



Potters House Academy v Kemer (Employment and Labour Relations Appeal E021 of 2021) [2025] KEELRC 1263 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1263 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E021 OF 2021
MA ONYANGO, J
APRIL 30, 2025**

BETWEEN

POTTERS HOUSE ACADEMY APPELLANT

AND

LEAH CHEMELI KEMER RESPONDENT

JUDGMENT

1. In its ruling dated 17th November 2021, the trial Court (Hon. B.K. Kiptoo SRM), dismissed the Appellant's application dated 18th November 2020. In the which application the Appellant sought stay of execution of the warrant of attachment of movable property in execution of a decree for money, the ex-parte proceedings, the judgment and subsequent orders in the proceedings at the trial court.
2. The Appellant herein was aggrieved by the said ruling and filed the instant Appeal vide a Memorandum of Appeal dated 22nd November 2021 citing the following grounds: -
 - a. The learned trial magistrate erred in law and in fact in totally failing to consider the application as presented, the weight of the evidence thereof and the submissions rendered on the part of the Appellant.
 - b. The learned trial magistrate erred in law and fact in failing to consider that the right to be heard is unalienable right that a citizen should not be deprived of and that there was no justification presented not to hear the Appellant.
 - c. The learned trial magistrate erred in law and fact in holding that the Appellant slept on its rights when there was no evidence to that effect and when service had been disputed.
 - d. The learned trial magistrate erred in law and in fact in refusing or declining to have the process server cross-examined.



- e. The learned trial magistrate erred in law and in fact in refusing that having made a finding that the hearing notice was served on an advocate who was not on record but proceeded to dismiss Appellant's the application for setting aside judgment.
 - f. The learned trial magistrate erred in law and fact in proceeding on wrong principles of law when the issues before court were clear.
3. The Appellant prayed that the orders of the trial court made on 17th November 2021 be set aside and be substituted with an order allowing the Appellant's application dated 18th November 2020. It also prayed for costs of the Appeal.
4. The background of this case is that the Respondent (the Claimant in the trial court case), instituted a suit before the trial court vide a Memorandum of Claim dated 18th June 2019 seeking compensation and terminal benefits on allegation that the Appellant had constructively dismissed her from employment. From a perusal of the record, it appears that the Appellant did not enter appearance and the matter proceeded ex parte. Thereafter, on 6th October 2020, the trial court entered judgment in favor of the Respondent herein and awarded her Kshs. 1,292,677 as terminal dues with costs and ordered the Appellant to issue the Respondent with a certificate of service.
5. The Appellant moved the trial court vide an application dated 18th November 2020 for orders that:
 - a. That this application be certified as urgent and the same be heard ex-parte in the first instance
 - b. That there be stay of execution of the Warrant of Attachment of Movable Property in execution of a decree for money issued by this court on 16th November 2020, pending the hearing and determination of this application inter parties
 - c. That the ex-parte proceedings, the judgment and orders and the subsequent proceedings and all consequential orders be set aside and the Applicant be granted leave to file its defence to the claim
 - d. That the deponent of the affidavit of service for the pleadings herein be summoned to attend court and there be an order for cross examination of such deponent.
 - e. That the costs of this application be in the cause.
6. On 17th November 2021, the trial court delivered a Ruling wherein the court dismissed the application dated 18th November 2021, hence this Appeal.
7. The appeal was canvassed by way of written submissions. The Appellant filed its written submissions on 10th January 2022 while the Respondent's submissions were filed on 21st January 2022.
8. In its submissions, the Appellant contended that it had demonstrated in the supporting affidavit that the judgment sought to be executed and which it seeks to stay was an ex-parte judgment. In addition, the Appellant submitted that it is a learning institution and if Kshs 1,499,797 were to be paid to the Respondent, the same shall affect the learners negatively. The Appellant asserted that the Respondent is unemployed and if the decretal sum is paid to her, she will not be able to refund the same should the appeal succeed thus rendering the appeal nugatory.
9. On her part, the Respondent submitted that the Appellant woke up from slumber after the judgement was delivered and the process of execution had been started and yet all the time the Appellant was aware of the filing of the claim.



