



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 431 OF 2015**

(Formerly HCCC No. 259 of 2005)

**Before Hon. Lady Justice Maureen Onyango**

**EVANS ARTHUR MUKOLWE.....CLAIMANT**

VERSUS

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA WILDLIFE SERVICE.....2<sup>ND</sup> RESPONDENT**

**RULING**

Judgment in this suit was delivered on 7<sup>th</sup> March 2019 by Nduma J. By an application dated 3<sup>rd</sup> September 2019, the 2<sup>nd</sup> respondent sought stay of execution of the judgment pending the hearing and determination of the 2<sup>nd</sup> respondent's appeal to the Court of Appeal. The claimant was served but did not respond to the application or attend court for hearing of the application on 17<sup>th</sup> September 2019. The 1<sup>st</sup> respondent supported the application.

There having been no opposition to the application the same was granted with costs to abide the outcome of the appeal.

In the instant application the claimant seeks the following orders –

1. Spent
2. That the Court be pleased to set aside the orders granted on 17<sup>th</sup> September 2019 confirming the exparte stay orders granted on 4<sup>th</sup> September 2019
3. That the Claimant be granted Leave to file a Response to the application dated 3<sup>rd</sup> September 2019 for the application to be heard on merit.
4. That the costs of this Application in cause.

The application is supported by the grounds on the face thereof which are restated in the supporting affidavit of ELIJAH BITANGE MAGETO, Counsel for the applicant. In the grounds and the affidavit, he states that –

- i. The 2<sup>nd</sup> Respondent's Application was served upon the firm of the advocates for the Claimant on 6<sup>th</sup> September 2019 but was mistakenly and erroneously misplaced in the office by a clerk and was therefore not brought to the attention of the Advocates nor dialized.
- ii. On 17<sup>th</sup> September 2019 the matter came for interpartes hearing before Court 1, Onyango J. and the Advocate for claimant who was not aware of the date and who had been consistently appearing in court for the case for 15 years did not attend court and the exparte orders granted on 4<sup>th</sup> September 2019 were confirmed unconditionally pending the hearing and determination of the yet to be filed Appeal by the 2<sup>nd</sup> Respondent.

iii. Nonattendance in Court on 17<sup>th</sup> September 2019 by advocate for the claimant was not deliberate and was occasioned by the mistake of the advocate's clerk and by extension the Advocate who misplaced the application, failed to notify the advocate or diarize the office diary mistake should not be visited upon a claimant.

iv. As of 23<sup>rd</sup> September 2019, when ruling date on taxation of the Claimant's bill of costs was fixed and the file taken by the Deputy Registrar for ruling, the orders given on 17<sup>th</sup> September 2019 had not been extracted and issued.

v. On 25<sup>th</sup> September 2019 the Orders granted on 17<sup>th</sup> September 2019 were served upon the Advocate for the Claimant but the same appeared to have been issued on 24<sup>th</sup> September 2019 one day after the Deputy Registrar had set the date for ruling of the Taxation of the Claimant's bill of costs. Therefore, the file was not available at the Registry for filing of any documents.

vi. That on 15<sup>th</sup> November 2017, Onyango J. who presides in Court 1 had in her own wisdom recused herself from hearing of this matter for the reason that said court had heard a related case and made specific that the matter could proceed before any other judge.

vii. At the time of making the said orders for recusal the Claimant's Advocates were not present in court but more importantly the Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents were present in Court.

viii. On 17<sup>th</sup> September 2019 when this matter was placed before Court 1, it was incumbent upon the respondent's Advocates to disclose to the court that court 1 had recused itself and was not in the position to handle the matter and make any orders regarding the same.

ix. Based on the order of 17<sup>th</sup> September 2019 the deputy Registrar declined to tax the claimant's bill of costs and delivered a ruling dated 7<sup>th</sup> November 2019 that the said taxation was to await the outcome of the appeal which is yet to be filed.

