



**Sila v Principal Masii Secondary School & another (Cause
1484 of 2015) [2024] KEELRC 1713 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1484 OF 2015**

JK GAKERI, J

JULY 8, 2024

BETWEEN

SHADRACK SILA CLAIMANT

AND

PRINCIPAL MASII SECONDARY SCHOOL 1ST RESPONDENT

THE B.O.M MASII SECONDARY SCHOOL 2ND RESPONDENT

RULING

1. Before the court for determination is the Respondent's Notice of Motion dated 28th February, 2024 filed under Certificate of Urgency seeking orders that;
 1. Spent.
 2. Spent.
 3. The judgment and the subsequent ex parte proceedings, decree and proclamation and warrants of attachment be set aside as the same were obtained irregularly, unprocedurally and in total aberration of the rules of procedure and the applicant be granted leave to defend the suit as per the defence filed on record.
 4. The costs of this application be provided for.
2. The Notice of Motion is expressed under Order 10 Rule 11 of the *Civil Procedure Rules* and Section 1A, 1B and 3A of the *Civil Procedure Act* and is based on the grounds set out on its face and the Supporting Affidavit of Joseph Nzioka sworn on unidentified date.
3. Mr. Joseph Nzioka deposes that he is the current Principal of the Respondent School and when the school received the suit papers, it appointed M/S O.N. Makau & Mulei Company Advocates based at



Machakos who filed a response on 12th November, 2015 and served the Claimant on 22nd December, 2015.

4. The list of witnesses and documents were filed on 4th July, 2017.
5. The affiant further deposes that Mr. Mulei notified him the firm of Bundi & Co Advocates based in Nairobi would handle the matter but sadly Mr. Mueli died in a road accident on 24th September, 2022 and no communication took place between Mr. Francis Muthuri, the former Principal of the school and the advocates and the school was unaware of the proceedings until 24th February, 2024 when the Claimant proclaimed the school property in execution of the judgment and the school has 1500 students and attachment will paralyze learning.
6. That the mistake of the previous advocates should not be visited on the school.
7. The affiant states that it has a good defense and stands to suffer irreparable harm and be condemned unheard.

Reply

8. In his Replying Affidavit, the Decree-holder deposes that the Notice of Motion is incompetent, fatally defective and should be struck out as it was filed by advocates who are not properly on record.
9. That the allegation that Bundi & Co. advocates was instructed by O.N. Makau & Mulei Advocates is untrue as the law firm filed a Notice of Change of Advocates on 17th April, 2019 which clearly stated that the firm was acting on instructions of the Respondent and the law firm never ceased to act for the Respondent as it is still on record though the firm filed an application to cease acting owing to lack of instructions but it did not prosecute the application on 6th December, 2021 when the firm was supposed to prosecute the application.
10. That the advocates have kept the Respondent informed and cannot feign lack of update and is guilty of laches.
11. That setting the judgment aside will prejudice the Decree-holder.
12. That the matter was heard on 28th June, 2022 before Mr. Mulei died.
13. The affiant deposes that due notice was given to the advocates including bill of costs and certificate of taxation as well as the draft decree.
14. In his Supplementary Affidavit sworn on 3rd April, 2024, the affiant deposes that he was appointed the Principal of the Respondent school on 1st January, 2023 and the advocate was properly on record as change was by consent between the two law firms.
15. That there was no communication between Bundi & Co. Advocates and the school which led to their ceasing to act for the school.
16. The affiant deposes that the school was unaware of the developments or hearing or judgment notice.

Applicant's submissions

17. Counsel urges that the Respondent has a credible defence and was unaware of entry of judgment and the mistake of counsel should not be visited on the school.
18. Reliance was made on the sentiments of *Nyakundi J. in Doa Doa Tented Camps & Lodges Ltd V Jubilee Insurance Co. (K) Ltd* (2021) eKLR as well as those in *George V Secretary of State for Environment*



(1979) 77 LCR 69 and *Patriotic Guards Ltd V James Kipchirchir Sambu* (2018) eKLR to urge that the court ought to exercise discretion so to meet the interests of justice.

19. On the defence, the decision in *Patel V E.A Cargo Handling Service* (1974) EA 75 was relied on as were the sentiments of the court in *Tree Shade Motors Ltd C DT Dobie & another* (1995) 1EA 324.
20. As regard notice of entry of judgment, reliance was made on *Nairobi Bottlers Ltd V Benjamin Deon Musau*.

