



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 648 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA BUILDING, CONSTRUCTION TIMBER  
AND FURNITURE INDUSTRIES EMPLOYEES' UNION.....CLAIMANT**

**VERSUS**

**ROADS AND CIVIL ENGINEERING  
CONTRACTORS ASSOCIATION (RACECA).....RESPONDENT**

**RULING**

The application before court is dated 20<sup>th</sup> November 2018 and seeks the following orders

1. That this Court be pleased to certify this Matter as most urgent.
2. That pending the hearing and determination of this application, this Court be pleased to temporarily stay the Orders issued on the 12<sup>th</sup> of November, 2018 directing that the collective Bargaining Agreement between the Claimant and the Respondent/ Applicant be registered.
3. That pending the hearing and determination of this application, this Court be pleased to set aside the Orders issued on the 12<sup>th</sup> of November, 2018 directing that the collective Bargaining Agreement between the Claimant and the Respondent/Applicant be registered.
4. That this Court be pleased to set aside the Ex Parte hearing and resultant Judgment entered on 12<sup>th</sup> November, 2018 and the Respondent/Applicant be granted leave to file its defence out of time, defend this suit and the matter be heard on merit.
5. That the costs be provided for.

The applications is premised on the grounds on the face thereof as follows–

1. That there was a delay on the part of the client in giving instructions to the Advocates on record and as a result, the Advocates could not prepare the defence herein in time.
2. That by the time instructions were given, the time within which to file responses had already lapsed.
3. That hearing proceeded ex parte for non-attendance and/or appearance of the Respondent/Applicant herein and judgement entered against it.
4. That the Respondent / Applicant is an Association of individual construction companies and not an employer for purposes of the Employment Act 2007 and Labour Relations Act No. 14 of 2007.
5. That the Respondent/Applicant cannot hence, have a CBA with the Claimant herein.

6. That it is in the interest of justice that the Respondent/ Applicant be allowed to defend this suit and the matter be heard on merit.
7. That the Respondent/Applicant has a formidable defence that raises triable issues.
8. That this application has been brought in a timely manner without unreasonable/inordinate delay.
9. That the Defendant/ Applicant will suffer great prejudice if the said ex parte judgement is left to stand and is executed.

The application is supported by the affidavit of **KIRPAL SINGH SURI**, the Chairman of the respondent association in which he deposes that there was an inadvertent delay by the respondent in instructing counsel to file defence, hence the ex parte hearing; that the respondent has a good defence that raises triable issues as demonstrated in the draft defence attached to the affidavit and that it is in the interest of justice to grant the orders sought.

The claimant opposes the application and filed a replying affidavit of FRANCIS MURAGE, the General Secretary of the claimant. Mr. Murage deposes that the respondent was properly served with summons and memorandum of claim and the firm of Ameyo, Guto, Etole and Company Advocates filed a memorandum of appearance. The firm was served with hearing notices. That counsel attended court on 9<sup>th</sup> July 2018 and sought leave to file replying affidavit to the claimant's application on allegations that the respondent was out of the country. That the application was denied, the court having observed that the respondent had knowledge of the suit from inception on 3<sup>rd</sup> May 2018, further that the respondent is an organisation that cannot be said to have travelled.

He deposes that directions were given that parties proceed by way of written submissions and a date set for highlighting of submissions on 24<sup>th</sup> September 2018. The respondent however failed to comply with directions for filing submissions and failed to attend court on 24<sup>th</sup> September 2018 highlighting of submissions.

Mr. Murage deposes that judgment was delivered on 12<sup>th</sup> October 2018 in the presence of both parties. He deposes that it is therefore not true that counsel was instructed late as alleged in the affidavit of KIRPAL SINGH SURI. He deposes that the court outlined the history of the case in the judgment, demonstrating the apathy displayed by the respondent with regard to the matter.

Mr. Murage deposes that in the judgment the respondent was ordered to sign the CBA within 14 days and a mention was fixed for 12<sup>th</sup> November 2018 to confirm compliance. That the claimant invited the respondent for a meeting to sign the CBA on 1<sup>st</sup> November 2018 but the meeting did not take place. A further meeting was called by the claimant on 8<sup>th</sup> November 2018 but instead counsel for the respondent invited the claimant for a meeting in their chambers on 9<sup>th</sup> November 2018 at which the respondent sought to be given time to sign the CBA within 14 days. That before the 14 days were over the claimant was served with the instant application.

It is Mr. Murage's averment that the respondent does not deserve the orders sought and has filed this application to delay the course of justice, that the respondent is composed of professional companies engaged in roads and civil engineering, and they took part in the negotiations of the CBA. Mr Murage deposes that the defence attached to the affidavit of KIRPAL SINGH SURI does not raise any triable issues. He prays that the application be dismissed.

In the further affidavit of KIRPAL SINGH SURI sworn and filed on 14<sup>th</sup> December 2018 he reiterates that the delay in filing the response was inadvertent and not calculated to delay or abuse the process of the court. He admits that pleadings were served on the respondent but the respondent failed to instruct its counsel until after the time for filing the response had lapsed. He deposes that he was not in the country when the matter came up for hearing on 9<sup>th</sup> July 2018. He urges the court to grant the orders sought in the claim.

#### Submissions by Parties

The application was heard on 19<sup>th</sup> December 2018 and Mr. Ameyo appeared for the Respondent/Applicant while Ms. Chege appeared for the claimant.

Mr. Ameyo submitted that this court is empowered to grant the orders sought in the application, relying on the Court of Appeal decision in **Peterson Ndung'u -V- KPLC** in which the court observed "*It does not take much imagination ... that the Industrial Court is empowered to review its decisions under much wider powers than the High Court...*"

He submitted that the orders of this court directed the respondent to sign a CBA, that the respondent as a matter of law cannot ever sign a CBA. That the respondent is an association that require officials to meet to get instructions, that the process of getting instructions took a long time and counsel was instructed while the ex parte proceedings were ongoing, thus the counsel was not able to file a defence.

Ms Chege for the claimant submitted that the respondent was served and appointed the firm of Ameyo, Guto Advocates who filed a memorandum of appearance on 29<sup>th</sup> May 2018. No defence was filed.

Ms Chege submitted that the claimant's application dated 3<sup>rd</sup> May 2018 came up for hearing on 9<sup>th</sup> July 2018 when counsel for the respondent sought leave to file reply. That prior to that date the matter had been fixed for hearing on 14<sup>th</sup> May 2018 but was not listed. That respondent's application to file a replying affidavit was declined by court and parties directed to proceed by way of written submissions. The court further directed that parties highlight submissions on 24<sup>th</sup> September 2018. That the respondent's further attempt to enlarge time was denied on 24<sup>th</sup> September 2018. That judgment was delivered on 12<sup>th</sup> October 2018 in the presence of counsel for the respondent.

Ms. Chege submitted that no attempt was made by the respondent for reopening of the proceedings. That after the judgment the claimant invited the respondent for meetings on 1<sup>st</sup> and again on 8<sup>th</sup> November 2018 but the respondent postponed both meetings, and called a meeting at respondent's counsel's offices on 12<sup>th</sup> November 2018 when the respondent's representative asked for 14 days within which to sign the CBA. Before the lapse of the 14 days the respondent filed the present application.

Ms Chege submitted that the instant application is an abuse of court process and a bid to evade signing the CBA discussed in meetings attended by the respondent's counsel who was the one taking minutes. That during conciliation Mr. Suri was in attendance. Ms Chege submitted that the respondent was aware that the CBA lapse date was December 2018 and was deliberately frustrating the claimant to buy time to scuttle the CBA.

Ms. Chege pointed out that the only contentious clause in the CBA was the effective date which in any event had been agreed upon. She further pointed out that this CBA was a review of a previous CBA. She submitted that the respondent cannot justify the application on grounds that there was delay in issuing instructions. She submitted some members of the respondent had complied with the CBA in contention. She referred to appendix 5(a) and 5(b) of Mr. Murage's replying affidavit which are agreements between the claimant and two members of the respondent who had complied with the CBA and paid arrears for the first year of the CBA and were awaiting the determination of this suit to pay the second year arrears.

Ms Chege submitted that it is not clear which members of the respondent were averse to implementing the CBA, she submitted that so much prejudice has been caused to workers. That the respondent had taken the claimant in circles from the date of judgment.

She submitted that the application has no merit and should be dismissed with costs.

In a brief rejoinder Mr. Ameyo submitted that it is not true he attended any negotiations and took minutes. He further denied that the application was meant to frustrate the claimant, buy time or scuttle the court process. He submitted the application is brought to enable the respondent have an opportunity to argue a serious matter of law. He submitted his partner Mr. Etole who entered appearance suffered a stroke and has been in and out of hospital for treatment hence the failure to file defence.

## **Determination**

The issue for determination is whether the application by the respondent is merited.

The application herein seeks the setting aside of orders issued on the 12<sup>th</sup> of November 2018 directing that the Collective Bargaining Agreement between the claimant and the respondent/Applicant be registered and further that the ex parte hearing and resultant judgment entered on 12<sup>th</sup> November 2018 be set aside and the respondent/applicant be granted leave to file its defence out of time, defend this suit and the matter be heard on merit.

There is no order made by the court in this case on 12<sup>th</sup> November 2018. On that day the case was mentioned and the court fixed a further mention date on 10<sup>th</sup> December 2018. The judgment herein was delivered on **12<sup>th</sup> October 2018**.

