Kimonye v Kenya Meat Commission (Cause 465 of 2017)
[2022] KEELRC 13387 (KLR) (5 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13387 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 465 OF 2017

JK GAKERI, J

DECEMBER 5, 2022

BETWEEN

JAMES KIMONYE ..... DECREE HOLDER

AND

KENYA MEAT COMMISSION ..... JUDGMENT DEBTOR

RULING

1. Before the court for determination is a notice of motion application by the applicant seeking orders that;

    i. The application be certified urgent and heard *ex-parte* in the first instance.

    ii. The firm of Koceyo & Company Advocates be and is hereby granted leave to come on record for the respondent herein in place of the firm of Kioko Kilukumi & Company Advocates.

    iii. The court be pleased to stay the execution of the judgement and decree delivered on November 17, 2021 in this matter pending the hearing and determination of this Application.

    iv. The court be pleased to set aside the judgement and decree delivered on November 17, 2017 in this matter.

    v. The suit be re-opened and be heard a fresh and the respondent/applicant be granted leave to render evidence in the matter.

    vi. The costs of this application be provided for.

2. The application filed under certificate of urgency is expressed under Article 164(3), 48, 20 (3) (a) (b), Article 159(2) of the *Constitution of Kenya, 2010* and other enabling provisions of the *Civil Procedure Act* and *Civil Procedures Rules, 2010* among others and is supported by the affidavit of Anthony Ademba who depones that.

On June 27, 2022, the respondent was surprised to be served with a court decree having not been informed of any hearing date set by the former advocate. That on obtaining the file from the former advocates, they discovered that the suit was heard on September 29, 2021 without participation of the respondent's counsel and taxation of the Bill of Costs was scheduled for July 4, 2022 and was not defended. That the respondent was unaware of the hearing date.

3. The claim was for Kshs 10,907,566/= and the respondent had a counter-claim of Kshs 6,011,556/= and the respondent did not participate in the hearing due to the mistake of its advocate on record who did not inform it of the hearing date and the intended advocates are not formally on record.

4. That leave should be granted to the judgement debtor/applicant's new Advocates M/s Koceyo and Company Advocates to come on record and represent the judgement debtor/applicant.

5. The affiant states that in the event the decretal sum was paid and the application succeeds the same would be irreversible and irreparable damage as the claimant had no known assets or means to refund the same and no prejudice would be occasioned upon the claimant/respondent.

6. That the application has been brought without undue delay and the court had discretion to grant the orders sought.

7. That the amount involved is colossal involving a public entity and if not defended, public funds will be lost for a mistake of counsel and such mistake should not be visited upon the public at large.

8. That the judgement debtor/applicant had a strong defence and counter-claim and evidence shall be adduced for the court to appreciate the claimant's termination was procedural and fair and no compensation was due.

9. That the defense and counter-claim raises substantial and weighty issues of fact.

10. That it is in the interest of justice that the application be allowed failing which the applicant shall be condemned unheard contrary to the cardinal rules of the natural justice that no person shall be condemned unheard.

11. In his replying affidavit, Mr James Kimonye states that the suit was fixed for hearing by consent on August 10, 2021 and the hearing date scheduled for September 29, 2021.

12. The affiant further states that before the hearing on September 29, 2021, the file was placed aside for a hearing at noon for the claimant's advocate to contact the applicant's Advocate for the hearing. That the claimant's advocate was notified that the applicant's advocate indicated that they were engaged in other matters. That it is the duty of the client or litigant to constantly check with its advocates the progress in its matters or status update.

13. That the applicant has been indolent and it would be a travesty of justice for the court to exercise discretion in its favour.

14. The affiant states that the applicant's claim that it was unaware of the status of the suit for 8 months was untrue since judgement was delivered on November 17, 2021 and was scheduled for taxation on July 4, 2022.

15. That when the applicant's counsel on record received judgement notice dated October 26, 2021, they indicated that they had no instructions on the matter and had ceased acting and the applicant has not tendered evidence of any follow-up.

16. The affiant states that the applicant is dishonest in that by a letter dated October 29, 2021, the advocates wrote to the affiant's advocates copying the Deputy Registrar and Mr Anthony Ademba complaining about the *ex-parte* hearing and indicated that they would challenge it.

17. That the deponent herein Mr Anthony Ademba was aware of the matter in early October 2021 and could not allege any surprise by service of the court decree by reason of not having been informed by the previous advocates.