Claimant's submissions

21. Counsel submits that the allegation that the firm of O.N. Makau & Mulei Advocates instructed Bundi & Co. Advocates was intended to distance the Respondent from its advocate yet the latter had taken over the conduct of the matter from O.N. Makau & Mulei Advocates. In any case, no evidence has been availed on communication between the two law firms and no person associated with any of the law firms has sworn an affidavit to that effect.
22. Reliance is made on the sentiments of the court in *Republic V Cabinet Secretary, Ministry of Lands and Settlement & another* (2023) KEELC 21429. To reinforce the submission.
23. Counsel submits that the Respondent had not filed a complaint that Bundi & Co Advocates was acting without instructions and they signed the consent with the current law firm.
24. Counsel urges that the evidence on record shows that there was a change of advocates from O.N. Makau & Mulei Advocates to Bundi & Co Advocates dated 16th April, 2019.
25. According to counsel, the Respondent's allegation that the enlistment of Bundi & Co. Advocates was occasioned by logistical reasons is unconvincing and the Respondent did not visit its advocate's offices at Machakos.
26. Reliance is made on the decision in *Moses Kimaiyo Kipsang V Geoffrey Kiprotich Kirui & 2 others* (2022) eKLR where the court refused to set aside the judgment on account of counsel's mistake to urge that the Respondent has not demonstrated the actions it took as a follow up.
27. Sentiments of the court in *Savings & Loans Ltd V Susan Wanjiru Muritu* HCCC No. 397 of 2002 and *David Munene Gituma V Ibrahim Mutea Munene & another* (2024) KEELC 1724 to urge that the Respondent has not tendered any evidence of the effect of Mr. Mulei death in September 2022.
28. Counsel, further submits that the Respondent is guilty of laches and does not deserve the discretionary orders as it stayed away from the court.
29. That the Respondent's allegation that it has a good defence has no supportive evidence and Order 22 Rule 6 of the *Civil Procedure Rules*, 2010 was inapplicable to judgments entered into for non-attendance by the Respondent.
30. Counsel urges that the alleged mistake by counsel for the Respondent has not been demonstrated.

Analysis

31. The singular issue for determination is whether the Respondent/Judgment debtor's Notice of Motion dated 28th February, 2022 is merited.
32. The gravamen of the applicant's case is that although its advocate filed a defense and list of documents and witnesses as required by law, there was no communication between it and the advocate. The affiant, Mr. Joseph Nzioka appears to lay blame on his predecessor Mr. Francis Muthusi.



33. That the absence of communication worsened after the death of Mr. Mulei of O.N. Makau & Mulei Advocates on 24th September, 2024.
34. In order to appreciate the context of the instant application, a history of the suit herein suffices.
35. The Decree-Holder/Claimant commenced the suit on 24th August, 2015 and the Respondent filed its defence on 18th November, 2015.
36. The Claimant changed its advocates vide notice dated 2nd August, 2016 and filed a reply to the Respondents response in January 2017.
37. The suit was mentioned before Abuodha J. on 21st June, 2017 and directions on hearing were given.
38. Court records show that as early as 2017, Bundi & Co Advocates were acting for the Respondent but the Notice of Change of Advocates was filed on 17th April, 2019.
39. On 14th May, 2019, the Respondent was not ready for hearing and its last court attendance was on 5th June, 2019, having been absent on 31st October, 2018 and 13th December, 2018 and both parties were not ready on 3rd February, 2020 and was not in court on 18th May 2021, 3rd June, 2021 but both parties were present on 13th October, 2021. However, Mr. Bundi informed the court that he had no instructions from the Respondent and did not attend court on 21st October, 2021, 6th December, 2021, even after having filed to an application to cease acting for the Respondent.
40. On 26th January, 2022, the court fixed a hearing date and directed the Claimant's counsel to serve notice and file affidavit of service and hearing proceeded on 28th June, 2022 in the absence of the Respondent and judgment was delivered on 24th October, 2022.
41. From the record, it is clear that the Respondents' counsel on record had no instructions from the Respondent from as early as October 2021 and filed a notice to cease acting which the law firm did not prosecute and thus remained on record for the Respondent.
42. This is fortified by the consensual change of advocate's dated 25th February, 2024, more than one (1) year after delivery of judgment.
43. The affiant deposes that he became the Principal of the school in January 2023 but took no demonstrate step in relation to the suit until execution commenced more than one (1) year later.
44. From the Supporting and Supplementary Affidavits by Mr. Joseph Nzioka, it is decipherable that his predecessor, Mr. Francis Muthusi engaged the firm of O.N. Makau and Mulei Advocates and later Bundi & Company Advocates but no follow ups took place and did not give counsel instructions as expressed in the counsel's Notice of Motion dated 18th October 2021.
45. It is also clear that Mr. Joseph Nzioka's evidence is based on what he gathered from records or was told and has no tangible evidence to establish most of the allegations such as lack of assistance from the former Principal. That the death of Mr. Mulei Morris in September 2022 affected communication between the Respondent and Bundi and company advocates, notice of entry of judgment was not served.
46. It is common ground that the grant or refusal of the orders sought by the applicant involves the exercise of judicial discretion under Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 as correctly observed by Nyakundi J. in *Doa Doa Tented Camps and Lodges Ltd V Jubilee Insurance Co of Kenya Ltd* cited by the applicant.