The substantive law regarding review of a judgment or order of the court is to be found in section 80 of the Civil Procedure Act and the procedural law is Order 45 of the Civil Procedure Rules which stipulate that:

Section 80 of the Civil Procedure Act

### **80. Review**

**Any person who considers himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

Order 45 of the Civil Procedure Rules

**[Order 45, Rule 1.]**

**Application for review of decree or order.**

**(1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of**

**judgment to the court which passed the decree or made the order without unreasonable delay.**

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.**

Under Order 12 Rule 7 of the Civil Procedure Rules, where judgment is entered for the plaintiff in the absence of the defendant, the defendant may apply for setting aside of the *ex parte* judgment.

Setting aside an *ex parte* judgment is a matter of the discretion of the court, as was held in the case of **Esther Wamaita Njihia & 2 Others vs. Safaricom Limited** where the court citing relevant cases on the issue held *inter alia*:-

*“The discretion is free and the main concern of the courts is to do justice to the parties before it (see **Patel vs E.A. Cargo Handling Services Ltd.**) the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see **Shah vs. Mbogo**). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See **Sebei District Administration vs Gasyali**. It also goes without saying that the reason for failure to attend should be considered.”*

In **Shah vs Mbogo and Ongom vs Owota** the court held that for such Orders to issue *inter alia* the court must be satisfied about one of the two things namely:-

- a. either that the defendant was not properly served with summons; or
- b. that the defendant failed to appear in court at the hearing due to sufficient cause.

The court defined what constitutes *sufficient cause* and stated thus:-

*“Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the *ex parte* decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.*

*Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions.”*

Further Order 10, Rule 11 of the Civil Procedure Rules provides that –

#### **Setting aside judgment.**

**Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.**

In the instant case the respondent filed appearance but failed to file defence. The respondent further failed to attend court having been served with hearing notices.

The respondent therefore must explain why it failed to file a defence as well as the reasons for not attending court for hearing.

In the affidavits of KIRPAL SINGH SURI sworn on 30<sup>th</sup> November 2018 he states that there was inadvertence to instruct the counsel leading to delay in filing defence. No reason is given for failure to attend court on the hearing date. The supplementary affidavit of Mr. Suri sworn on 14<sup>th</sup> December 2018 further states as follows –

*“That indeed, pleadings were duly served upon our advocates on record but because of the said delay in issuing requisite instructions, by the time we gave the necessary instructions, the time within which to file our respective responses had already lapsed.*

*That I was not within the country when the application came up for inter parties hearing on the 9<sup>th</sup> July 2018 and although an organization cannot be said to have travelled, not everyone in the respondent association can depone to affidavits.*

*That I am not being pretentious in any way. I wish to reiterate that the respondent herein is an association with a busy schedule and the delay in issuing instructions to our advocates on record for them to respond is wholly attributable to this fact.*

*That it is as a matter of law that the respondent is not an employer but an association of independent professional construction companies within the roads construction industry with no employees belonging to any union. The Respondent is not even an*

association of employers within the meaning of the law and these facts shall be proven at the hearing of this matter should this Court be inclined to grant the orders sought.

That furthermore and without prejudice, the actions (or inactions) of counsel cannot be deemed to ratify illegalities. The fact that counsels met to discuss a CBA does not supplant the requirements for parties to sign a CBA envisaged and enumerated in the law.”

In the draft defence filed with the application, the respondent states at paragraph 5 that –

“The Respondent wishes to state that there was no CBA that was completed or due for signing. All the meetings between the Claimant and the Respondent were part of lengthy deliberations which were not finalized.”

At paragraph 8 and 9 of the reply it is stated –

The Respondent wishes to state as follows:-

(a) That the Respondent herein (RACECA) is an ASSOCIATION of professionals in the road construction field and NOT an employer within the meaning of section 2 of the Employment Act 2007 and Labour Relations Act No. 14 of 2007.

(b) That there is no recognition agreement between the Respondent Association herein and any trade union as required by section 54 of the Labour Relations Act. As such there can be no CBA between the Respondent and the Claimant herein.

(c) That by dint of section 54 (2) of the Labour Relations Act, for the purposes of collective bargaining, a group of employers must recognise a trade union if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector. Contrary to these provisions, the Respondent Association has fifty-two (52) members who are employers and only four (4) members out of the 52 have unionisable employees. Out of the four (4) members of the Respondent, less than ten (10) are unionisable employees. Therefore, there can be no CBA between the Respondent and the Claimant as required by the law.

As a result of the foregoing averions, there can be no CBA as between the Respondent and the Claimant herein.”

