

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
MACHAKOS
MISC. APPLICATION NO. E060 OF 2023

AUGUSTINE WAEMA KIMANI.....APPPLICANT/RESPONDENT

VERSUS

PRIME STEEL MILLS LIMITED.....1ST RESPONDENT/APPLICANT

DIRECTORATE OF OCCUPATIONAL

SAFETY AND HEALTH SERVICES.....2ND
RESPONDENT

RULING

1. On 1st December 2023, the Court, differently constituted, allowed the Applicant/1st Respondent's (hereinafter the Applicant) Notice of Motion dated 28th October 2023, thereby adopting the award issued by the Director of Occupational Safety and Health Services (Director) on 3rd August 2023 as the judgment and decree of the Court.

2. Subsequently, the 1st Respondent/Applicant (hereinafter the 1st Respondent) filed the present Notice of Motion dated 13th August 2023 seeking the following orders:

1) Spent.

2) Spent.

3) This Honourable Court be pleased to set aside the judgment in ELRC Misc. Application No. E060 of 2023 at Machakos.

4) This Honorable court do award any other orders it may deem just, fit and expedient to award in the interest of justice.

5) The costs of this Application be in the cause.

3. The Notice of Motion is premised on the averments set out in the Supporting Affidavit sworn on 13th August 2025 by the 1st Respondent's Human Resources Manager, **Kenneth Mureithi**.

4. Mr. Mureithi avers that judgment was entered against the 1st Respondent without its participation in the proceedings leading to the judgment. He states that the 1st Respondent was, at all material times, unaware of the proceedings and was never served with the Notice of Motion dated 28th October 2023, the supporting documents, hearing notices, or any other court papers relating to the application.

5. He further avers that the 1st Respondent only became aware of the existence of the case upon perusal of the court record, when it discovered that the matter had been listed for mention on 10th April 2025.
6. Thereafter, the 1st Respondent engaged the firm of M/s F.N. & Brian Advocates to file a Notice of Appointment of Advocates and to formally request service of the relevant pleadings in the matter.
7. Mr. Mureithi contends that the Applicant failed to serve the 1st Respondent with the requisite court documents, thereby necessitating its advocates to peruse the court file in order to ascertain the status of the case.
8. Upon perusal of the court file, the 1st Respondent's advocates extracted copies of the Notice of Motion dated 28th October 2023 filed against it, the affidavit of service filed by the Applicant, and other documents on record.
9. Mr. Mureithi avers that, on the basis of a purported Affidavit of Service sworn by the Applicant's process server, alleging service of the pleadings via the 1st Respondent's email address, the matter proceeded as an undefended application and judgment was entered against the 1st Respondent.

10. He adds that the said email was never received by the 1st Respondent and that no delivery receipt was produced by the Applicant. He is advised by the 1st Respondent's advocates, which advice he believes to be true, that judgment cannot properly be entered against a party in the absence of effective service of pleadings and court documents.

11. Mr. Mureithi further deposes that the Applicant was not an employee of the 1st Respondent but was instead employed by a third-party company subcontracted by the 1st Respondent to provide casual labour services. He contends that, under the subcontracting agreement, the 1st Respondent was expressly excluded from liability for any claims arising from injuries sustained by the employees of the said third party.

12. The Applicant opposed the Notice of Motion by way of a Replying Affidavit sworn on 28th October 2025.

13. In the Replying Affidavit, the Applicant deposes that the firm of F.N. Brian & Company Advocates came on record on 10th April 2025, long after the delivery of judgment, yet failed to comply with Order 9 Rules 5 and 9 of the Civil Procedure Rules by seeking leave to come on record after judgment.

14. He further avers that it is evident from the court record that the said firm has actively participated in these proceedings since 10th April 2025 with full

knowledge of the judgment and taxation, and at no time did it signal any intention to apply for the setting aside of the judgment or other proceedings.