x. The said order of 17<sup>th</sup> September 2019 and the ruling of 7<sup>th</sup> November 2019 are prejudicial to the Claimant as they deny the claimant his right to enjoy the fruits of judgment indefinitely.

xi. The said orders have the effect of condemning the claimant unheard contrary to the rules of natural justice and Article 50 of the Constitution.

xii. It is only fair and just that the orders of 17<sup>th</sup> September 2019 be set aside and the claimant be allowed to make a response to the 2<sup>nd</sup> Respondent's Application dated 3<sup>rd</sup> September 2019 and the matter do proceed for hearing interpartes for the court to make a determination on merit.

Both respondents opposed the application. The 1<sup>st</sup> respondent filed grounds of opposition in which it raises the following grounds—

1. The application is a waste of court's time for lack of merit and meaningful grounds.
2. The claimant did not oppose the application for stay and therefore the application is not justified.
3. No justified grounds have been tendered before the court to warrant setting aside of the orders of 17<sup>th</sup> September 2019.
4. The application is frivolous, vexatious and an abuse of the processes and ought to be struck out in *limine*.

The 2<sup>nd</sup> respondent filed both grounds of opposition and replying affidavit of PATRICK LUTTA, Counsel for the respondent. The grounds raised by the 2<sup>nd</sup> respondent are that –

1. There is inordinate delay in bringing of the Claimant's application.
2. The Claimant cannot in any way fault the 2<sup>nd</sup> Respondent for failing to respond to its application for stay of execution.
3. The Claimant had an opportunity to oppose the application but failed to do so.
4. Failure to respond to the 2<sup>nd</sup> Respondent's application for stay of execution is as a result of professional negligence on the Claimant's advocates and not a mistake as alleged.
5. No grounds have been submitted that warrant setting aside of the orders granted.
6. The Court had not recused itself from hearing interlocutory matters but hearing of the Claimants case on merits.
7. The applicant's application lacks candour and is contradictory.

8. The application is frivolous, vexatious and an abuse of the processes and ought to be struck out in *limine*.

The application was heard on 2<sup>nd</sup> February 2020.

Mr. Mageto for the applicant adopted the grounds on the face of the application and his affidavit. He further submitted that Article 50(1) of the Constitution provides for a right to fair hearing and rules of natural justice. He further submitted that his failure to respond to the application and to attend court are excusable mistakes which ought not be visited on his client.

Mr. Mageto relied on the decision in **Edney Adaka Ismail v Equity Bank Limited (2014) eKLR** where the court stated that setting aside is purely a discretion of the court. He submitted that what happened is a blunder which is human and his client should not be penalised for the same. That his client should be heard on the application for stay so that it is decided on the merits.

He further relied on the decision in **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** where the Court of Appeal stated –

“The appellant has also contended that the judgment of the Court which directly affected it, was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). There is no need to restate the importance of a fair trial as guaranteed by the Constitution. The right to a fair trial remains at the heart of any judicial determination and courts should endeavour to protect and uphold the same. It is a cardinal rule and it emanates from the principle of natural justice. In **M K v M W M & Another**

*[2015] eKLR it was reiterated that;*

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In **ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456**, Nyarangi, JA asserted at page 459:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”

At page 460 the learned Judge added:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

And in  **MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206**, at page 210, this Court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an *opportunity to be heard*.”

Mr. Mageto stated that he was not making any submissions on the issue of recusal of the Judge.

For the 1<sup>st</sup> respondent, Ms Akuno submitted that Counsel for the applicant had admitted service of the application and that he did not file a defence or grounds of opposition. That this is serious professional negligence that this court should not allow or entertain.

She further submitted that Article 50(1) is not applicable as the claimant was not denied a right to be heard. That even if the application got lost, Counsel should have picked it from the cause list. She urged that the application be dismissed.