10. According to the Respondent, the trial court satisfied itself of the service of the summons to enter appearance upon the Respondent by looking at the affidavit of service of the court process server before it proceeded to allow the hearing of the Claimant's witness. That as such the Appellant cannot say that there was no proper service of summons to enter appearance.
11. It is the Respondent's submission that the decision to set aside ex parte proceedings or decision is intended to avoid injustice or hardship resulting from accident or excusable mistake but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
12. Further, the Respondent submitted that the Appellant has not demonstrated a sufficient cause for failing to file a response or to prosecute its case.
13. It is the Respondent's further submission that the Appellant has not demonstrated to this court that it has a good defense with high chances of success by filing a draft Response to Memorandum of Claim to accompany the Memorandum of Appeal which is a mandatory requirement to enable the court satisfy itself that the Appellant has a good defense.
14. The Respondent urged the court to dismiss the appeal and urged that should the court allow the appeal, the Appellant should demonstrate seriousness by depositing the decretal sum in a joint bank account in the names of advocates for both parties on record.

Analysis and Determination

15. This being the first Appellate Court in this case, the duty of the Court is to re-evaluate, re-assess and re-analyze the available evidence and then come up with its own conclusion, while bearing in mind that the Court did not see or hear the witnesses. See *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123, 126.
16. I have considered and analyzed the pleadings and the evidence adduced before the trial court by the parties to this appeal. I have further considered the submissions in this appeal. It is my view that the issue for determination is whether the trial magistrate erred in law and fact in dismissing the appellant's application dated 18th November 2020.
17. It is not in doubt that the Appellant did not participate in the proceedings before the trial court. On 18th November 2020 the Appellant filed an application to stay execution of the said Judgement and to set it aside. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. The principles applicable were laid down by the Court of Appeal in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR as restated in *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] eKLR as follows: -

Firstly, 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 to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E

Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, 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. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA

Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93."

18. Similarly in *Nicholas Salat v IEBC & 6 others*, CA (Application) No 228 of 2013, the Court of Appeal held that: -

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

19. As rightly submitted by the Respondent, it is trite that a decision on whether to set aside or not set aside an ex parte Judgement is discretionary, and the said discretion is intended to be exercised so as to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to aid a party who deliberately seeks to obstruct justice, and has deliberately delayed the expeditious disposal of a matter. The concern of the Appellate Court is to do justice to the parties.
20. In determining the issue whether the trial court erred in dismissing the Appellant’s application in the instant Appeal, the Court has to consider whether the explanation given by the Appellant for failure to participate in the proceedings is justified. The Appellant in the supporting affidavit sworn by Boniface Adongo deposed that it was never served with summons to enter appearance or any other documents in the case notifying it of the existence of the claim in court until 18th November 2020 when it learned of the same through the auctioneers proclaiming the Appellant’s movable assets. The deponent contended that the affidavit of service sworn by Vincent Ogutu on 27th June 2019 purporting to have served the court pleadings upon her is misleading and a sham as such documents were never served on the Appellant.
21. I have looked at the return of service at page 23 of the record of appeal and noted that the process server at paragraph 3 indicated that Mr. Adongo, the Appellant’s headteacher upon service of the pleadings acknowledged service but declined to sign. From an overview of the conflicting versions given by the rival parties, the court is unable to make a determination on whether or not the Appellant was served.
22. It is trite law that a party should not be condemned unheard. From a perusal of the draft defence at page 33 of the Record of Appeal, the same raises triable issues and it is my view that it would not be in the interests of justice to deny the Appellant an opportunity to be heard.
23. For these reasons, I find merit in the appeal and allow the same.
24. Consequently, the Ruling of the trial Court delivered on November 17, 2021 is set aside and the Appellant’s application dated 18th November 2020 is allowed. The consequence is that the Judgement



of the Trial Court dated 6th October 2020 stands set aside and/or vacated. The original lower court file will be remitted back to the Chief Magistrate's Court at Eldoret, for expeditious hearing of the suit inter- parties.

25. The Court orders the Appellant to pay the Respondent Kshs. 50,000 as throw away costs.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF APRIL, 2025

MAUREEN ONYANGO

JUDGE