15. The Applicant contends that despite filing a Notice of Appointment on 10th April 2025 and participating in the proceedings, including seeking leave to respond to his Bill of Costs, which leave they failed to utilize, the firm remained indolent and only resurfaced on 13th August 2025, after the delivery of the ruling on taxation, demonstrating bad faith and deliberate delay.

16. He avers that the 1st Respondent was duly served throughout the proceedings through the official email address provided in the DOSHS Form 1 (Notification of Accident Form).

17. The Applicant further states that the said DOSHS Form 1 was properly completed and stamped by the 1st Respondent's representative, Mr. Kenneth Mureithi, who is the same individual now swearing the Supporting Affidavit.

18. It is the Applicant's view that the conduct of the 1st Respondent company throughout the proceedings has been marked by dishonesty, deliberate misrepresentation, and indolence, all calculated to frustrate the Claimant and delay the course of justice.

19.The Applicant maintains that the court record clearly demonstrates that service was properly effected at every stage of the proceedings.

20.The Applicant maintains that the 1st Respondent was at all times aware of the proceedings but deliberately chose not to participate, and now seeks to unjustly reopen a matter that has been fully heard and determined.

21.It is the Applicant's contention that the 1st Respondent has approached the Court with unclean hands, having willfully misled the Court and failed to act diligently, and now seeks to benefit from its own indolence.

22.He asserts that no sufficient cause has been shown to warrant the setting aside of the judgment or any subsequent proceedings of this Court.

Submissions

23.The Motion was canvassed through written submissions, which the Court has duly considered.

Analysis and Determination

24.Before addressing the merits of the Motion, it is necessary to consider a preliminary issue raised by the Applicant concerning the appearance of the firm of F.N. Brian & Company Advocates. In this regard, the Applicant contends

that the firm entered its appearance for the 1st Respondent on 10th April 2025, long after the judgment had been delivered, yet it never filed, as required under Order 9 Rules 5 and 9 of the Civil Procedure Rules, an application for Leave to appear after judgment.

25. **Order 9 Rule 9** provides as follows: -

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

a. upon an application with notice to all the parties; or

b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be” Underlined for emphasis

26. In the present case, it is noteworthy that the 1st Respondent did not participate in the proceedings leading to the entry of judgment on 1st December 2023. As it is, the firm of F.N. Brian & Company Advocates first appeared on record for the 1st Respondent on 10th April 2025. Accordingly, this constituted an initial appearance, rather than a change of advocates or an appearance in person in

place of counsel, as envisaged under Order 9, Rule 9 of the Civil Procedure Rules.

27. Analyzing the import of the said statutory provision, the Court in the case of **Nyeri Motor Services Ltd v Kanuti & 2 others (Miscellaneous Application 25 of 2023) [2023] KEHC 17734 (KLR) (18 May 2023) (Ruling)** observed that the mischief intended to be cured under Order 9 Rule 9 was to protect advocates who are retained by a client until the tail end of a case and sack them immediately after judgment is delivered with a view to reaping the fruits of labour in total disregard of the labourer who is the advocate that conducted the trial. (See also the case of **Connection Joint v Apollo Insurance [2006] KEHC 3281 (KLR)**).

28. Consequently, as no Counsel had previously appeared on record for the 1st Respondent, the Court finds that the provisions of Order 9, Rule 9 of the Civil Procedure Rules are inapplicable in the present circumstances.

29. Having made the foregoing finding, I now proceed to consider whether the 1st Respondent's Motion has merit.

30.I have considered the Notice of Motion before the Court, together with the Supporting Affidavit and the Applicant's Replying Affidavit. In the Court of Appeal decision in *Pithon Waweru Maina v Thuku Mugiria (1982–88) 1 KAR 171*, Potter JA stated as follows regarding the Court's discretion to set aside a judgment entered in default of appearance or defence, or upon the failure of a party to attend a hearing:

“This is another case concerning the exercise of the judicial discretion under Order 9A, rr10 and 11 and Order 9B r8(which are in the same terms) of the Civil Procedure (Revised) Rules 1948, to set aside an exparte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well established in our law.

