Njiiri v National Police Service Commission (Employment and Labour Relations Appeal E007 of 2024) [2025] KEELRC 1133 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1133 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2024

MA ONYANGO, J

APRIL 4, 2025

BETWEEN

SAMUEL NDIRANGU NJIIRI ..... APPELLANT

AND

NATIONAL POLICE SERVICE COMMISSION ..... RESPONDENT

(Being an appeal against the Ruling of Honourable Richard Odenyo - Principal Magistrate delivered on 8th February 2024 in Eldoret CMELRC No. E140 of 2021)

JUDGMENT

1. This Appeal arises from a ruling delivered by the trial court in Eldoret CMELRC No. E140 of 2021 delivered on the 8th February, 2024.

2. A brief background is that vide a Memorandum of Claim dated 21st September 2021, the Appellant sued the Respondent seeking compensation for alleged unlawful termination of his employment. The Respondent did not participate in the proceedings at the trial court. After the Appellant testified on 3rd November 2022, the court retired to write its judgment which was delivered on 22nd December 2022. Judgment was entered in favor of the Appellant where he was awarded Kshs. 11,208,500.

3. Thereafter, the Respondent filed the application dated 13th September 2023 seeking that the ex-parte judgment entered in default of appearance against the Respondent dated 22nd December 2022 be set aside and the suit be heard de novo on merit. In its ruling delivered on 8th February 2024, the trial court allowed the Respondent's application with costs to the Appellant.

4. The Appellant being dissatisfied with the ruling of the trial court filed the instant appeal vide the Memorandum of Appeal dated 20th February 2024 based on the following grounds of appeal:

i. The learned magistrate erred in law and in fact by allowing the Respondent's application dated 13th September 2023 which in effect set aside the judgment entered in default of appearance against the Respondent. In doing so, the learned magistrate misdirected himself as follows:

   a. The conclusion reached by the learned magistrate did not lead from his analysis of the evidence before him.

   b. There was no justification for allowing the Application even after the magistrate had concluded that the Respondent was duly served and that the Respondent had not offered any explanation as to why it did not enter appearance or file a defence or defend the suit

   c. The learned trial magistrate erred in law and in fact in exercising his discretion to allow the Respondent's application which discretion was not exercised judiciously when the Respondent herein had three opportunities to defend the suit but squandered the same without justified cause, to wit:

   d. The Respondent squandered the first opportunity when it was properly served with the summons and pleadings but without justified cause, failed to enter appearance or defend the suit

   e. The Respondent squandered the second opportunity when it was properly served with the Appellant's application for leave for default judgment to be entered against it, but failed to serve its purported responses to the application upon the Appellant, and failed to attend the hearing of the same despite being served with a hearing notice

   f. The Respondent squandered the third opportunity when it failed to follow up on the status of the aforesaid application for leave for default judgement to be entered against it despite having purportedly filed a response to the same and being aware of the hearing date

   g. The Respondent was indolent and callous in its approach of defending this suit

   h. The learned magistrate erred in law and fact in ordering that the suit be heard de novo on merit as if it was not on merit. There was a hearing, production of evidence, filing of submissions and upon considerations of the same on merit, the court allowed the claim in its judgment of 22nd December 2022. As such, it is a misnomer to treat the suit as if it was never heard on merit

   i. The learned magistrate did not exercise his discretion to award thrown away costs judiciously despite the fact that the trial court has already concluded through a formal proof hearing, judgment delivered, costs taxed and failed to consider the age of the suit before him.

5. The Appellant therefore prays for the following reliefs:

   a. The Appeal be allowed and the ruling of the lower court be set aside

   b. Costs of the Appeal

6. On 5th June 2024, the Court directed that the Appeal be canvassed by way of written submissions. The Appellant filed his submissions dated 15th August 2024. It appears the Respondent did not file any submissions.

The Appellant's submissions

7. In his submissions, the Appellant framed the issues for determination to be: -

   i. Whether the learned trial magistrate misdirected himself in reaching a conclusion that did not lead from analysis of the evidence before him,

   ii. Whether the learned trial magistrate exercised his discretion judiciously in allowing the application dated 13th September 2023,

   iii. Whether the learned trial magistrate erred in law and in fact in ordering that the suit be heard de novo on merit,

   iv. Whether the learned trial magistrate exercised his discretion judiciously in failing to award the Appellant thrown away costs.

8. On the first issue, the Appellant submitted that the trial magistrate in his ruling observed that having considered the application, the rival affidavits and the submissions filed by the parties, he was convinced that the Respondent had been properly served with the court summons. According to the Appellant, despite the observations made by the trial court, it proceeded to allow the application. It is the Appellant's submissions that by allowing the Respondent's application dated 13th September 2023 despite acknowledging the evidence that the Respondent had been properly served with the summons and pleadings but failed to enter appearance or defend the suit, the learned trial magistrate contradicted and misdirected himself by arriving at a conclusion that did not lead from his analysis of the evidence and matters canvassed before him. The Appellant submitted that courts have a duty to make decisions based on evidence placed before them. In support of this position, reliance was placed on the case of Patrick Sosio Lekakeny v Tomito Alex Tampushi & 3 others (2018) eKLR.

