



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

CAUSE NO. 702 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st May, 2017)

FELIX LIPESA SHABUYACLAIMANT

VERSUS

MR. & MRS. MEENA JATISHYA SHAH

T/A FLORAL HERITAGERESPONDENT

RULING

1. Before the Court is an Application dated 22nd November 2016, where the Applicant/Respondent seeks orders:

- 1. That this Honorable Court be pleased to certify this application as urgent and that the same be heard ex-parte in the first instance.***
- 2. That this Honorable Court be pleased to grant leave to the firm of Mwamuye, Kimathi & Kimathi Advocates to come on record for the Respondents/Applicants.***
- 3. That there be Stay of Execution of the Decree passed on the 29th June 2016 and issued on the 17th October 2016, resulting from the judgment made on the 29th February 2016; pending the hearing and determination of this Application inter parties.***
- 4. That there be a Stay of Execution of the Decree resulting from the Judgment made on 29th February 2016 and any other consequential orders arising therefrom, pending the hearing and determination of this application.***
- 5. That the judgment entered herein on the 29th February 2016 and any other consequential orders arising thereon, be set aside and the Respondent/ Applicants be granted leave to defend the suit.***
- 6. That costs of this application be provided for.***

2. The application is supported by the annexed affidavit of Meenakshi Jatish Shah and on the following grounds:

- a) Since being served with the Claimant's statement of claim dated 30th April 2014, sometimes in***

early May 2014, the Respondent/Applicant have not been served with any Mention or Hearing Notice in this matter, save for the Mention Notice dated 29th August 2016, which was served on the Respondent/Applicant on the 31st August 2016, and which was informing them that the matter was coming up for taxation of the Bill of Costs on the 5th September 2016.

b) The Respondents/Applicants filed a Respondent's Answer and Defense to the Claimant's Memorandum of Claim dated 14th May 2014 which however is not in the Court File.

c) The Claimants/Respondents conducted the entire suit by keeping the Respondent /Applicants in the dark; so as to obtain judgment in his favour through unjust and illegal means.

d) On 29th February 2016, judgment was entered in favour of the Claimant/Respondent against the Respondent/Applicant in the sum of Ksh 318,395.00.

e) The Claimant/Respondent extracted the Decree herein, which is dated 17th October 2016 having been passed in Court on the 29th of June 2016; and applied for Warrants of Attachment and Sale of the Respondent/Applicants' property. The Said Warrants are returnable on or before 15th December 2016.

f) On the 16th November 2016, the Respondents/ Applicants were served with a Notice of Proclamation and the said Notice was set to expire on the 22nd of November 2016.

g) The period for proclamation of the Applicant's property has expired and the Claimant/Respondent may proceed with sale of the Applicants' property at any time.

h) The documents served on the Respondents/Applicants by the Auctioneer acting on behalf of Claimant/Respondent are peculiar in the following ways:

a. The Warrant of Attachment of Movable Property specifies that "whereas Delina General Enterprises Limited was ordered by decree of this Court passed on the 29th day 2016 in the above-mentioned suit to pay to the Claimants the sum of Kshs 318,935.00...". Thus the Warrant of Attachment is as against a subject party known as Delina General Enterprises Limited not the Respondents /Applicant herein, notwithstanding the case header being correct.

b. The Warrant of Sale of Property issued under the hand and seal of this Honorable Court dated 15th November 2016 is peculiar in that it specifically states that it is in favour of the Decree-Holder in Cause No 833 of 2012; while the case herein is Cause No 702 of 2014, notwithstanding the case header being correct.

c. The Proclamation Notice dated 16th November 2016 issued by the Auctioneer on behalf of Claimant/Respondent to the Respondent /Applicant is missing vital information that would identify the root of the decree ostensibly being executed.

i) The Applicants stand to suffer great injustice in the event the Claimant/Respondent is not stopped from proceeding with Execution.

j) It would be against the principles of natural justice to condemn the Applicants without giving them an opportunity to be heard.

k) The Applicants will suffer great loss and harm if it is condemned unheard while on the other hand the Claimant /Respondent can always be compensated by way of reasonable costs.

i) The Applicants have weighty and triable issues which they intend to raise if given the

opportunity to defend the suit of both legal and factual nature, including the fact that the Claimant stole from the Applicants' business and the same was reported to the police after which the Claimant deserted employment.

m) That the Claimant will not suffer any prejudice if the orders sought are granted especially since the decree has been challenged.

n) This Application has been brought without undue delay.

o) The wider interest will be best served if this application is allowed as prayed.

