



REPUBLIC OF KENYA

**IN THE EMPLOYMENT & LABOUR RELATIONS
COURT**

AT NAIROBI

CAUSE NO. 879 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

CHRISTINE KATUNGE KITALE.....CLAIMANT/RESPONDENT

VERSUS

STATPACK INDUSTRIES LIMITED.....RESPONDENT/APPLICANT

RULING

1. Pending before me for determination is the Respondent's Notice of Motion Application dated 29th July, 2020. The same is brought under Certificate of Urgency and under the provisions of Section 16 of the Employment & Labour Relations Court Act and Rules 33 and 38 of the Employment & Labour Relations Court (Procedure) Rules, 2016, Order 10 rule 11 of the Civil Procedure Rules, 2010. Seeking Orders that:-

- 1. This application be certified urgent and heard on priority in view of its urgent nature and service of the same be dispensed with in the first instance.***
- 2. This Honourable Court be pleased to review, vary and/or set aside the Judgement in default entered on 21st May 2020 and brought to the Applicants attention on 17th June 2020.***
- 3. This Honourable Court be pleased to order stay of execution of the Judgement in default entered on 21st May 2020 and brought to the applicants attention on 17th June 2020 pending hearing and determination of this application, inter parties.***
- 4. This Honourable Court grants leave to the Applicant/Respondent to file its response to the Memorandum of claim.***
- 5. The Application be at liberty to apply for further orders and/or directions as the Honourable Court may deem just to grant.***
- 6. The costs of this application be provided for.***

2. The Application which is premised on the grounds that:-

- a) Judgement in default was entered on 21st May 2020 and notice of entry of judgement served upon the Applicant on 17th June 2020.***
- b) Being aggrieved by entry of the Judgement in default, the Applicant is applying for a review of the Judgement.***
- c) That on being served with the Notice of Entry of Judgement the Applicant filed on the 23rd day of June 2020 an application for the current Advocates for the Applicant to be granted leave to come on record. That leave was granted on 28th July 2020.***
- d) When the Applicant was served with the Memorandum of Claim, it appointed the firm of Jude & Sheila Associates to enter appearance and defense on its behalf.***
- e) The Advocate at the time acting on behalf Applicant notified the Applicant that it has entered appearance and is working on a draft defense.***

f) It was customary on receipt of any service, the Applicant would send the same to the firm of Jude & Sheila Associates for action. That on receiving the notice of entry of judgement the Applicant has since discovered through the assistance of the firm on record on its behalf that its previous appointed advocate has been inactive for 2 years as per the Law Society website and that the said firm may have never filed any documents in the matter or participated in any way in the suit.

g) The Advocate previously appointed by the Applicant had informed the Applicant that the matter is pending scheduling of a hearing date, which date is to be fixed by the Claimant. That it would appear the defense was never filed and the Applicant has been denied the chance to ventilate its case.

h) The Applicant has an arguable defense and the matter herein should be heard on its merits.

i) The Application had been made without any unreasonable delay.

j) This Application ought to be granted in the interest of equity, fairness and justice.

k) The Applicant should not be condemned for the misdeeds of its previous Advocate.

3. The Application is further supported by the Affidavit of **JOSEPH KINYANJUI**, the Respondent's Administration and Finance Manager sworn on 29th July, 2020, in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application, the Claimant filed a Replying Affidavit deponed by **DAVIS MULANI**, counsel on record for the Claimant sworn on 2nd October, 2020, in which he maintains that the instant Application is misconceived, a clear abuse to the Court process and the Orders sought therein are estopped by the principle of laches.

5. He further avers that the Memorandum of Claim and summons were properly served and acknowledged by the Respondent herein and a return of service dated 31st May, 2017 filed in support of the assertion.

6. He contends that upon failure by the Respondent to enter appearance and file defence in this matter, the Claimant rightfully applied to this Honourable Court on 15th August, 2017 to have the matter proceed for formal proof. He further maintained that the said application was similarly served upon the Respondent and an Affidavit of service filed to confirm.

7. The Affiant averred that the matter was subsequently fixed for formal proof 6th February, 2020. He further averred that the respondent was duly served with a hearing notice on 15th January, 2020 on 23rd January, 2020 and that the Respondent did acknowledge receipt of the said notice.

8. He further averred that despite proper service the Respondent failed to attend the hearing. He confirmed that Judgment was delivered on 21st May, 2020 in the Claimant's favour as against the Respondent herein who failed to participate in the proceedings despite proper service of the Court processes.

9. Counsel maintained that the Judgment made by this Honourable Court on 21st May, 2020 was not made in default as contended by the Applicant but was rather made on merit and is therefore regular as the matter proceeded for hearing on 6th February, 2020.

10. He further maintained that the instant Application is therefore an abuse to the Court process and is only aimed at depriving the Claimant from enjoying the fruits of her Judgment. He argued that the same is devoid of merit therefore urging this Honourable Court to dismiss the same in its entirety with costs to the Claimant.

