

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1399 OF 2018

RUTH NYAMBURA.....CLAIMANT/RESPONDENT

VERSUS

EAST AFRICA SAFARI

AIR EXPRESSRESPONDENT/APPLICANT

R U L I N G

1. On 8th March 2024, this Court delivered judgment in favour of the Claimant/Respondent following a hearing held on 30th October 2024. Notably, the Respondent/Applicant did not present its case at the hearing, as its advocates on record had filed an application to cease acting on 20th November 2023. Consequently, the Respondent was unrepresented on the date scheduled for defence hearing.

2. In the present Notice of Motion dated 11th November 2025, the Respondent/Applicant seeks an order setting aside the judgment delivered on 8th March 2024, together with all consequential orders, and requests leave to reopen its defence and be heard on merit.

3. The Motion is founded on the grounds stated on its face and the averments contained in the Supporting Affidavit sworn on 11th November 2025 by **Donald Earl Smith**, who describes himself as the Applicant's Chief Executive Officer. The Applicant contends that the Claimant's case proceeded without the Applicant's knowledge or presence, as it was not properly served with notice of the hearing.
4. Mr. Smith deposes that on or about 21st November 2023, he received an email from the Applicant's former advocates, **Njeri Ngunjiri Advocates**, forwarding an application dated 20th November 2023 seeking leave to cease acting for the Applicant. The Application was scheduled for hearing on 27th November 2023. Mr. Smith asserts that the communication made no mention that the main cause would also proceed on that date, and the Applicant believed that only the application to cease acting was listed. Accordingly, the Respondent did not attend court on 27th November 2023, resulting in the defence proceeding in its absence.
5. He further avers that upon reviewing the court file, he discovered that the Claimant's counsel had filed an Affidavit of Service alleging that a Mention Notice was served via email addresses that the Applicant never received.

6. Mr. Smith states that he only became aware of the judgment delivered on 8th March 2024 after being served via WhatsApp with a copy of the Claimant's application dated 3rd March 2025, which sought to compel the Respondent's directors to attend court for examination regarding the Respondent's assets and accounts.
7. He further avers that the Applicant filed the present Motion promptly upon reviewing the court file and discovering the proceedings of 27th November 2023. He also asserts that the Respondent has a good and arguable defence based on the pleadings filed.
8. The Claimant has opposed the instant Motion through a Replying Affidavit sworn on 19th November 2025.
9. In her Affidavit, the Claimant deposes that the Applicant's directors were duly notified of the hearing scheduled for 27th November 2023. She states, on the advice of her advocates, which she verily believes to be true, that the Court recorded that despite proper service, the Applicants were absent and the Court proceeded to give directions on submissions.
10. The Claimant contends that the Applicant's argument that they misunderstood the email to relate only to the application to cease acting and not the main cause

is immaterial. She contends that a mere misinterpretation does not absolve the Applicant of its legal obligation to attend court for any hearing.

11. She further avers that the Applicant's directors were served with the mention notice leading to the judgment date of 19th December 2023, sent to the Applicant's last known email address, which had been used in prior correspondence. Therefore, she cannot be held liable for any failure on the Applicant's part to access or receive communications sent to that address.

12. The Claimant further deposes, on the advice of her advocates, which she verily believes to be true, that the present Application is overtaken by events, as execution proceedings have already commenced. She avers that the Court, in its Ruling dated 14th November 2025, allowed her application to summon the Applicants' directors for examination regarding the company's assets and means, enabling the execution process to proceed.

13. In her view, the present Application is made in bad faith and constitutes a blatant abuse of the Court process, intended to delay and frustrate her enjoyment of the judgment.

14. The Claimant further contends that the Applicant has provided no reasonable or justifiable explanation for their undue delay in bringing this application, nor for their failure to attend court when the matter was scheduled for hearing.

Submissions

15. On 11th December 2025, the Court directed that the Motion be disposed of by way of written submissions. Both parties complied, and the Court has considered the submissions filed.

Analysis and Determination

16. The Court has reviewed the Applicant's Notice of Motion, the Claimant's Replying Affidavit, and the rival submissions and finds that the issues for determination are: *whether the judgment delivered on 8th March 2024 should be set aside and whether the Applicant should be granted leave to reopen the matter for a defence hearing.* I will address both issues simultaneously.

17. In the case of ***Pithon Waweru Maina v Thuku Mugiria (1982–88) 1 KAR 171***, the Court of Appeal set out the principles governing the exercise of discretion to set aside a judgment entered in default of appearance or defence, or where a party fails to attend the hearing, as follows:

“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”.

18. Fundamentally, the Court has the discretion to reopen a case, and this discretion must be exercised carefully and judiciously. In doing so, the Court must ensure

that reopening the matter does not unfairly prejudice or inconvenience the opposing party.

19. The record shows that the Applicant's former counsel, **Njeri Ngunjiri Advocates**, filed a Chamber Summons Application on 20th November 2023 to cease acting for the Applicant. Notably, this took place after the Claimant had given her testimony, undergone cross-examination and re-examination, thereby bringing her case to a close on 30th October 2023.

20. Mr. Smith acknowledges receiving the application to cease acting but contends that the communication did not indicate that the main cause would also proceed to defence hearing on the same date. According to him, he believed that only the application to cease acting was scheduled.

21. Given Mr. Smith's assertions, it is unclear why the Applicant did not appear in Court on 27th November 2023 when the application to cease acting was heard. What's more, I cannot help but question why the Applicant did not take immediate steps thereafter to secure legal representation and participate in subsequent proceedings, especially considering that, as of 21st November 2023, the Applicant was aware that it was unrepresented.

22. It is also notable that the Claimant served the Applicant with a mention notice for 19th December 2023, the date on which the matter came up for mention to confirm filing of submissions and setting a judgment date. It is instructive to note that this mention notice was served electronically to donsmith@fly540.com, the same email address previously used by the Applicant's former counsel to serve the application to cease acting, which the Applicant confirmed receiving.

23. Consequently, the Applicant's claim that it was unaware of subsequent proceedings after 27th November 2023 is not plausible.

24. Granted, even if the Applicant was unaware of the mention of 19th December 2023, it knew that this suit was pending and, being aware of the potential outcomes, should have acted promptly to protect its interests by participating in the proceedings herein.

25. What emerges from the foregoing is that the Applicant was least bothered by the proceedings beyond 27th November 2023, until faced with the threat of execution.

26. It is trite that equity aids the vigilant, not the indolent. In my respectful view, the Applicant's conduct in this matter demonstrates indolence, and it would not

be in the interest of justice for this Court to exercise its discretion in favour of the Applicant in light of its inaction.

27. While the Applicant may possess a Defence raising triable issues, it has provided no plausible explanation for its failure to participate in the proceedings herein after 27th November 2023 by attending Court as required.

28. Respectfully, the Court finds that by its own conduct, the Applicant has disentitled itself from the Court's discretion.

29. In reaching this conclusion, the Court is cognizant that the Constitution guarantees every person the right to be heard before an adverse decision is made. However, in the present case, the Applicant was afforded this opportunity but failed to exercise it by neglecting to appear in Court when required.

30. Overall, it is my respectful view that the Applicant does not merit the exercise of the Court's discretion.

31. For these reasons, the Court finds that the Notice of Motion dated 11th November 2025 is without merit and is therefore dismissed with costs.

DATED, SIGNED and DELIVERED at MERU this 13th day of March 2026.

.....

STELLA RUTTO

JUDGE

In the presence of:

Ms. Akinyi for the Claimant/Respondent

Ms. Ochieng for the Respondent/Applicant

Qabale 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