3. The Claimant/Respondents have filed a Replying Affidavit deposed to by Felix Lipesa Shabuya.
4. He avers that the service of Memorandum and Summons has been proper admitted and unequivocal and its apparent the Applicant deliberately refused, neglected, failed and ignored to honour the Court summons which is not his fault and the Respondent/Applicants should face their own consequences.
5. Further, he avers that their advocates properly moved the Court for directions for orders that the Honourable Court to issue interlocutory judgment in his favour and ordered the matter undefended and the same proceed for formal proof which was done.
6. He avers that the Court itself verified that there was no response to his Memorandum of Claim and the assertion that it was filed is false and a misrepresentation to the Court by the Applicant. Further, after judgment, his advocates served a Certificate of Taxation which upon coming up for hearing, personal service was directed and done.
7. He avers that the Respondent admits receipt and service but failed yet again to attend Court to defend the taxation. The Applicant has attempted to produce falsified documents which have neither been stamped nor does he have an official receipt to show he entered defence.
8. He avers that the Applicants have failed to attend Court, even when they had indicated upon receipt of notices that they will seek adjournment, leading him to seek execution of the judgment.
9. He avers that there was no proper reason for not attending Court and that the Applicants acknowledged the errors offering the auctioneers Kshs 200,000.00 in order to buy time as they sought stay orders.
10. They aver that upon banking the cheque, the Applicants refused to honour it asking the bank to reverse it. They aver that the OB as alleged is a forgery by the Applicants and that he is ready to meet the complaint fairly and squarely.
11. They conclude that the application is in bad faith and abuse of the Court process and ought to be dismissed with costs.
12. The Respondents have filed written submissions dated 20th December 2016.
13. In them, they submit that they have not been served with any mention or hearing notice save for the Mention Notice dated 29th August, 2016 which was served on the Respondents/Applicants on the 31st of August 2016 where they were informed that the matter was coming up for taxation of the Bill of Costs on the 5th September 2016.
14. They submit that while they agree that they never entered appearance after being served with the Memorandum of Claim, they being elderly were not aware of the Court procedure and the Claimant/Respondent ought to have served them with Hearing and Mention Notices as their address was known to them. They urge the Court to exercise its inherent jurisdiction and unfettered discretion and set aside the judgment and decree herein.

15. They submit that they thought they had properly filed a response dated 14th May 2014 and have annexed it.

16. They cite the matter of **Shah vs. Mbogo & Another [1967] EA 116** where the Court held as follows, at page 123:

“I have carefully considered, in relation to the present application, the principles governing the exercise of the courts discretion to set aside a judgment obtained ex-parte. 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 has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice..”

17. They submit that the Applicants will suffer irreparable damage and hardship. The Claimant/Respondent conducted the suit in the dark so as to obtain favorable judgment which was unjust and illegal.

18. The Respondent/ Applicant submit that the documents served on the Respondent were fatally defective and illegal which cannot be wished away. Warrants of Attachment and Warrants of authority under the Court must be in the prescribed form and discrepancies should have been noticed them. They should not be acceptable and the Respondents/Applicants should be restored to their position before the illegal execution.

19. They submit that they have weighty triable issues which they intend to raise if given the opportunity which include the theft by the Claimant/Respondent, the fact that he was not underpaid and misjoinder of Mr. and Mrs. Shah from the suit as they are a separate legal entity from the business.

20. They cite the case of **Kimani vs. Mccuirel (1966) EA 547** where it was stated that:

“that a Court in determining whether to set aside an ex parte judgment should consider whether any material factor appears to have entered into the passing of the ex parte judgment which would not or might not have been present had the judgment not been made ex parte, and then if satisfied, that such was it may not have been the case, to determine whether, in the light of all facts and circumstances both prior and subsequent and or the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment if necessary upon terms to be imposed.”

21. They submit that the judgment contains several material facts that were entered ex parte and would not have been part of the judgment had the matter proceeded inter parties.

22. They further submit that the cheque to the auctioneers was obtained through coercion and it is clear that it would be in the interest of justice for the application herein to be allowed as prayed.

23. The Claimant/Respondents have filed submissions dated 16th January 2017 where they submit that the final judgment, all Court processes, were lawful and regular.