9. As regards the second issue, the Appellant submitted that it is trite that law that judicial discretion ought to be exercised judiciously and in adherence to the laid down principles. While citing the case of Patel v E.A Cargo Handling Services Limited (1974)E.A 75, Shanzu Investments Limited v Commissioner of Lands (1993) eKLR, the Appellant submitted that having established the ex parte judgment was regular based on evidence placed before it, the trial court ought not to have exercised its discretion to set aside the ex parte judgment as the Respondent did not meet the parameters that would entitle the court to exercise its discretion to upset the judgment.

10. The Appellant further contended that the trial court having failed to analyze the requirements for setting aside an ex parte judgment, failed to exercise its discretion judiciously in allowing the Respondent's application.

11. On the issue whether the trial court erred in law and in fact in ordering that the suit be heard de novo on merit, the Appellant submitted that there was a hearing, production of evidence, filing of submissions and upon conclusion of the same on merit, the court allowed the claim in its judgment of 22nd December 2022. It is the Appellant's submission that it is a misnomer to treat the suit as if it was never heard on merit.

12. Lastly, on the issue of thrown away costs, the Appellant while placing reliance on the case of Haraf Traders Limited vs Narok County Government (2022) eKLR submitted that the trial court did not exercise its discretion to award thrown away costs judiciously despite the fact that trial had already concluded through formal proof, judgment delivered and costs taxed.

13. In this regard, the Appellant urged the court to grant him thrown away costs in the event it upholds the trial court's decision.

Analysis and Determination

14. Having considered the grounds of appeal, the submissions on record and the trial court's record, the only issue that present itself for determination is whether the learned trial Magistrate erred in setting aside the default judgment and the consequential orders thereto.

15. Order 10 Rule 11 of the Civil Procedure Rules, 2010 empowers the Court to set aside or vary a default judgement entered under Order 10 (in default of Appearance or Defence) and any consequential decree or Order upon such terms as are just. It provides that: -

> " Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

16. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123.

17. The well-established principles of setting aside interlocutory judgments were laid out in the case of Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 as per Duffus P. who stated as follows:

> " 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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

18. In the case of James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR, the court stated thus:

> " In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he has failed to enter appearance or to file defence, resulting in default judgment."
>
> The court went further to state:
>
> > ".....such a defendant is entitled, under Order 10 rule 11 of the Civil procedure Rules to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.....".

19. The Respondent in its application giving rise to the ruling that is subject of this appeal contended that it was never served with the pleadings by the Appellant and that it only became aware of the matter when it was served with the application dated 20th January 2022 whereupon it filed its Replying Affidavit on 31st March 2022.

20. From a perusal of the trial court record, it is clear that the suit proceeded by way of formal proof on 3rd November 2022. This is a clear indication that the Respondent was aware of the matter being in court but chose not to participate in the proceedings after filing its Replying Affidavit on 31st March 2022.

21. Be that as it may, being a regular judgment, the court in granting such an order must consider whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit. The court is thus called to interrogate to whether the Applicant's case raises any triable issues.

22. In the case of; Patel vs E.A. Cargo Handling Services Ltd (1974) the Court held that:-

> " ... where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication."

23. In as much as the trial court allowed the application seeking setting of the judgment entered in default of appearance, I note that in the impugned ruling, there is no mention on whether the draft defence raised triable issues or not. The trial magistrate did not consider the said draft defence and that was an error.

24. From a perusal of the Respondent's response to the Claim at page 147 of the Record of Appeal, the Respondent in its Response to the claim dated 13th September, 2023 averred that the Claimant declined to attend the disciplinary proceedings and was charged in Orderly Room proceedings for offences against discipline as a result of which he was subsequently terminated from service.

25. This in my view is a good defence which should have been a factor in exercise of court's discretion in setting aside a judgment entered in default of appearance and defence.

26. Taking into consideration the principle that justice is better served when all parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issue, I find that the grant of the orders sought by the Respondent by the trial court was in order.

27. The only issue for consideration at this point is with regard to the Appellant's assertion that the trial court failed to exercise its discretion judiciously by failing to award the Appellant throw away costs upon granting the Respondent the orders of setting aside the judgment entered in default of appearance.

28. The grant of orders for costs is provided for under Section 27 of the *Civil Procedure Act* as follows: -

> " the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid."

29. Throw away costs are meant to cater for substantial indemnity costs to reflect time that was wasted and would be duplicated when the trial is rescheduled. In the case of Rayat Trading Co. Limited -v- Bank of Baroda & Tetezi House Ltd [2018] eKLR the Court held that:

> " If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim."

30. It is my considered view that the Appellant was entitled to grant of thrown away costs after the Respondent failed to take necessary steps to participate in the court process and upon it being given an opportunity to ventilate its case through the impugned ruling. I therefore exercise my discretion and award throw away costs of Kshs 40,000.

31. Accordingly, the Appeal is allowed only to the extent that the Appellant is entitled to throw away costs of Kshs. 40,000. I uphold the ruling of the trial court delivered on 8th February 2024 setting aside the ex-parte judgment and allowing the Respondent to file a defence to the suit. For clarity, the throw away costs will be in addition to the costs of the application as awarded by the trial court.

32. The trial court file is to be returned to the lower court for compliance with the requisite procedures under the Civil Procedure Rules and appropriate directions for hearing of the suit.

33. Each party shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 4TH DAY OF APRIL 2025

MAUREEN ONYANGO

JUDGE