OF 2020**.

The court found that even though judgment was regularly entered but because there was an arguable case which may or may not succeed at hearing but is consistent with the right of fair hearing under Article 50(1) of the Kenya Constitution the court allowed the judgment to be set aside.

24. In the present case judgment was properly entered and there is no question on that. Nevertheless since the defence has raised triable issues which should be subjected to a full hearing before a trial court in the presence of both parties to the dispute. I will grant the orders as prayed.

25. Let me also point out that even though the Respondent advocate failed to provide his email address nevertheless he moved fast to file this application and so there was no delay.

26. The court noted that the Claimant has prayed that in the event the court grants the stay the Respondent be ordered to deposit the decretal amount of Kshs.325,000/= to the court within 7 days of the court's Ruling together with interests and costs all totaling to Kshs.570,000/=.

27. The Claimant further says that the Respondent has no known assets in Kenya and that all its assets have been acquired and transferred to Isuzu East Africa. He says the Respondent has only retained two employees who work for Isuzu East Africa.

28. The Claimant also says that the Respondent only occupies one floor in Nairobi and has one staff Bhanendra Kumar Bagda who is transferring all parties and supplies to East Africa Limited.

He says the Respondent is almost running insolvent. He further says that the Directors of the Respondent are planning to relocate from the

country.

29. The Respondent in his response says that the Directors of the respondent are Kenyan citizens and have assets in Kenya including a building referred as BASL house. They6 reiterate they are willing and ready to proceed with the matter within the shortest time possible.

30. Having found that the Respondent has an arguable case and finding no documentary evidence that the Respondent's assets are being transferred to Isuzu East Africa Limited and that the respondent is becoming insolvent I proceed to order as follows:

(i) That stay of execution of the judgment dated 30th September, 2021 is granted pending the hearing and determination of this application.

(ii) The ex-parte proceedings hearing of 6th August, 2021 and resultant judgment be set aside and applicant to be allowed to defend the suit.

(iii) In view of the fact that this application arose out of the inadvertent omission of the Respondent's advocate the order to deposit the decretal amount and interest and costs will not be given at this point and will allow the case to proceed for hearing but **Messrs KERANDI MANDUKU & COMPANY** are ordered to pay throw away costs of this application amounting to Kshs.30,000/= to the Claimant's advocates.

(iv) The case to be set for hearing on priority basis between February and March, 2022 subject to court's diary.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 9TH DAY OF DECEMBER, 2021.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE