



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 49 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENNEDY MAKASEMBO.....CLAIMANT

-Versus-

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS.....RESPONDENT

R U L I N G

The application before me for determination is a notice of motion dated 27th June, 2016 filed under certificate of urgency on 28th June 2016. It is made under section 12 of the Labour Institutions Act, Rule 15 of the Industrial Court (Procedure) Rules 2013, Article 159 (2)(d) of the Constitution and all enabling provisions of the Law.

The application is filed by the Respondent/Judgment debtor and seeks the following orders -

- a. THAT this application be certified urgent.
- b. THAT service of this application in the first instance. (Sic)
- c. THAT this honourable court be and is hereby pleased to stay the execution of the decree herein dated 16th February 2016, pending the hearing and determination of this application.
- d. THAT this honourable court be and is hereby pleased to vacate and/or vary, and set aside its decree herein, dated 16th February 2016.
- e. THAT this honourable court be and is hereby pleased to allow the union/applicant herein leave to file its statement of defence out of time.
- f. THAT costs be provided for.

The Application is supported by the grounds on the face thereof and the affidavit of AKELLO M. T. MISORI, the Secretary General of the Applicant.

The Applicant was granted interim orders of stay upon the deposit of the entire decretal sum of Shs.524,837 in court on 1st July, 2016.

The application is opposed and the Claimant/Judgment creditor filed a replying affidavit in opposition to the application on 8th July, 2016.

The application was argued in court on 28th July, 2016. Mr. Nyaboga Mariaria instructed by Mariaria & Co. Advocates appeared for the Applicant (J.D) while the Claimant/Judgement Creditor was represented by Charles O. Onyango instructed by Olel, Onyango, Ingutia & Co. advocates.

Facts

This case was heard in the absence of the Respondent and Judgement delivered on 16th February, 2016. The Claimant thereafter commenced execution proceedings culminating in the execution process that is the subject of this application. The applicant did not file defence nor participate in the proceedings even though it was served properly with summons, memorandum of claim and all mention and hearing notices.

It is the applicant's case that the money claimed by the Claimant has already been paid by the Applicant to Migori KUPPET County Branch, that the Claimant is not an official of Migori - KUPPET County Branch and that even if the claimant was owed any money it is the Migori KUPPET County Branch which should pay him.

In the affidavit of Akello M. T. Misoro in support of the application he states that the Claimant was a branch chairman of KUPPET Migori County Branch and it is the Branch that is responsible to pay him.

Mr. Akello states that the applicant has a good defence which it has annexed to the affidavit and should be allowed to defend the case.

In the Replying Affidavit of KENNEDY MAKASEMBO the claimant, he states that the application is misconceived, mischievous and intended to deny him the fruits of his judgement.

He states that he filed the suit on 11th March, 2014 contemporaneously with an application seeking certain injunctive reliefs which he was ordered to serve and did so on 11th March, 2014 through a process server Linda Jane Handah whose affidavit of service he has filed together with the affidavit. He states that the applicant neither filed a defence nor attended court for hearing of either the application or the claim. He states that after the judgement was delivered he served a bill of costs and an assessment notice which the Respondent did not respond to.

The Claimant further states that the applicant violated a court order of 4th April, 2014 and another order of 19th November, 2014 in cause 100 of 2014 both of which were properly served.

It is the claimant's position that the applicant was all along aware of this suit and court orders but deliberately chose not to respond to the same and that the applicant does not deserve the orders sought.

The Claimant further states that cause No.100 of 2014 and this case are not of the same subject matter as this case involves payment of branch allowances to KUPPET County Branch, Migori while Cause No.100 of 2014 relates to elections.

Submissions

At the hearing Mr. Mariaria submitted that this court has unfettered powers to entertain an application to set aside *ex parte* judgement or a judgement in default of appearance and defence, that the applicant's draft defence raises triable issues and it is in the interest of justice that the applicant be given a chance to be heard.

Mr. Mariaria submitted that the court can impose conditions for setting aside that the applicant has deposited the entire decretal sum in court as security and the Claimant can easily access the same.

Mr. Mariara further submitted that the court ought to consider whether the draft defence raises triable issues. He submitted that even if the court finds that there was no good reason for the Respondent's failure to file appearance and defence it has a constitutional right to be heard and the court had powers to set aside the *ex parte* judgement on conditions of either depositing decretal sum or payment of thrown

away costs.

Mr. Mariaria also referred to the further affidavit of Hilda Boke Gati, the current Branch Secretary of KUPPET Migori County Branch in which she deposes that all monies due to the Branch from the Respondent have been paid.

He urged the court to allow the application.

The applicant relied on the following authorities -

1. C A NO:64 of 1982, Nairobi, KLR 1983, reported **Waweru vs. Ndiga**
2. C A NO:46 of 1986, Mombasa, KLR 1988 (reported) **Sheikh t/a Hasa Hauliers vs Highway Carriers Ltd.**

3. HCCC NO.1058 of 2000, Milimani Commercial Courts. (Unreported)

Charles Mwalia vs the Kenya Bureau of Standards.

4. HCCC No.1079 of 1980, Nairobi, KLR 1984 (reported)

Maina VS Muriuki

5. C A No.**Mburu Kinyua Vs Gachii Tuti**, KLR Court of appeal at Nairobi.

6. HCCC NO.95 of 2014, Nairobi

Shailesh Patel T/A Energy Company of Kenya Vs Kessel's Engineering Works LTD and Nzioa Sugar Co. Ltd and another.

7. HCCC NO.152 of 2013 - Nairobi

Prime Bank LTD VS Paul Otieno T/A Nyamodi & CO. Advocates

Mr. Onyango on behalf of the Claimant submitted that the applicant has not explained why it did not respond to the claim or attend court for hearing. He submitted that although the court is clothed with wide discretion to grant the orders sought by the applicant such discretion must be exercised judiciously and the court must consider the material that has been placed before it. He submitted that the court's discretion is intended to avoid injustice and not to assist a party which had deliberately designed to frustrate the course of justice. He submitted that the applicant is not deserving of the discretion of the court as it has not demonstrated it will suffer injustice on inadvertence.

Mr. Onyango traced the history of this case which he submits is replete with instances of deliberate non compliance by the applicant.

Mr. Onyango urged the court to refuse to grant the orders sought because it will cause immense prejudice to the claimant.

Determination

I have carefully considered the pleadings and the submissions of parties in respect of this application.

The principles for setting aside judgements in default of appearance and defence have been well set in numerous decisions of courts.

In the case of **Baraka Apparel EPZ (K) Ltd v Rose Mbula Ojwang T/A Faida 2002**

Caterers[2007]eKLR the court of Appeal summarised the principles in the following terms -

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just.. 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 it by the rules."

"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

The Employment and Labour Relations Court (Procedure) Rules 2016 do not provide for setting aside of rulings and Judgments. The Rules however provide at Rule 32 (2) that Rules on execution of an order or decree shall be in accordance with the Civil Procedure Rules. This application being a post judgment application, would therefore fall under Rule 32(2) and Order 12 Rule 7 of the Civil Procedure Rules would apply. Order 12 Rule 7 provides that -

7. Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

Before the court can exercise its wide discretion under order 12 Rule 7 of the CPR, it is important to set out and consider the facts of this case which has been very elaborately done in the replying affidavit of the claimant at paragraphs 4 to 18.

The applicant was first served with Notice of Motion under certificate of urgency dated 10th March 2014 and Statement of Claim on 17th March, 2014. The applicant did not respond to the same.

On 30th June, 2015 the applicant was served with hearing notice. The applicant did not attend court for hearing of this case on 16th November 2015, pursuant to the said notice and the case proceeded in its absence.

In the affidavit of Akello M. T. Misoro he admits that the applicant was served with pleadings but failed to present its defence. He has not given any reason for such failure. The applicant did not file a supplementary affidavit to contest the averments in the replying affidavit to the effect that it deliberately failed to attend court or file its defence with the intention to delay the proceedings. The applicant also did not state why it did not respond to the hearing notice served upon it on 30th June, 2015 or the notice of assessment of costs.

The applicant does not deny that it responded to the claimant's counsels letter of 7th July 2015 reminding it about this courts order of 17th April, 2014.

From the foregoing it is the opinion of the court that the applicant deliberately ignored summons, Orders, mention notices and hearing notices of this court.

I have considered the draft defence filed with the application. The defence lays blame on a branch of the Respondent which the Respondent is responsible for and under its supervisory jurisdiction but without enjoining the said branch.

According to section 25 the Labour Relations Act, the branches are created by the Union and according to its Constitution, the Respondent receives all funds of the Union. It is the Respondent which funds all its branches.

The Respondent can therefore not deflect responsibility to its branch which is under its control.

I find no just cause to set aside the judgement. I am persuaded that the applicant had ample opportunity to defend this case before judgement and also opportunity to apply for setting aside of judgement but deliberately failed to do so until it was threatened with attachment. Granting the orders would inflict undue hardship to the claimant who has since 2014 diligently pursued his case.

The constitution requires that every person is given an opportunity to defend itself but does not require the court to bend backwards to accommodate a party who after being given an opportunity to defend itself, deliberately fails to do so, as is the case herein. This application is a further attempt by the applicant to obstruct the course of Justice. The Claimant has a right to enjoy the fruits of his judgment.

For these reasons, I am persuaded that the applicant deliberately failed to defend itself and is therefore not entitled to the court exercising discretion in its favour. The result is that the application is dismissed with costs to the claimant and the Deputy Registrar is directed to release the moneys deposited in court to the Claimant.

Before I pen off, I must also observe that section 12 of the Labour Institutions Act and Rule 15 of the Industrial Court (Procedure) Rules are non-existent. The whole of part III of the Labour Institutions Act which provided for the establishment of the Industrial Court (now Employment and Labour Relations Court) was repealed by the Industrial Court Act 2011 (Now Employment and Labour Relations Court Act) while the Industrial Court (Procedure) Rule were enacted in 2010 and not 2013.

Dated and signed and delivered this 19th day of January, 2017

MAUREEN ONYANGO

JUDGE