

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

CAUSE NO. E012 OF 2024
(Before Hon. Lady Justice Anna Ngibuini
Mwaure)

JESCAH GESARE

RATEMO.....CLAIMANT/RESPONDENT

VERSUS

SEVENTH DAY ADVENTIST CHURCH
CENTRAL RIFT VALLEY CONFERENCE.....
.....RESPONDENT/APPLICANT

RULING

Introduction

1. The Respondent/Applicant filed a Notice of Motion dated 3rd July 2025 under certificate of urgency seeking the following orders that:

1. Spent

2. There be a stay of execution of the Judgment herein and all consequential orders pending the hearing and determination of this application.

3. The Court be pleased to set aside the ex-parte judgment herein and all consequential orders, and the

Respondent/Applicant be granted leave to file its defence within 21 days.

4. Costs of the application be provided.

2. The application is brought under ***Article 48, 50(1) of the Constitution, Order 10 Rules 6, 10 & 11, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, section 1A, 1B, 3A and section 63(a) of the Civil Procedure Act and all other enabling provisions of law.***

Respondent/Applicant's supporting affidavit

3. The application is supported by the affidavit of PR. Philip Isika, the Respondent/Applicant's Executive Secretary of the Rift Valley Conference, dated even date as the application.
4. The Respondent/Applicant avers that it became aware of a judgment against it through a newspaper notice on 24th June 2025 and, upon inquiry, discovered a case had been filed and judgment delivered on 18th June 2025.
5. The Respondent/Applicant contends that it was not properly served with the pleadings, which were sent to an incorrect email address (sdacrvc@gmail.com)

rather than its official one
(info@crvc.adventist.or.ke).

6. The Respondent/Applicant avers that the affidavits of service do not clarify how the incorrect email was obtained, and the email in question was sent by someone other than the process server and copied to unknown individuals.
7. The Respondent/Applicant avers that the court, misled by this service, entered judgment without giving it a fair chance to respond, thereby violating its right to be heard.
8. The Respondent/Applicant avers that the judgment was based on concealed facts and, if allowed to stand, would cause significant prejudice and injustice.
9. The Respondent/Applicant seeks to have the judgment stayed and set aside, emphasizing that no harm would befall the claimant if the matter is reopened, as the applicant merely wishes to defend itself on merit, believing it has a strong case.

10. The court directed that the parties put in their respective written submissions.

Respondent/Applicant's submissions

11. The Respondent/Applicant submitted that in civil proceedings, proper service of summons and claims is essential to notify a party of any legal action. In this case, the Respondent/Applicant argued that the Claimant/Respondent relied on an affidavit of service dated 17th May 2024, indicating that documents were sent to sdacrvc@gmail.com. However, the Respondent/Applicant submitted that its official email is info@crvc.adventist.or.ke and denies any association with the email used. The Respondent/Applicant argued that the process server failed to explain how he obtained the incorrect email or confirm its validity, and the claimant did not prove it was functional. Given this, there is a strong presumption that the Respondent/Applicant was not properly served and thus had no obligation to appear in a case it was unaware of.

12. The Respondent/Applicant relied on the case of ***James Kanyiita Nderitu & another V Marios Philotas Lilikas & another [2016] eKLR***, quoted in paragraph 28 in ***Altana Corporation Limited v***

Clarence Matheny Leadership Training Institute; National Land Commission & another (Interested Party) [2019] eKLR, where the court held as below:

“In an irregular default judgment...the judgment will have been entered against a defendant who has not been served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justicie, as a matter of right. The court does not even have to be moved by a party. Once it comes to its notice that the judgment is irregular. it can set the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to

those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

13. Given the clear indication that the Respondent/Applicant submitted that it was not properly served with summons or the statement of claim, the court should set aside the judgment without delving into other matters. The Respondent/Applicant argued that the Claimant/Respondent failed to provide a delivery receipt for the email service, as required under ***Rule 26(2) of the Employment and Labour Relations Court Procedure Rules, 2024***, casting doubt on whether the applicant ever received the documents. This position aligns with the case of ***Sifuna & Sifuna Advocates V Patrick Simiyu Khaemba [2021] eKLR***, which emphasized the need for proof of email receipt. Additionally, the Respondent/Applicant submitted that the inconsistencies in the affidavit of service, where the deponent and the actual sender of the email differ, further undermine the credibility of the service process.