11. Parties agreed to dispose of the Applications by way of written submissions.

Submissions by the Parties

12. The Respondent/Applicant submits that it has met the threshold for the grant of the orders of review and/or setting aside of the exparte judgment entered by this Honourable Court on 21st May, 2020. To buttress this argument the Applicant cited and relied on the provisions of Order 10 Rule 11, Order 12 Rule 7 of the Civil Procedure Rules, 2010 and Rule 32 (2) of the Employment and Labour Relations Court (Procedure) Rules and the case of **Signature Tours & Travel Limited Vs National Bank of Kenya Limited (2018) eKLR** where the Court cited the Court of Appeal decision in the case of **James Kanyiita Nderitu & Another (2016) eKLR** on setting aside of default judgments.

13. The Respondent further submitted that its failure to file its memorandum of appearance and defence was occasioned by a blunder by its former advocates on record. It further urged this Court not to visit the blunder upon it. For emphasis the Respondent cited the case of **Lucy Bosire Vs Kehancha Div. Land Dispute Tribunal & 2 Others (2013) eKLR**.

14. The Applicant maintained that the instant Application has not been filed with inordinate delay and that demonstrates its desire to have the matter heard and determined on merit.

15. The Respondent/Applicant further maintained that its draft defence raises triable issues and that the Respondent ought to be allowed to ventilate its case for the Court to make its decision on merit. For emphasis the Applicant cited and relied on the case of **Job Kiloch Vs Nation Group Ltd, Salaba Agencies Limited & Michael Riorio (2015) eKLR**. The Applicant further urged this Court not to condemn it

and proceed to punish it without according it an opportunity to be heard.

16. In conclusion the Respondent/Applicant maintained that it had demonstrated that its Application dated 29th July, 2020 has merit and urged this Honourable Court to allow the same in terms of the reliefs sought therein.

Claimant's Submissions

17. The Claimant on the other hand submitted that the Applicant has failed to meet the threshold for the grant of the review orders it seeks from this Honourable as provided under Rules 33 and 38 of the Employment & Labour Relations Rules, 2016 and Order 10 Rule 11 of the Civil Procedure Rules, 2010. The Claimant urged this Court to be guided by the judicial decision in the case of **Multichoice (Kenya) Limited Vs Wananchi Group Kenya Limited & 2 Others (2020) eKLR.**

18. The Claimant further submitted that the Applicant has failed to show sufficient reason(s) to warrant the review of this Court's Judgment. She further submitted that the Applicant has indeed admitted in its Application that it was aware of the proceedings in this matter and therefore has no excuse of not taking part in the said proceedings.

19. The Claimant further urged this Honourable Court to exercise its discretion to allowing the instant Application judiciously and that the Respondent's failure is inexcusable. For emphasis the Claimant cited and relied on the Court's findings in the case of **Gerald Mwithia Vs Meru College of Technology (Sued Through The Chairman oard of Governors) & Another (2018) eKLR** where the Court held that *exercise of the Court's discretion in allowing applications for review must be done judiciously and with an intention of avoiding any injustice resulting from accident, inadvertence or excusable error.*

20. The Claimant further argued that the instant Application is devoid of merit as it fails to meet the threshold for the grant of the orders sought as spelled out in the case of **Kenya Building, Construction Timber and Furniture Industries Employees' Union Vs Roads and Civil Engineering Contractors Association (RACECA) (2019) eKLR.**

21. In conclusion the Claimant urged this Honourable Court to dismiss the instant Applications with costs.

22. I have examined the averments of the Parties herein. As explained in the Pleadings herein, the Respondents were served with the Memorandum of Claim on 16/5/2017. The Respondents failed to enter appearance nor file a defence as expected.

23. On 15/8/2017, the Claimants filed an application seeking an interlocutory judgement be entered against the Respondents for failing to file a defence. This application too was served upon the Respondents and they did not oppose it. The Claim therefore proceeded undefended for hearing and judgement was delivered by this Court on 21/5/2020 and notice of the same served upon the Applicants on 17/6/2020.

24. For this Court to consider, the merits of this application, the Applicants must demonstrate that they have an arguable case. The Applicants argue that their advocate whom they appointed to defend them Jude and Sheila Associates have been inactive for 2 years and so did not defend them as expected.

25. There is however no indication that Jude and Sheila Associates were given instructions by the Respondents to defend them in this cause.

26. The Applicants want this Court to review its Orders and set the default judgement aside. The Applicants have not however demonstrated any error on record or discovery of any new issue not in their possession which will warrant review. They contend that their Counsel let them down but they have also not been vigilant enough to know what was happening to this cause.

27. However, given that they are desirous of defending the case, the Claimant will also have an opportunity to restate their case and justice will be served. I will therefore allow the application and set aside the judgement of 17th May, 2020. The Respondents will pay the Claimants thrown away costs of Kshs.50,000/= and proceed to set this case down for hearing within 90 days. In default the judgement in place to be reinstated.

28. Costs in the cause.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Onyancha for Claimant/Claimant- Present

Wachira for Applicant/Respondent – Present