



**Kalama v Baobab Beach Resort Mombasa (Kenya) Limited; Director of Occupational Health and Safety Services (Interested Party) (Miscellaneous Application E046 of 2024) [2025] KEELRC 809 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 809 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E046 OF 2024**

**M MBARŪ, J  
MARCH 13, 2025**

**BETWEEN**

**BENSON BARAKA KALAMA ..... APPLICANT**

**AND**

**BAOBAB BEACH RESORT MOMBASA (KENYA) LIMITED ..... RESPONDENT**

**AND**

**DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY SERVICES ..... INTERESTED PARTY**

**RULING**

1. The respondent, Baobab Beach Resort Mombasa (Kenya) Limited, filed an application dated 5 February 2025 seeking an order that the ex-parte judgment and proceedings be set aside and admitted herein for hearing on merit. The affidavit of Ian Mbae supports the application advocate, who avers that the enforcement proceedings herein proceeded ex parte, and the applicant obtained a default judgment against the respondent on 4 February 2025. The applicant is ready to execute the judgment, but no summons was served to enter the applicant's appearance.
2. The respondent was unaware of these proceedings until notice of execution was issued. The respondent has a good response to the application and if not allowed to defend the matter will suffer irreparable loss and damage that cannot be compensated in monetary terms. The judgment and orders issued were final, and unless set aside, the respondent would suffer loss and damage.
3. Mbae avers that without service, the judgment herein is irregular, and the orders sought to be set aside are prejudicial to the respondent who was condemned unheard.



4. In reply, the applicant filed his Replying Affidavit and aver that the respondent does not dispute that he was an employee and that on 26 August 2019, he got injured while on duty. The matter was reported to the interested party, who assessed and established 40% disability with an Ksh.1, 238,515.20 award. The respondent participated in the process and was issued a notice to pay the award but failed to do so, leading to these proceedings.
5. The applicant avers that the respondent did not file any objections or an appeal against the DOSH award. These proceedings were initiated, and service was effected. Returns to confirm service were filed and these have not been challenged. Orders issued on 4 February 2025 are lawful, and the application should be dismissed with costs.
6. The respondent as the applicant submitted that they seek to set aside the orders adopting the DOSH award since the proceedings herein were not served to allow them to attend and defend the matter. The judgment obtained is irregular without proof of service by the applicant. There will be no prejudice if the orders are set aside as the applicant can be paid throwaway costs. There is no contestation that there was no service. There is no challenge to the DOSH award, but the chance to reply and be heard before the award can be enforced.
7. The respondent submitted that in the case of *Sammy Maina v Stephen Muriuki* HCCC No.1079 of 1980, the court held that it has broad discretion to set aside its orders on terms that are just and where there is a valid defence. In a regular default judgment, the respondent is served with a summons to enter an appearance but is entitled to move the court to set aside the default judgment where there is a good defence. However, where there is an irregular judgment entered without proper service of summons, the same should be set aside ex debito justitiae as a matter of right as held in *James Kanyिता Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) in this case, there was no service of summons hence an irregular judgment which should be set aside as a matter of right.
8. The applicant submitted that there was service and that an Affidavit of Service was required to confirm such fact. Service by email is accepted, and the applicant went beyond and served through courier service, which is not challenged. Under Rule 69 of the *Employment and Labour Relations Court (Procedure) Rules*, the applicant applied the procedures thereof, and the respondent was issued with notice and subject application leading to the orders issued on 4 February 2025. The orders sought are meant to delay justice and should be dismissed with costs.

#### Determination

9. The respondent seeks to set aside the orders of 4 February 2025 because they were obtained irregularly, and no summons to appear and defend the DOSH enforcement award herein was served. If the default judgment was irregular, there is a right to protect the case.
10. A default judgment is well addressed in the case cited by the respondent, *James Kanyिता Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR). The court held that this is an irregular default judgment entered against a defendant who has not been served or properly served with the summons to enter an appearance. The respondent is not aware of the proceedings and hence did not attend or participate, but it has a right to give its response as a matter of right.
11. In *Mburu & 5 others v Barclays Bank of Kenya Limited* [2025] KECA 390 (KLR) and the case of *Kotecha & Sons Limited & another v Amalo & Company Limited* [2025] KECA 65 (KLR), the court held that in a default judgment, there is discretion to set it aside where the respondent has a draft defence that contains a valid or reasonable defence to the claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court must consider whether it raises a reasonable defence to the claim. The defendant should be allowed to enter and defend the suit if it does. See Tree



Shade Motors Limited v DT Dobie & Company (K) Limited & Joseph Rading Wasambo, Civil Appeal No. 38 of 1998.

12. In this case, the court proceeded on 4 February 2025 on the strength of submissions by the applicant that the respondent was served correctly and an Affidavit of Service filed to confirm such fact. There is the Affidavit of Service of Henry Omwenga, advocate, dated 3 February 2025, who avers that on 30 January 2025, there was service upon the respondent through the email address provided on their website at reservations@baobab.beach.resort.com and attached is the email and the attachments.
13. Further, Omwenga advocate effected service through Fargo courier on 1 February 2025, and the receipt is attached to the Affidavit of Service.
14. The respondent does not contest the averments in the Affidavit of Service. There is no case that the email address used to effect service is irregular or in default. Further, the courier service effected directly at the respondent's premises is not challenged. The forwarding address, by email or surface mail and courier, is that of the respondent.  
There was proper service.
15. The respondent has made a case that even where there is ex parte judgment, where the respondent has a good response, the same can be set aside to allow such a party to be heard. The judgment can be set aside where a good response exists.
16. Save for the Supporting Affidavit to the instant application; no effort has been made to offer a response to the impugned application subject to the orders issued on 4 February 2025. None is on record. The case to guide the court gives the respondent a fair chance to argue that its case does not exist.
17. Application dated 5 February 2025 is without merit and is hereby dismissed. Costs to the applicant/respondent.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 13 DAY OF MARCH 2025.**

**M. MBARŪ**

**JUDGE**