18. That the applicant had led no evidence to demonstrate the action it took against the previous advocates for the alleged lapses by way of a complaint to the law firm or the Disciplinary Tribunal for the misconduct.

19. The affiant further states that he had been in court for the last 14 years on this matter and the same should be concluded as litigation must come to an end and there was no justification to re-open the case since the applicant did not provide any evidence in support of its case.

20. That the respondent/applicant is bound by the law and the application should be dismissed with costs.

Applicant's submissions

21. The applicant identified several issues for determination, whether

    i. The firm of Koceyo & Co Advocates should be granted leave to come on record for the Applicant.

    ii. The judgement delivered on November,17 and decree should be stayed.

    iii. The applicant is deserving of orders sought.

22. On the first issue, reliance was made on the decision in *Stephen Mwandware Ndighila v Steel Makers Ltd* (2022) eKLR as well as Order 9 Rule 9 of the *Civil Procedure Rules, 2010* to urge that a court order is necessary for a change of advocates after judgement had been delivered.

23. The court was urged to allow the law firm of Koceyo & Co Advocates to come on record for the applicant.

24. As to whether the judgement delivered on November 17, 2021 and decree should be stayed, reliance was made on Order 46 Rule 6(2) of the *Civil Procedure Rules* on the elements to be established for a stay to be granted, namely, substantial loss, absence of unreasonably delay and provision of security for due performance.

25. The court was urged that the applicant was a public entity and the claim involves a colossal sum.

26. That public interest should be taken into consideration and counsel's mistake should not be visited upon the client.

27. It was urged that the applicant had a strong defence and the claimant's termination from employment was fair.

28. That it would be difficult for the applicant to recover the decretal sum from the decree holder should be application succeed.

29. Reliance was also made on the decision in *Richard Muthusi v Gituma Ngomo & another* (2017) eKLR to reinforce the submission.

30. It was urged that if the judgement was not stayed, the applicant who has the right to be heard shall be condemned unheard contrary to the cardinal rules of natural justice.

31. As to whether the judgment and decree should be set aside, reliance was made on Article 159 (2) (d) of the *Constitution of Kenya, 2010* and Sections 1A and 1B of the *Civil Procedure Act*, that focus should be on the administration of substantive justice as opposed to procedural technicalities.

32. It was urged that the court has discretionary powers to set aside the *ex-parte* judgement for justice to prevail and the respondent had a defense and counter-claim.

33. The decision in *Mohamed & another v Shoka* (1990) KLR 463 was relied upon to demonstrate the parameters a court should consider in entering interlocutory judgement, as are the decisions in *Mwala v Kenya Bureau of Standards ER* (2001) 1 EA 148, *Kimani v McConnel* (1966) EA 545 among others.

34. It was urged that the applicant's response raises triable issues.

35. As to whether the orders sought were deserved, reliance was made on the decisions in *Patel v EA Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motors Ltd v DT Dobie Co Ltd* (1984) KLR 407 to urge that the court had discretion to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error and the client should not suffer due to the mistake of its counsel.

36. Finally, it was submitted that on June 27, 2022, the applicant was surprised to be served with a court decree in this matter and had not been previously informed of any hearing date set by its former advocates.

37. That its advocates did not inform them about the hearing.

38. That it was in the interest of justice that the application be allowed.

Respondent/Decree Holder's submissions

39. The respondent submitted that it was not opposed to prayer number 2 of the notice of motion application and was allowed by the court.

40. According to the respondent, the issues for determination were whether;

    a. The applicant has demonstrated sufficient reasons for the re-opening of the matter.

    b. Depending on the answer to issue (i) above

        i. Whether the applicant has met the threshold for setting aside of the judgement.

        ii. Whether the Applicant is entitled to a stay of execution of the decree.

41. As regards the first issue, the decision in *Gideon Mose Onchwati v Kenya Oil Co Ltd & another* (2017) eKLR was relied upon to demonstrate the court's discretion in determining applications such as the one at hand.

42. It was urged that the hearing in this case was fixed by consent on August 10, 2021 and took place as scheduled on September 29, 2021 and out of caution, the court placed the file aside until noon to facilitate the respondent/applicant's participation and the decree-holder's counsel was informed that the applicant's counsel had other matters.

43. The decree-holder catalogues the chain of events to demonstrate that the applicant had come to court with unclean hands. In particular, the applicant was served with a judgement notice and written

submissions on October 26, 2021 and responded by letter dated October 29, 2021 stating that it would have the judgement set aside but took no action and the applicant was copied.

44. It was further submitted that the applicant had rendered no evidence of the action it took against its previous advocates.

45. That the applicant had not demonstrated why it had approached the court 7 months later yet it was aware of the status of the matter.

46. It was urged that as explained in *Gideon Mose Onchwati v Kenya Oil Co Ltd & another* (Supra), it was the duty of the litigant to constantly check with its advocates on the progress of its case and in this case, the applicant had not demonstrated such diligence.

47. Reliance was made on the sentiments of Onguto J. in *Republic v Kenya Medical Training College & another EX Parte Kenya Universities and Colleges Central Placement Service* (2015) eKLR on the obligations of an applicant appearing ex-parte on disclosure of material facts and sincerity.

48. The court was urged to find that the applicant was a culprit for non-disclosure of material facts.

49. As to whether the applicant had met the threshold for setting aside of the Judgement delivered on November 17, 2021, it was submitted that it had not.

50. Reliance was made on the decision in *Ann Wanja Mwangi V Samson Muriithi Muriuki* (2019) eKLR to highlight the courts discretion to determine applications such as the instant one on the basis of the circumstances in each case.

51. It was submitted that the Applicant had not availed any material to justify the setting aside of the judgement delivered on November 17, 2021 and was not truthful.

52. That the only reasons relied upon by the applicant was that the response raised triable issues and the amount involved was colossal.

53. As regards the stay of execution, it was submitted that the applicant had submitted on grounds similar to those provided under Order 42 Rule 6(2) of the *Civil Procedure Rules* which relate to the grant of stay of execution pending appeal, yet the applicant was not seeking such a stay and as such, the applicant's submissions were inapplicable to the instant case.

54. It was further submitted that since the applicant sought the re-hearing of the suit, the argument that damage would be reversible had no application.

55. Finally, it was submitted that it would be unfair and unjust to punish the decree holder in his quest to enjoy the fruits of his labour, the court having found in Judicial Review No 2 of 2008 that he was unfairly terminated from employment and had been pursuing the matter for 14 years.

56. The court was urged to dismiss the Application with costs.

Determination

57. I have carefully considered the application, replying affidavit and the rival submissions by counsel.

58. The issues for determination are;

    i. Whether the firm of Koceyo & Co Advocates should be granted leave to come on record for the applicant.

    ii. Whether the judgement delivered on November 17, 2021 and decree should be stayed.

iii. Whether the judgement delivered on November 17, 2021 should be set aside.

59. As regards the first issue, the respondent had no objection to the firm of Koceyo & Co Advocates being granted leave to come on record for the applicant.

60. More significantly, the court is guided by the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 and relevant judicial decisions such as *Stephen Mwandware Ndighila v Steel Makers Ltd* (Supra) and *SK Tarwadi v Veronica Muehlemann* (2019) eKLR cited by the Applicant's counsel.

61. Nothing turns on this issue.

62. As to whether the judgement delivered on November 17, 2021 should be stayed, the Applicant relies on Order 46 Rule 6(2) of the *Civil Procedure Rules, 2010* as the guiding provisions in the determination of applications for stay of execution and proceeds to set out the threshold.

63. Regrettably, the court is in agreement with the respondent's submissions that the *Civil Procedure Rules, 2010* have no provision for Order 46 Rule 6(2) as cited by the applicant's counsel.

64. Needless to emphasize, Order 46 addresses arbitration under orders of the court and other alternative dispute resolution and has no provision on stay of judgement or execution.

65. The provisions relied upon are those of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* which relate to stay of execution pending appeal which is not the case in the instant application.

66. The applicant herein is seeking a stay of the execution of the judgement and decree delivered on November 17, 2021, to re-open the case and be granted leave to tender evidence.

67. Having found that the provisions relied upon by the Applicant to urge its case are not applicable to the instant application, I will now proceed to assess whether the grounds relied upon are sufficient to justify a stay of execution.

68. The applicant urges that it stands to suffer irreversible and irreparable damage should the decree holder execute the decree since it involves a large amount of money and the decree holder has no known means or assets to refund the same.

69. When the application came up for hearing on July 1, 2022, the court directed that inter-partes hearing date be fixed at the Registry and taxation of the bill of costs to proceed on July 4, 2022 and no interim relief was granted.

70. On July 4, 2022, the Deputy Registrar directed that the application be served upon the respondent by close of business on the same day.

71. On July 21, 2022, parties were directed to file written submissions, 14 days a piece and both had complied by September 29, 2022 when a ruling date was fixed.

72. The absence of interim orders notwithstanding, the claimant/respondent has not threatened to execute the decree and there was no imminent fear of execution.

73. The prayer for stay of execution pending hearing and determination of this application appears to have been overtaken by events and is thus of no moment.

74. However, the closely related issue of re-opening of the case to be heard a fresh is elemental. It is trite law, that the court has discretion to allow the re-opening of the case.

75. In *Samuel Kiti Lewa v Housing Finance Co of Kenya & another* (2015), Kasango J expressed herself as follows;

> " The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay."

76. Similar sentiments were expressed in *Gladys Wakiuru Nyota v Pincle Njoroge & another* (2020) eKLR where Kamau J stated as follows;

> " Having said so, re-opening of a case is not a matter of course. A court must consider each case on its own merits. As was held in the case of *Joseph Ndung'u Kamau v John Njihia* (Supra) and *Standard Chartered Financial Services & 2 others v Manchester Outfitters (Suiting Division) Ltd & 2 others* (Supra), the decision to re-open a case is a discretionary one. The rider is that such discretion must only be exercised sparingly to avoid injustice and miscarriage of justice.

77. The court is guided by these sentiments.

78. In the instant case, it is not in contest that the claimant filed this suit in the High Court on April 20, 2009 as HCCC No 2015 of 2009, the respondent filed its defense and counter-claim on May 29, 2009 and the claimant filed a defense to the counter-claim on June 9, 2009 and list of agreed issues on April 15, 2010.

79. By a notice of motion application dated January 28, 2008, the claimant obtained an order of certiorari quashing the decision of the Permanent Secretary, Ministry of Livestock and Fisheries Development made on December 11, 2007 and the Minister's decision terminating his employment on December 24, 2007.

80. The suit was transferred to this court by a court order dated June 2, 2015.

81. The respondent/applicant filed a list of agreed issues on December 13, 2018.

82. Strangely, and for unexplained reasons, the respondent/applicant did not at any point file a witness statement or list and bundle of documents.

83. Relatedly, the hearing date was fixed by consent on August 10, 2021. While Mr Omulama represented the Claimant, Mr Kimani held brief for Mr Kioko Kilukumi for the Respondent.

84. On the hearing date on September 29, 2021, the respondent was absent. Mr Omulama for the claimant informed the court that the date was taken by consent and he was ready to proceed. He also notified the court that no documentation had been filed and wondered whether the respondent was still keen on defending the suit having filed a counter-claim.

85. In its endeavour to ameliorate the situation, the court placed the file aside at 10.05 am and directed counsel for the claimant to contact his counter-part, counsel subsequently reported to the court that they could not be reached. counsel urged the court to allow the matter to proceed as undefended.

86. Worthy of note, the respondent's counsel law firm had been admitted for the virtual hearing as the firm name was evident on the screen.

87. Hearing commenced at 1.00 pm to accommodate the respondent, further the court left the respondent's case open till the judgement date and directed the claimant's counsel to serve submissions after 14 days and the respondent had 14 days to file and serve. A judgement date was given.

88. Although service was effected, the respondent's counsel on record did not file submissions.

89. Judgement was delivered on November 17, 2021 as contemplated and nothing transpired until the current application by which the applicant blames it counsel on record then for not informing it about the hearing.

90. It is unclear to the court when the previous counsel and the respondent communicated on matters germane to this case. The absence of a witness statement or list and bundle of documents is puzzling.

91. The applicant's complaint about being unaware of what was happening and being surprised by the service of notice of taxation of bill of costs scheduled for July 4, 2022 is not entirely correct or honest on account that by a letter dated October 29, 2021, the respondent's counsel wrote to the claimant's counsel and copied the letter to the Deputy Registrar of this court and Mr Anthony Ademba, the Chief Legal Officer of the judgement debtor/applicant informing the three parties that they had received the claimant's written submissions and Judgement Notice and were surprised that they had no hearing notice, but more critically, the letter was emphatic that their client/applicant would apply to set aside the judgement and all other consequential proceedings.