24. They submit that they served all Court process including summons and the Memorandum of Claim. They submit that the Respondent/Applicants were not kept in the dark and have further not demonstrated that they have a proper defense on merit to warrant setting aside of the judgment.

25. They Claimant further submit that the allegations of theft are false and the reporting was done after almost two years since the Claimant left employment. Moreover, they submit that the Court cannot use unsubstantiated allegations as a consideration to set aside the final judgment and decree in the matter, the Respondent having reminded the Court that they have no jurisdiction in criminal matters and therefore this allegation cannot be triable issue in the Court herein.

26. They further submit that the Applicant has not provided evidence via pay slips or corresponding legal

notices that they complied with the requirement of minimum wage.

27. Further they submit that misjoinder is not a triable issue and the argument is not properly developed by the Respondent/Applicant and there is no evidence of misjoinder and denial that the Respondent was not the employer of the Claimant.

28. They submit that the typographical mistakes by the registry in preparation of the decree and warrants cannot be a basis to set aside judgment as they are not fatally defective.

29. They cite the case of **Habo Agencies Limited Vs. Wilfred Odhiambo Musingo [2015] eKLR** where it was held that:

“I further find that the Applicant was not candid in explaining the delay and this deprives it of equitable relief...prolongation of this litigation would be prejudicial to the decree holder and would violate the public policy that litigation must come to an end. The upshot is that this application is lacking in merit and I order that it be and is hereby dismissed with costs...”

30. They submit that it would be bad precedent to allow the application and urge the Court to adhere to the finding in **Michael Kamau Gakundi vs. Daima Bank Limited & Another [2012] eKLR** where the Court stated:

“I agree with the Defendants that the Plaintiff has been indolent and has not shown good faith in the conduct of his case. This Court cannot exercise its unfettered discretion in favor of a litigant who wants to steal a march on his opponent or who wants to obstruct or delay the course of justice. Indeed as far as the Defendants are concerned, justice to be further delayed, is justice denied..”

31. They submit that the Courts discretion is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice such as the Applicant. Further, a retrial would escalate costs and there is no undertaking by the Respondent for payment.

32. They submit that justice delayed is justice denied and that the policy is litigation must come to an end the Honorable Court should dismiss the applications with costs.

33. Having considered the submissions of both parties and upon examining the affidavits filed in this case, I note the averments from the Applicants that they had indeed filed a defence as per paragraph 6(a) of their grounds filed herein and paragraph 3 of supporting affidavit. They however rebut this position under paragraph 11.3 of their submissions where they state as follows:

“Judgment dated 29th February 2016, your Ladyship was clear that the Respondents herein were served with a Memorandum of Claim and Summons but they thereafter never entered appearance or filed a defence. My Lady, this is not disputed by the Respondent/Applicants”.

34. It is however notable that the Respondent/Applicants have annexed to this application their Annex “MJS1” a purported defence to the claim with a stamp of the Court which has over ridings on it and this is a clear indication that the same is forged.

35. No receipt stamp of the Court is visible and there is no payment receipt attached to indicate payments made. This in effect is an indication that the Applicants are not trustworthy and they are approaching this Court seeking Court’s discretion when they are guilty of falsehoods.

36. The Applicants are urging the Court to exercise its discretion to set aside its Judgment but at the same time are displaying documents with question marks.

37. This Court’s discretion should be exercised judiciously and the Court would only exercise its discretion to aid a party who deserves the Court’s consideration. In the case of **Shah vs. Mbogo and**

Another (1967) EA 116, the Court held as follows:-

“I have carefully considered, in relation to the present application the principles governing the exercise of the Court’s discretion to set aside a judgment obtained exparte. The discretion is intended to be exercised to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct “ (emphasis is mine).

38. It is my position that indeed this Court cannot aid a person who approaches it with falsehood to the extent of making averments in an affidavit which are incorrect. The Court would not aid the Applicant/Claimant in this manner.

39. It is evident that the Respondent was served with Memorandum of Claim and summons way back in May 2014. They didn’t file any defence or appearance. The case then proceeded on merit as undefended as directed by Court.

40. Allowing the application to set aside the judgment already obtained by the Claimant is to deny the Claimant the fruits of his judgment and aid those not.

41. I decline to grant orders sought by the Respondents and order execution to proceed.

42. Costs to the Respondent/Claimant.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Obutu holding brief for Okemwa for Claimant

No appearance for Respondent