



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO87 OF 2016

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

ALMASI BEVERAGES LIMITED.....RESPONDENT

RULING

1. This ruling relates to the Respondent's Notice of Motion dated 15.9.2021 seeking the following orders THAT:-

- a) *The orders issued by this court on 27.7.2021 be vacated and/or set aside, ex de debitojustitiae.*
- b) *All monies paid out to the claimant be paid back into court forthwith.*
- c) *The application dated 9.7.2021 be set down for hearing inter partes and leave be granted to the respondent to reply thereto.*
- d) *The applicant be at liberty to apply for such further/consequential orders as may be just and expedient in the circumstances.*
- e) *Costs of the application be provided for.*

2. The application is supported by the Affidavits sworn on 15.9.2021 by the applicant's counsel Mr. Herbert Nyamurongi and its Chief Human Resource Officer Mr. Timothy Muthini. The application is opposed by the claimant vide her Replying affidavit sworn on 1.10.2021 by its National Organizing Secretary Mr. Mike Oranga.

3. On 5.10.2021, the parties agreed to dispose of the motion by written submissions.

4. The gist of the applicant's case is that the Applicant the claimant filed the application dated 9.7.2021 seeking for the release of the decretal sum deposited in court as condition for stay pending appeal; that on 15.7.2021, the court heard the application *ex parte* and fixed it for hearing on 27.7.2021 and directed the claimant to serve it; that the claimant served the application on 16.7.2021 via email without indicating the hearing date; that the on 27.7.2021, the application was allowed as prayed; that there is no way the respondent could have attended the hearing to oppose the application without being served with a hearing notice; that the applicant has been condemned unheard; that the application relates to C.A.CA No.E275 of 2020 which is pending in the Court of Appeal; and that the application has been made without undue delay.

5. To fortify its case, the applicant cited a number of judicial precedents including **Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** where the Supreme Court held that where a litigant overlooks procedural requirement the court will not hesitate to declare the pleading incompetent.

6. On the other hand the claimant's case is that on 16.7.2021 at 16.58 hours and 16.59 hours, it served the applicant's counsel with the application dated 9.7.2021 together with the Court order dated 15.7.2021 vide the email address **info@nyamurongiadvocates.com**; that the said order clearly indicated the hearing date of the application as 27.7.2021 and directed that the application be served on the respondent; that the applicant herein was made aware of the said hearing date; that it applied for the release of the decretal sum after the application for leave to file appeal out of time was dismissed by the Court of Appeal on 4.6.2021; that it has since then written to withdrawal its application to have the Notice of Appeal filed on 10.5.2017 deemed as withdrawn because it is now overtaken by events; and that the instant application lacks merits and should be dismissed with costs.

Analysis and determination

7. Having considered the application, affidavits and submissions, the issue for determination is whether the application meets the legal threshold for setting aside regular court order.

8. The relevant law herein is Order 51 Rule 15 of the Civil Procedure Rules provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as to costs.”

9. In **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

“This discretion (to set aside decisions) 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.” (emphasis added)

10. In the case of **James Kanyiti Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** the Court of Appeal held that:

“... the former Court of Appeal for East Africa, in Ali Bin Khamis v Salim Bin Khamis Kirobe & others [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, the procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order.”

11. In **Nixon Murathi Kiratu v Director of Criminal Investigations & others [2019] eKLR**, it was held that:

“Unfairly obtained ex parte judgment or order should not be allowed to stand once the applicant has demonstrated lack of service or having not been a party to a suit in which adverse order has been issued without it being aware of the matter or being involved.”

12. From the foregoing binding precedents, it is clear that the court's hands are never tied from doing justice, but it has unfettered discretion to set aside of judgment or court orders for good cause being shown and upon terms as to costs. The discretion is to be exercised upon demonstration by the applicant that the impugned decision was not occasioned by willful negligence or recklessness on his part.

13. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and

special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...

14. In this case the reason given for the applicant's failure to attend court was the alleged lack of service of hearing notice. However, having considered the rival affidavits and the Affidavit of service sworn on 26.7.2021 by the Court Process Server Mr. DiffinahMoithogaNyamwange, I am satisfied that the applicant herein was duly served with application dated 9.7.2021 plus the Court order dated 15.7.2021 which certified the Application urgent and directed that the application be served for inter partes hearing on 27.7.2021. Consequently, I find and hold that the applicant was made aware of the said hearing date by the said court order and it is immaterial that it was not served with a hearing notice. In my view, a court order must always supersede a hearing notice.

15. Having found that the applicant was made aware of the hearing date, I must agree with the claimant that the application herein lacks merits and it falls on its face.

16. As regards the Civil Application No 275 of 2020 filed by the Claimant which seeks to have the Applicant's Notice of Appeal dated 10.5.2017 deemed as withdrawn, I will not say much on it because I believe there is a competent court to deal with it. Suffice it to say, however, that the said proceedings do not affect the proceedings before this court because the same Court of Appeal has already closed the door for the applicant from filing appeal after it declined to grant leave to file appeal out of time.

17. In the end I dismiss the application dated 15.9.2021 with costs to the claimant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY DECEMBER, 2021.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE