



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 419 OF 2017

(Before Hon. Justice Mathews N. Nduma)

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

TARATIBU BAR AND RESTAURANT.....RESPONDENT

RULING

1. Application dated 29th July 2019 prays for an order in the following terms:

- (i) Stay of execution of the exparte judgment and decree issued on the 21st February 2019 in favour of the claimant against the respondent.
- (ii) That the court be pleased to set aside the exparte proceedings and judgment
- (iii) And the applicant be allowed to defend the suit

2. The application is premised on grounds set out on the face of the application and in the supporting affidavit of Fanuel Lenox Okoth a Director of the respondent to wit:

3. Judgement was obtained against the respondent in favour of the claimant on 21st February 2019 for a sum of Kshs. 119,606 plus interest and costs.

4. The claimant through Madume Auctioneers have executed the decree on 23rd July 2019 through a proclamation of attachment together with warrant of attachment and sale.

5. That the matter proceeded exparte due to the fault of the previous advocate Mr. K'owinoh who after receiving full instructions went ahead and only filed a memo of appearance but failed to file a response to the memorandum of claim as required by law.

6. The advocate failed to communicate to the applicant during the pendency and progress of the case and it was on the 3rd May 2019 when the matter came for hearing when the counsel informed the court of his intention to cease acting, which the court declined and had this matter proceed exparte.

7. That counsel did not inform the applicant of these developments until he sent a copy of the judgment to the applicant dated 25th February 2019.

8. That the applicant has since sought to meet his advocate in vain. The applicant has now been served with a notice of proclamation and he sought services of alternative advocate who has now filed this application.

9. That applicant has good defence to the suit and ought not to be punished for errors by his advocate.

10. The claimant/respondent filed a replying affidavit to the application in which is deposed that at all material time, the respondent/applicant was aware of the proceedings in court. That on 17th January 2018, the respondent was directly served with a mention notice and was subsequently served with final submissions on 24th May 2018 and therefore cannot be heard to say that he only became aware of the proceedings in the suit upon being served with the judgment by his previous advocate.

11. That the applicant is not candid with the court, the application is visited with inordinate delay and is therefore frivolous and vexatious and meant to delay justice to the claimant member in breach of Article 159(b) of the constitution of Kenya 2010.

12. That the application be dismissed with costs.

Determination

13. The present application was filed more than five (5) months from the date the applicant admittedly was served by its advocate with the judgment of the court dated 21st February 2019. The applicant has not refuted the allegations in the replying affidavit of the claimant that it was served with a mention notice on 17th January 2018 and with written final submissions on 24th May 2018.

14. It is therefore abundantly clear that the applicant is not candid with the court that it was aware of the court proceedings in this matter as early as 17th January 2018 but filed this application on 29th July 2019 more than one year and six months from the date it became aware that the suit had proceeded *ex parte* on 3rd May 2018.

15. The applicant cannot blame its advocate for these glaring omissions and inordinate delay.

16. The applicant does not have clean hands in the matter and has not demonstrated sufficient reason for the court to exercise its discretion in its favour.

17. The applicant is a going concern and a bar and restaurant and cannot be presumed to be ignorant of court process. In any case ignorance of the law is no defence and expedient disposal of cases is an ingredient of fair and just administration of justice.

18. The claimant would be greatly prejudiced by the delay that would be occasioned by hearing this matter afresh without sufficient justification given.

19. Accordingly, the application is dismissed with costs.

Ruling Dated, Signed and delivered at Kisumu this 15th day of October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Ondegogero Advocates for Applicant/Respondent

M/S Mwaka for claimant/respondents

Chrispo- Court clerk