Mr. Lutta for the 2<sup>nd</sup> respondent associated himself with the submissions of Counsel for the 1<sup>st</sup> respondent. He further relied on the grounds of opposition and replying affidavit filed on behalf of the 2<sup>nd</sup> respondent.

He submitted that the application is a knee jerk reaction to the stay of taxation by the Deputy Registrar in her ruling delivered on 1<sup>st</sup> November 2019. That the application was filed almost 2 months after the orders sought to be set aside were made. That there was no intention to object to the 2<sup>nd</sup> respondent's notice of motion.

He submitted that what the court should consider is whether there are sufficient grounds to disturb the orders sought to be set aside. That Counsel has not explained why he did not file a response to the application after the interim order was served upon his firm on 25<sup>th</sup> September 2019. That the orders ought to have triggered some reaction by Counsel. That it is only when the bill of costs was stayed that Counsel was jolted into action.

Mr. Lutta submitted that there was utmost and inordinate delay in bringing the application. That blaming a clerk whose identity is not disclosed is not a sufficient reason for setting aside.

He submitted that as observed by Ms. Akuno, no draft of the replying affidavit or grounds of opposition have been filed by the applicant. That it is settled law that a party that wishes to set aside an order ought to put before the court a draft of the reply or grounds of opposition that would have been used to oppose the orders in order to assist the court to determine whether there are justifiable grounds. He submitted

that the authorities filed by the applicant relate to substantive hearings and not interlocutory applications.

He submitted that the court should not exonerate indolent and negligent Counsel as has been demonstrated. That the claimant has not put in an affidavit to show the prejudice he will suffer.

He submitted that should the appeal be declined, the Attorney General will be able to pay.

He prayed that the application be dismissed.

In a brief rejoinder, Mr. Mageto submitted that no authority had been cited by the Counsel for the 2<sup>nd</sup> respondent to support his submission that the applicant ought to have filed a draft affidavit or grounds of opposition. Further that his office only checks cause lists when they expect to have a matter on the cause list and it is not obliged to look at a cause list on matters it is not aware of.

He submitted that all arguments by the respondent are based on technicalities. Mr. Mageto urged the court to grant the orders sought in the claimant's application.

### **Determination**

As has been stated by the applicant's Counsel setting aside is at the discretion of the court. The discretion must however be made judiciously and therefore must be based on valid grounds.

In the instant application, Counsel submits that he was served but due to mistake or error in his office, the same was misplaced by a clerk. As observed by Counsel for the respondents, there is no draft of either grounds of opposition or replying affidavit of the applicant that has been filed, to demonstrate that the applicant had valid grounds to oppose the said application.

The application that was heard in the applicant's absence is for stay of execution pending appeal. Appeal is a matter of right. This court would not have stopped the respondents from filing the appeal.

Further the respondents are the Attorney General and Kenya Wildlife Services, a government entity. Both of them would not be unable to settle the judgment debt should the appeal fail. It is unlikely that the court would order deposit of either the decretal sum or security for costs against them.

The applicant has not filed a replying affidavit to demonstrate the prejudice he would suffer other than delay in enjoyment of the fruits of his judgment.

The submissions by the applicant's Counsel that his rights to a fair hearing have been denied is not applicable herein as no such right was denied. It is the applicant who squandered such right by failing to either respond to the application for stay of execution or attend court for the hearing.

Applicant's Counsel's submission that he was under no obligation to look at the cause list when not expecting any matter on the cause list only serves to demonstrate his incautiousness, as a prudent law firm would go through the entire cause list in courts where it regularly practices to ensure that it attends to any matter that may have escaped its attention.

It is my finding that the applicant has not demonstrated that had it been allowed to defend the impugned application the court would have reached a different outcome.

For these reasons I find no reason to disturb the decision made on 17<sup>th</sup> September 2019 granting stay of execution of the judgment and decree here. The result is that the application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**MAUREEN ONYANGO**

**JUDGE**