47. Needless to gainsay, the court’s discretion must be exercised judiciously and as held in *Patriotic Guards Ltd V James Kipchirchir Sambu (Supra)*;

“ . . . judicious because the discretion to be exercised is a judicial power derived from the law as opposed to judges private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the court to do real and substantive justice to the parties to the suit.”

48. As adverted to elsewhere in this ruling, although the applicant is blaming its former counsel on record, Bundi & Co Advocates, it has not produced any scintilla of evidence of the efforts made in following up its case. Mr. Francis Muthusi, the principal actor in the matter did not swear an affidavit on how many times or how often he sought feedback from the Respondent’s advocates since August 2015 when the suit was filed.

49. It is common ground that the suit belonged to the Respondent not its counsel on record.

50. Equally, the affiant joined the school in January 2023 and he did not depose that there was no handover or that he was unaware of the suit being the secretary of the Board of Management (B.O.M) of the Respondent School.

51. As early as 13th October, 2021, Mr. Bundi of Bundi and Co. Advocates informed the court that he had no instructions from the Respondent but failed to prosecute his application to cease acting notwithstanding having been accorded time to do so by the court. The firm remained the Respondents advocates on record till Judgment was delivered.

52. From the contents of the Supporting Affidavit, it is discernible that the affiant was unaware of who the Respondents advocate on record was or his or her mistake.

53. In determining the issue of exercise of discretion by the court, the court is guided by the sentiments of Nzili CK in *David Munene Gituma V Ibrahim Mutea Munene & another (Supra)* cited by the Claimant that;

“ Mistake by counsel may be pardoned. However, where such mistakes and lack of vigilance, but is condemned or tolerated by a party, who must constantly check the progress of his case. The inordinate delay herein shows a lack of interest on the part of the plaintiffs to follow up their case with their former advocates, as evidenced in the supporting affidavit . . . ”

54. These sentiments apply on all fours to the facts of the instant suit.

55. No evidence of follow up has been placed before the court.

56. The Respondent appear to have been woken up by the execution. The suit was filed in 2015 yet the Respondent has no documented feedback from its counsel on record or evidence of invitation to the office or calls made. The Respondent, in the court’s view was indolent.

57. The foregoing position is further fortified by the Court of Appeal decision in *Daqare Transporters Ltd V Chevron Kenya Ltd* (2020) eKLR as follows;

“ The adage that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think it has doctrinal status. The court must look into the conduct of the party pointing the finger of blame in order to make a just decision. The appellant felt that the learned judge erred in looking into its past conduct in reaching her decision. That cannot be right as the conduct of the appellant was key in the determination



of whether or not it deserved to be granted the reinstatement. In exercising discretion, the court must be satisfied that justice will be done to all parties to a suit.”

58. Finally, in *Tana & Athi Rivers Development Authority V Jeremiah Kimigbo Mwakio & 3 others* (2015) eKLR, the Court of Appeal made it clear that;

“In determining whether to exercise the discretion in a party’s favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party”.

59. Significantly, the applicant avers and submits that it has a good defense to the claim.

60. Other than a copy of a letter dated 18th March, 2015 signed by the Secretary B.O.M, Mr. Muthusi F.M which makes reference to a Board of Management meeting held on 9th March, 2015 and which the Claimant attended and computation of his dues Kshs.305,080/= comprising gratuity and 3 months pay in lieu of notice and evidence of payment, no other supportive evidence has been availed.

61. Based on the evidence availed by the Respondent, the court is not persuaded that the Respondent has a strong defence to rebut the Claimant’s case of unfair and unlawful dismissal.

62. Equally significant in the exercise of jurisdiction is the fact that the instant suit was filed in August 2015 and judgment delivered in October 2022.

63. Similarly, the court is aware that the Respondent is a secondary school with 1500 students as deponed by Mr. Joseph Nzioka, but as courts have held variously, execution is not an unlawful process. It is a legally sanctioned process which a Decree-holder is free to resort to where the Judgment-debtor fails or refuses to honour the terms of the decree.

64. Having found that the applicant was indolent and tendered no evidence of having followed up the matter with its counsel before or after the current principal took over, the court is not persuaded that the applicant has made a sustainable case for the court to exercise its discretion favourably.

65. However, considering that the Respondent is a secondary learning institution with learners in session, execution is likely to be disruptive and unpalatable. In the circumstance, the court is inclined to grant a stay of the proclamation and warrants of attachment for 30 days to enable the parties agree on a payment plan of the decretal amount by instalments effective the date of this ruling.

66. For the avoidance of doubt, the applicant’s Notice of Motion dated 28th February, 2024 is dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF JULY 2024

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

