Kenya Union of Domestic, Hotels, Betting, Educational Institutions and Hospital Workers (KUDHEIHA Workers) v Board of Management, Gombato Boys Secondary School (Cause E091 of 2024) [2025] KEELRC 2545 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELRC 2545 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE E091 OF 2024

M MBARŨ, J

SEPTEMBER 25, 2025

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, BETTING, EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS (KUDHEIHA WORKERS) ..... CLAIMANT

AND

BOARD OF MANAGEMENT, GOMBATO BOYS SECONDARY SCHOOL ..... RESPONDENT

RULING

1. The respondent, BOM Gombato Boys Secondary School, filed an application dated 21 March 2025 seeking the following;

    a. The court be pleased to review, vary and set aside the judgment entered on 20 February 2025 and decree, the proceedings thereto and all consequential orders.

    b. The court be pleased to grant the applicant leave to file a response to the claimant out of time within 14 days hereof and have the matter heard afresh with all parties' participation.

    c. Costs be provided for.

2. Evelyn Njoki Kagoi, State Counsel in the office of the Attorney General, support the application. Counsel avers that the court delivered judgment herein on 20 February 2025 without the respondent having the opportunity for a hearing. The respondent is represented by the office of the Attorney General, which office was not served with summons under sections 26, 27, 28 and 29 of the Employment and Labour Relations Court (Procedure) Rules (Court Rules). The office of the Attorney General was never served with notice of mentions, hearing notices, or judgment notices. The respondent only learnt of the matter when it was served with the Judgment.

3. Ms Kagoi avers that the respondent is a public institution and will suffer loss and damage if the judgment herein is executed without having a fair chance to argue its case. The application is filed in good faith, and the court is invited to exercise its discretion and set aside the judgment and allow the respondent to file a response.

4. The claimant filed this suit and deliberately failed to serve the respondent school or the office of the Attorney General.

5. The respondent is already engaged with the Ministry of Education and seeking guidance on how to file a response. The Ministry's position is that the respondent cannot sign a CBA and be compelled to do so without having the ability to meet the ends of justice. The Board does not pay nonteaching staff, and only the Ministry of Education disburses money, which can take responsibility. As a public school, the respondent is not allowed to sign the CBA with the claimant.

6. In reply, the claimant filed the Replying Affidavit of Francis Omondi, Kwale Branch Secretary, who avers that judgment herein was delivered on 20 February 2025, after the due process, the respondent was served with summons and failed to enter an appearance or attend at the hearing. There are Affidavits of Service to confirm that the summons was issued and served on 26 September 2024. The respondent was further served with amended pleadings and returns filed.

7. The claimant served the respondent with summons and pleadings herein. The core grievance was the sustained refusal by the respondent to acknowledge recognition procedures, engage in collective bargaining and remit union dues for unionisable employees despite the claimant fulfilling all statutory prerequisites under the *Labour Relations Act*.

8. On 8 October 2024, the respondent was served and filed a return in court. The respondent's authorised officers received court summons, notices, and directions but declined to acknowledge receipt. Further service was executed on 24 and 31 October 2024.

9. The court proceeded with the hearing upon being satisfied that the respondent had been properly served. The judgment delivered on 20 February 2025 is lawful and subject to execution.

10. The respondent neglected to enter an appearance and hence evaded the right to participate in these proceedings. The judgment is regular and lawful.

    Parties were directed to file written submissions.

    Only the claimant complied.

    The respondent filed the instant application and did nothing else.

11. Indeed, the court may review its orders if there is a mistake, error, or just cause. The applicant must demonstrate the discovery of new matter, an error on the face of the record, or sufficient cause to justify such a review.

12. Save to emphasize to the court that there was no service through the office of the Attorney General, who has the authority to attend to public institutions; there is no matter that justifies an order of review in the current application. Rule 74 of the Court Rules, on which the present application relies, is not addressed at all.

13. The court is also allowed to set aside its orders for good cause and to meet the ends of justice. However, such an order must be premised on the principles set in the case of Remco Ltd v Mistry Javda Parbat & Co. Ltd & 2 others that the applicant;

> First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside ex debito Justitiae (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of judicial process itself. Secondly, if the default judgement is a regular one, the court has unfettered discretion to set aside such Judgment and any consequential decree order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the court is to do justice between the parties

14. The court will only review its orders under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules if there exists an error, mistake, or sufficient cause. This Rule is similar to Order 45 rule 1 of the Civil Procedure Rules, which provides as follows:

(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 evidencewhich,aftertheexercise of due diligence,was notwithin his knowledge or could not be produced by him athetime 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 ormadethe orderwithout unreasonable delay.

18. In the case of Mbugua v Hiram (Environment and Land Appeal 39 of 2020) [2024] KEELC 1, the court held that;

> Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 thetimewhen the decreewas passed orthe order made or on account of some mistake orerrorapparent on theface of therecord or forany other suficient reason – a person who is within those categories may apply forareview of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay."

19. In this case, save to urge the court that there was no service, no groups under Rule 74 of the Court Rules or Order 45 Rule 1 have been addressed. The orders sought for a review are left bare.

20. On whether the judgment herein should be stayed to allow the respondent file a response, In this case, the respondent does not deny service of summons.

21. Upon the service of summons on the respondent, there was a duty and responsibility to attend and ensure the office of the Attorney General was present on its behalf. This cannot be placed on the claimant to serve the office of the Attorney General, whereas the respondent is the primary party to attend court and defend itself.

22. The affidavits of service filed herein by the claimant have not been challenged as incorrect.

    There was proper service.

23. The respondent is also seeking leave to file its response out of time. There is no draft response attached to Abeid's Affidavit. There is nothing to suggest there is a plausible response to the claim herein. What then is the purpose of the application?

24. The respondent was served, took a back seat, watched as matters progressed, and did nothing. Upon service of the judgment, to stall execution, the instant application was filed. This is the only explanation for the respondent's conduct. This is an abuse of the court process.

25. On the claim for costs, having deliberately failed to attend court or offer any response, the claim for costs is not justified.

26. Accordingly, the application dated 21 March 2025 is without merit and is an abuse of the court process. The same is dismissed with costs to the claimant.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 25TH DAY OF SEPTEMBER 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....