92. The letter was signed by Mr Kioko Kilukumi SC of Kilukumi & Co Advocates.

93. Mr Anthony Ademba has not denied having received this letter or unaware of its contents. A copy of the letter was attached to the application herein.

94. The court is left wondering how the applicant and its counsel on record communicated on the instant case. Other than a copy of the letter dated October 29, 2021 to the claimant's counsel, the applicant has not attached any documentary evidence of when it last sought a status update from its counsel or what it did after receipt of the letter dated October 29, 2021.

95. The record has no scintilla of evidence of any action taken.

96. While it is trite law that mistakes of counsel should not be visited on the client, as explained in *Jomo Kenyatta University College of Agriculture and Technology v Musa Ezekiel Oebal* (2014) eKLR as well as *Lee G Muthoga v Habib Zurich Finance (K) Ltd & another* (2016) eKLR among others, this principle is inapplicable where the client or litigant appears complicit as the facts of this case would appear to reveal.

97. The applicant has not availed evidence of its diligence by having contacted its counsel on record since 2009 about the progress of the case as explained in *Gideon Mose Onchwati v Kenya Oil Co Ltd & another* (Supra).

98. In addition, although the applicant was aware of the judgement date slated for November 17, 2021, it tendered no evidence of the actions it took to ensure that it was heard before judgement was delivered. In any case, its case was still open.

99. In view of the foregoing, the court is persuaded that the applicant would have had a fairly convincing argument if it had attached indicative documentary evidence it intended to rely upon as well as a draft witness statement. In the absence of such material, the submission that the response raises triable issues remain unpersuasive.

100. For the above stated reasons, the court is satisfied that the applicant has not demonstrated sufficient justification for the court to exercise discretion in its favour by ordering the re-opening and hearing of the suit.

101. Finally, as to whether the judgement and decree delivered on November 17, 2021 should be set aside, the court is in agreement with the judicial authorities relied upon by the parties such as *Jomo Kenyatta University of Agriculture & Technology v Musa Ezekiel Oebal* (Supra), where the court adverted to the purpose of giving the court discretion to set aside *ex parte* judgement as;

> " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."

102. The court is also guided by the sentiments of the court in *Rayat Trading Co Ltd v Bank of Baroda & Telezi House Ltd* (2018) eKLR as follows;

> " It is an old adage that justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the court is obligated to promote the provisions of Article 159(2)(d) of the *Constitution of Kenya, 2010* and uphold substantive justice against technicalities, the law must protect both the applicant and the judgement creditor for justice to be seen to be done. Even then, a mistake by counsel is not a technicality. In the same vein, the provisions of section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the court in the expedition disposal of cases."

103. These sentiments are consistent with the constitutional and statutory principles that cases should be disposed of expeditiously and without undue delay.

104. In the instant case, it is common ground that the suit was transferred to this court in 2015 and had been pending until September 29, 2021 when it was heard from 1 pm. The respondent was absent and its case remained open until November 17, 2021.

105. Although the respondent's counsel was notified about the judgment date and filing of submissions and notified its client by letter dated October 29, 2021, no action was taken until the instant application was filed on June 29, 2022, seven (7) months after delivery of judgment, an inordinate delay which the applicant has not explained since it was aware of the impending judgement by the end of October 2021.

106. Relatedly, its counsel on record was served with the draft decree for approval but did not respond.

107. Similarly, the applicant's counsel was copied the letter dated January 18, 2022 on the direction the suit was moving, specifically in relation to the approval and issuance of the decree.

108. Finally, it is trite that a successful litigant should not be denied the fruits of his judgment. (See *Kenya Shell Ltd v Kibiru* (1986) KLR 410).

109. Similarly, in *Justus Kyalo Musyoka v John Kivungo* (2019) eKLR, Odunga J stated as follows;

> " Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher court."

110. In the absence of evidence to justify the long delay in filing the application herein notwithstanding the respondent's awareness of the status of the proceedings, the court is satisfied that there is no sufficient reason why the Judgement creditor/respondent should be denied the fruit of his judgement.

111. For the foregoing reasons, it is the finding of the court that the applicant has not placed sufficient material before the court for an order to set aside the judgement delivered on November 17, 2021.

112. Save for the order that the firm of Koceyo & Co Advocates have leave to come on record for the respondent in place of the firm of Kioko Kilukumi & Company Advocates, the Notice of Motion application is hereby dismissed.

113. Parties to bear own costs.

114. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2022.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

DR. JACOB GAKERI

JUDGE