Firstly, as was stated by Duffus P in Patel vs. EA Cargo Handling Services Ltd. [1974] EA 75 at 76C and E: “There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules.”

Secondly, as Harris J. said in Shah vs. Mbogo [1967] EA 116 at 123B, “This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”. That judgment was approved by the court of appeal in Mbogo vs. Shah [1968]EA 93 and in Shabbir Din vs. Ram Parkash Anand [1955]22EACA 48 Biggs JA said at 51 “I consider that under Order 9 r20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised”.

31. I will now proceed to consider the application guided by the foregoing principles.

32. The record bears that on 1st December 2023, the Court adopted the award issued by the Director on 3rd August 2023 as its judgment and decree in the absence of the 1st Respondent.

33. The 1st Respondent contends that it was not served with the Notice of Motion dated 28th October 2023, pursuant to which the Court adopted the Director's award.

34. On the other hand, the Applicant avers that the 1st Respondent was duly served through its official email address as provided in DOSH Form 1.

35. On record is an Affidavit of Service sworn on 24th November 2023 by **Ivy Jepkemboi**, Advocate, in which she deposes that she effected service of the Notice of Motion dated 28th October 2023, together with a hearing notice, upon the 1st Respondent by electronic mail sent to information@abyssiniagroup.com

36. The 1st Respondent disputes this, terming the Affidavit of Service fictitious, and contends that it did not receive the email allegedly transmitting the Notice of Motion, noting that no delivery receipt was produced as proof of service.

37. In view of the divergent positions taken by the parties, it becomes necessary to revisit the legal framework governing service of court process by electronic means, specifically through electronic mail.

38. **Order 5 Rule 22B of the Civil Procedure Rules** provides:

(1) Summons sent by electronic mail shall be sent to the defendant's last confirmed and used email address.

(2) Service shall be deemed effected when the sender receives a delivery receipt.

(3).....

(4) An officer of the court who effects service shall file an affidavit of service attaching the delivery receipt confirming service.

39. Similarly, **Rule 26(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules, 2024** provide that:

(1) A summons sent by electronic mail shall be sent to the respondent's last confirmed and used email address.

(2) Service shall be deemed effected when the sender receives a delivery receipt.

40. It follows that service by electronic mail is only deemed effective upon proof of delivery by way of a delivery confirmation. Notably, the affidavit of service on record does not contain any such delivery receipt as required under the foregoing provisions.

41. In *Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba [2021] eKLR*, the Court, while addressing the issue of proof of service under sub-rule (2) of Rule 22B, stated as follows:

“...Sub-rule 2 provides that the sender must receive “a delivery receipt” as a confirmation that service has been effected. In my view, the sub-rule was meant to cure the mischief of parties sending documents to emails of others keeping quiet about it and taking advantage of others lack of knowledge of the activity in their email.”

42. As stated herein, the Affidavit of Service relied on by the Applicant did not include a delivery receipt, as required under Rule 22B (4) of the Civil Procedure Rules and Rule 26(2) of this Court’s Rules. Consequently, the Court finds that the purported service of the Notice of Motion dated 28th October 2023 by email on 20th November 2025 was defective.

43.The foregoing raises doubt as to whether the 1st Respondent actually received the email sent by the Applicant’s Advocate on 20th November 2023, which purportedly transmitted the Notice of Motion dated 28th October 2023 and the Hearing Notice dated 7th November 2023.

44.In the final analysis, the Court finds merit in the 1st Respondent’s Notice of Motion dated 13th August 2025. Accordingly, the judgment entered in favour of the Applicant on 1st December 2023 is hereby set aside, together with the resulting decree and orders.

45.Accordingly, the 1st Respondent shall file a Response to the Notice of Motion dated 28th October 2023 within 14 days from the date hereof. The costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of February 2026.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Ombati instructed by Mr. Kirwa for the Applicant/1st Respondent

No appearance for the 1st Respondent/Applicant
No appearance for the 2nd Respondent
Catherine Court Assistant

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 had 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.

STELLA RUTTO
JUDGE