14. The Respondent/Applicant submitted that it only learned of the judgment through a newspaper notice, reinforcing its claim of non-service. In ***Wachira Karani V Bildad Wachira [2016] eKLR***, where Justice John M. Mativo held as follows:

“I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard, the opportunity of prosecuting his case”.

15. The Respondent/Applicant argues that denying it a chance to be heard would be unjust. Therefore, the court is urged to set aside the ex parte judgment and related orders, and either the Claimant/Respondent to serve afresh and allow it to file a defence within 21 days.

16. At the time of writing this ruling, the Claimant/Respondent did not file any response or written submissions despite being served with the application.

Analysis and determination

17. The court has considered the application and supporting affidavit. The issue for determination by this court is whether the application is merited.

18. **Order 36 Rule 10 of the Civil Procedure Rules** provides as follows:

“Any judgment, given against any party who did not attend at the hearing of an application under this Order, may, on application, be set aside or varied on such terms as are just.”

19. In ***Muriithi V Njogu & 6 others***

[2025] KECA 1426 (KLR), the Court of Appeal stated as follows:

“The principles governing the setting aside of ex parte judgments are well settled. As held in Mbogo & Another v Shah [1968] EA 93, appellate interference with the exercise of discretion is limited to instances of misdirection, consideration of irrelevant matters, or failure to consider relevant ones”

20. In this instant case, the court has perused the pleadings and looked at the first affidavit of service sworn by Evans Ndalana, a duly licenced process server, dated 17th May 2024, the email address used was sdacrvc@gmail.com and was copied to

the Respondent's secretariat members, including maundu@eku.adventist, makoris@eku.adventist.org and maiyon@eku.adventist.org. The said process server consistently served the Respondent using the same email addresses until judgment was delivered.

21. The Respondent/Applicant filed this application. Their contention is that they were not in receipt of the summons and hence the reason they did not defend the suit. They state the email address used by the Process server is not their email address that is adacrvc@gmail.com. They say that they are not aware where the Claimant got that email. They claim their correct email is info@crvc.adventist.or.ke
22. It is regrettable the Claimant did not file a response or submissions to advise the court how and where they got the disputed email address. In the absence of any evidence from the Claimant on where they got that email address it would be presumptuous of the court to assume it was the Respondent's email address. The court is always careful to avail justice to all the parties and it would be unjust to lock out a party from defending its case based on uncertain

evidence of service of summons and without evidence of the legitimacy of the email address used in service.

23. In the case of **FRIGONKEN LTD -VS- VALUE PAK FOOD LTD** cited in the case of **JAMES KANYITA NDERITU -VS- MARIOS PHILOTA GHIKAS & ANOTHER (2016) eKLR** it stated: -

“According to Kenya Law established that such a judgment is not a matter of discretion but an irregular judgment that must be set aside as a matter of Judicial duty to uphold the integrity of the judicial process.”

24. In the case of **OBIERO -VS- SEVERIN & ANOTHER - CIVIL APPEAL E201 OF 2023**

according to Kenya Law reasons for setting judgment aside consideration would be: -

- 1. The reason for defendant’s failure to its act***
- 2. The length of time since default judgment was entered.***
- 3. Whether the intended defence raises “triable issues” (issues that should be determined in a full trial)***

4. The prejudice each party is likely to suffer

5. Whether setting aside the judgment is in the interest of justice over all.

25. So the court delivered its judgment on 18th June 2025 and the Respondent avers he read Judgment of the case in the Daily Nation Newspaper of 24th June 2025. They filed the application on 3rd July 2025.
26. The court finds the reason given by the Respondent as to why they did not defend the suit is worthy of consideration as they claim they never received the summons.
Furthermore, they filed this application without unreasonable delay barely a month after delivery of the judgment.
27. The court is satisfied the Respondent has proved solid grounds to justify granting the application vide notice of motion dated 3rd July 2025.
28. The *ex-parte* judgment herein and the consequential orders are set aside and the Respondent is granted leave within 14 days to file its response.
29. Costs will be in cause.

Order accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 28th Day of November, 2025.**

**ANNA NGIBUINI MWAURE
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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE

ORIGINAL