In a letter dated 12<sup>th</sup> January 2017 the respondent's counsel wrote to the claimant thus –

“The National General Secretary

Kenya Building, Construction, Timber and

Furniture Industries Employees Union

Munshi-Ram Building

Mfangano Street

P.O. Box 49628 – 00100, G.P.O

NAIROBI

**ATT: Mr. Murage**

12<sup>th</sup> January 2017

Dear Sir

**RE.: REVISION OF PARTIES COLLECTIVE BARGAINING AGREEMENT**

Thank you for your letter of 9<sup>th</sup> January, 2016 to the Chairmen, RACECA proposing a “seeing on 18<sup>th</sup> January, 2017,

Kindly note that RACECA would like to change the date for the meeting to 17<sup>th</sup> January, 2017 at the same time and venue.

Please confirm if this change is acceptable to you. You may call the undersigned on his cell phone no. 0722605469 for confirmation in view of the short notice.

Yours faithfully,

SIGNED

*Francis Etole*

*For and on behalf of RACECA*

*Cc: RACECA SECRETARIAT”*

Again in a letter dated 10<sup>th</sup> January 2018 the respondent’s counsel wrote the claimant as follows –

*“The National General Secretary*

*Kenya Building, Construction, Timber and*

*Furniture Industries Employees Union*

*Munshi-Ram Building*

*Mfangano Street*

*P.O. Box 49628 – 00100, G.P.O*

*NAIROBI*

*16<sup>th</sup> January 2018*

*Dear Sir,*

*RE: COLLECTIVE BARGAINING AGREEMENT*

*Your letter Ref No. BU/GS/2018/51/Vol.5/1 dated 11<sup>th</sup> January 2018 addressed to the RACECA Chairman has been referred to us with instructions to respond as follows:*

*Our clients are unable to sign the CBA in its present form as the start date agreed by the Parties was January 2018 and not January 2017.*

*Kindly amend the Draft CBA accordingly to enable our clients execute the same.*

*Regards.*

*Yours faithfully,*

*SIGNED*

*Dan K. Ameyo FCI Arb*

*For and on behalf of RACECA*

*Cc: Chairman*

*RACECA”*

I have set out the various positions of the respondent to demonstrate that it is not sincere and that what is contained in the defence is a sham.

In the draft defence it denies that there is a valid CBA yet in the letters above counsel for the respondent invited the claimant for a meeting to discuss the CBA. There are minutes of the meeting held on 19<sup>th</sup> June 2017 where the parties agreed to most of the issues in the CBA among them the effective date which the respondent later contested giving rise to the present suit. It is inconceivable that in the reply to the memorandum of claim the respondent would state that there is no recognition agreement and no valid CBA.

The Conciliator’s report as captured in the judgment is further demonstration of the folly of what the respondent has stated in the draft reply to the memorandum of claim. The Conciliator stated –

*“I understand the issue in dispute to be: “Effective date of the Current Bargaining Agreement.”*

*Both parties attended a Conciliation meeting on 2<sup>nd</sup> February 2018 and submitted as follows:*

*The Union submitted that they negotiated for all the terms and conditions for the current CBA and concluded only the Management to withdraw on the effective date which has been agreed in their negotiation.*

*The Union further submits that the last CBA expired on 31/12/2016 hence as per the practice and law the next CBA shall be effective on 1<sup>st</sup> January 2017.*

***The Management submitted that they negotiated the CBA in utmost good faith and agreed on all the issues apart from the effective dates.***

*They further submit that due to the prevailing economic situations and availability of contracts they feel the burden of paying arrears will heavily affect their operations. They conclude by submitting that effective date be January 2018 or a rider for waiver of arrears for 2017 be inserted.*

### **Recommendation**

*After careful consideration of both parties' submissions, it is recommended that the effective date of the current bargaining agreement be 1<sup>st</sup> January 2017. If it is acceptable the parties can proceed and sign the CBA if not the parties can proceed to the next level of dispute resolution mechanism."*

In **Patel vs East Africa Cargo Handling Service Duffus, V.P.** stated;

*"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"*

As to what constitutes "sufficient cause" to warrant the exercise of the court's discretion, the case of the Supreme Court of India case of **Parimal vs Veena** attempted to describe what was "sufficient cause" when it observed that:-

*"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

It is clear from the foregoing that from the moment the respondent consented to the effective date of the CBA that it negotiated with the claimant, its object has been to delay this case. It is also clear from the foregoing that the respondent had no valid reason to delay filing the defence or to fail to attend court or the hearing date. It is further clear that the draft defence presented with the instant application is a sham as the parties have a long history and the negotiations that are the subject of the dispute herein arose out of a review of the CBA.

Further, after judgment was delivered on 12<sup>th</sup> October 2018, no action was taken by the respondent to set aside the judgment until 30<sup>th</sup> November 2018, after the claimant had called for two meetings and the respondent had promised to sign the CBA within 14 days.

Further, the application seeks to set aside orders of 12<sup>th</sup> November 2018. There were no orders granted by the court on that date capable of being set aside.

From the foregoing, I find no merit in the application and dismiss it with costs to the claimant.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**