



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 119 OF 2015

ALEX LUTUNGU MATANGE.....CLAIMANT

VERSUS

KANINI HARAKA ENTERPRISES LTD.....RESPONDENT

RULING

1. Before me for determination is the Respondent/Applicant's Notice of Motion dated 28th July, 2021 filed under certificate of urgency on even date pursuant to section 1A,1B,3A, and 95 of the Civil Procedure Act, Order 9 Rule 9 and Order 22 Rule 22 of the Civil Procedure Rules 2010, seeking the following Orders; -

- 1) That the instant application be certified as urgent and the same be heard exparte in the first instance.**
- 2) That leave be granted to the firm of M/S Odhiambo Opar and co advocates to come on record for the Respondent/Applicant herein.**
- 3) That the Judgment dated 6th July, 2021 be set aside by this Honourable Court and the Respondent be allowed to give evidence in support of its case.**
- 4) That the costs of this Application and the interest thereon be provided for**
- 5) Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.**

2. The Application herein is based on the grounds on the face of the Application and the supporting Affidavit deposed upon on the 28th June, 2021 by **David Githinji**, the Operational manager of the Applicant and based on the following grounds; -

- a) That judgment was delivered in this case on 6th July, 2021 for payment of Kshs.312,403 together with costs of suit and interest therein.
- b) That this suit proceeded for hearing ex parte in absence of the Applicant when the Applicant had entered appearance and filed all compliance documents, as such the applicant's right to hearing under Article 50 of the Constitution was curtailed.
- c) It is stated that the previous advocates on record Muthanwa and company advocates did not inform the Respondent about hearing of this matter and only wrote to it a letter dated 21st July, 2021 asking it to forward the decretal sum to the Claimant.
- d) That the applicant's previous advocates' mistakes ought not be visited upon the Applicant.
- e) The Applicant prays to for this Court to set aside its judgement and be allowed to defend the suit herein in the interest of justice.
- f) That no prejudice will be visited upon the claimant herein and that the applicant has an arguable defence.

3. The Claimant/ Respondent in this Application filed a replying affidavit on 4th August, 2021 deposed upon on the 3rd August, 2021 and based on the following grounds;-

a) The Respondent herein avers that the matter herein proceeded for hearing in presence of the advocate for the Applicant but in absence of their witnesses.

b) That throughout the hearing of this case the Applicant actively participated in including conciliation meeting that was held in Naivasha Labour office.

c) He states that the Applicant was always served with all dates whenever there was a mention or hearing including the hearing of 21st March, 2021 and the hearing of 22nd April, 2021 which their advocate on record was present and even closed their case for failing to secure attendance of the Applicant witness twice.

d) The Respondent herein prayed for this Application to be dismissed for lacking merit and the Claimant be allowed to enjoy his fruits of judgment.

4. This Application was canvassed by way of written submissions.

Applicants Submissions.

5. The Applicant submitted that this Court is clothed with immense discretion to grant and decline to set aside its Orders however while doing so the Court has to ensure justice is served upon the parties. It was argued that courts have always exercised its discretion where its demonstrated that there was excusable mistake, inadvertence or error. In this they cited the case of **Esther Njihia and 2 others V Safaricom Limited [2014] eklr.**

6. The Applicant also submitted that they have given sufficient cause why they failed to participate during hearing and urged this Court to allow the application. In this they cited the case of Supreme Court of Uganda **Philip Ongom, Capt v Catherine Nyero Owota (Civil Appeal 14 of 2001) [2003] UGSC 16.**

Respondent's Submissions

7. It was submitted for the Respondent herein that the judgement delivered by this Court on 6th July, 2021 was regular and meritorious and therefore ought not be set aside. It was argued that the Respondent participated during the preliminary stages of the suit and during hearing they failed to summon their witnesses when the Court gave them two chances and in all occasions their advocate was present in Court.

8. The Respondent submitted that the Applicants are using this Application as a tool to delay justice when he had filed this suit in the year 2013 and therefore was at the verge of enjoying the fruits of his judgment. In this he cited the case of **Rayat Trading CO. Limited V Bank of Baroda and Ttetezi Housing Ltd [2018] eklr.**

9. The Respondent also submitted that the only reason given for the failure by the Respondent to attend hearing is lack of communication between its advocate however that the court have time and again maintain that litigants ought to actively participate in their cases and not merely blame their advocate and when they blame their advocate they must show tangible steps taken by them in following up the matter. They then supported their argument by citing the case of **Ruga Distributors Limited V Nairobi Bottlers Limited HCCC 534 of 2011** and the case of **Habo Agencies Limited V Wilfred Odhiambo Musingo [2015] Eklr.**

10. The Respondent submitted that he will be prejudiced by the setting aside of the Court judgment as he had waited for more than 7 years to enjoy its fruits. The Respondent then urged this Court to disallow the Application.

11. I have examined all the averments of the parties herein. From the record herein, the counsel for the respondent always attended court and was present even during the hearing of the claimant's case.

12. The date fixed for defence hearing was 22/4/21 when both counsels were also present and Muthanwa for respondent indicated that he will not be calling any evidence and therefore the court proceeded to give directions on submissions and later a Judgment was delivered on 6/7/21.

13. As it were, the respondents were always adequately represented by their counsel.

14. The firm of M/s Odhiambo Opar has sought leave to come on record for respondents herein but also proceeded to file this application whereas they had not been granted leave to come on record.

15. Order 9 of the CPR states as follows;-

9. Change to be effected by order of court or consent of parties [Order 9, rule 9.]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in

person as the case may be.

16. There is no indication that the firm of Odhiambo Opar & Co. Advocates were granted leave to come on record for the respondent and seek to file an application.
17. There is no consent filed too indicating that there was agreement with the previous counsel that the firm could come on record.
18. That being the case, I find the application incompetent for being filed by counsel not on record and I therefore dismiss the application accordingly.

RULING DELIVERED VIRTUALLY THIS 2ND DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

IN THE PRESENCE OF:-

AWUOR FOR CLAIMANT – PRESENT

OPAR FOR RESPONDENT – PRESENT

COURT ASSISTANT - FRED