



Ng ' ang' a v Africa Film & TV Talent Training Institute (Cause E831 of 2021) [2025] KEELRC 1333 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1333 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E831 OF 2021**

CN BAARI, J

MAY 8, 2025

BETWEEN

EDWIN GACUCA NG ' ANG' A CLAIMANT

AND

AFRICA FILM & TV TALENT TRAINING INSTITUTE RESPONDENT

RULING

1. Before Court is the Respondent's motion application dated 27th February, 2024, brought pursuant to Sections 1A, IB, 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, Article 50 and 159 (2)(d) of *the Constitution* of Kenya 2010. The Respondent seeks the following orders:-
 - i. Spent
 - ii. That the ex-parte judgment entered against the Respondent on 8th November, 2022 and all consequential orders arising therefrom be set aside/vacated
 - iii. Spent
 - iv. That the Respondent be granted leave to file its response to the Claimant's claim out of time.
 - v. That the Honorable court be pleased to deem the draft response filed herewith as duly filed and served upon payment of the requisite filing charges /fees
 - vi. That costs of this application be in the cause.
2. The application is supported by grounds on the face of the motion and the affidavit of Luka Kasili. The crux of the motion is that on 8th November, 2021 the Claimant obtained ex-parte judgment against the Respondent, and that the omission to file a response on time was inadvertent error and not intentional on the part of the counsel for the Respondent, and which mistake should not be visited on the litigant.



3. The Applicant avers that it now has a response to the Claimant's claim which raises triable issues and the Respondent ought to be allowed to participate in the Claimant's claim.
4. It avers that allowing this application will uphold substantive justice as envisaged by Article 159(2) (d) of *the Constitution* of Kenya, 2010, read with Sections 1, 1A,3A and 3B of the *Civil Procedure Act* which frowns on technicalities.
5. The Claimant/Respondent opposed the motion vide a replying affidavit sworn by Edwin Gacuca Ng'ang'a, the Claimant on 2nd April, 2024. He avers that on 2nd November 2021, his Advocates served the Respondent/Applicant with the pleadings in this matter including summons to enter appearance, and that he is aware that the said Respondent/Applicant entered appearance through the firm of Masika & Koross Company Advocates who uploaded a memorandum of appearance on the Court e-filing system on 13th December, 2021, but never paid the requisite filing fees.
6. The Claimant states that he is aware that the Respondent/Applicant did not file a Response to the Claim within 21 days as stipulated by law and that his Advocates proceeded to request for Judgment against the Respondent/Applicant for its failure to file a Response to the Claim in the matter.
7. It is his case that an Interlocutory Judgment was entered against the Respondent/Applicant on 8th November 2022 for failing to file a Response to the Claim, and the matter allocated to a Judge for purposes of fixing a hearing date.
8. The Claimant further avers that he is advised by his Advocates that before the matter was set down for hearing, the firm of Masika & Koross Company Advocates filed an application to cease acting for the Respondent/Applicant, which application was allowed.
9. It is the Claimant's position that the matter came up for mention on 6th October, 2023, before the judge for purposes of fixing a date for formal proof, and that the firm of Rioba Omboto & Company Advocates appeared on behalf of the Respondent/Applicant and requested for fourteen (14) days to enable them peruse the file and put in additional documents if need be, which was allowed, but when the matter was mentioned again on 18th October, 2023, the Respondent had still not filed any documents.
10. The Claimant states that the Respondent/Applicant is trying to draw the Court to accommodate its indolence and that of its Advocates in pursuing the matter, and the same can only be deemed as negligence which is neither excusable nor is it a mistake.
11. The Claimant avers that it is hard to believe that it took the Respondent/Applicant's Advocates nearly a year after they came on record in January 2023, to discover that the Response to the Claim had not been filed in the matter, and that an interlocutory Judgment against its Client had been entered.
12. The Claimant prays that the application be dismissed with costs.
13. Parties urged the application through written submissions and which have been duly considered.

Determination

14. The issue for determination is whether the Respondent's motion is merited.
15. The Respondent/Applicant seeks that the ex-parte judgment entered against it on 8th November, 2022, be set aside/vacated and it be granted leave to file its response to the Claimant's claim out of time.
16. The Court notes that from the record, the Claimant filed a request for entry of judgment against the Respondent dated 8th June, 2022, but which request does not seem to have been acted upon, at least



per the court record. The Court however listed the matter for formal proof hearing on 18th October, 2023 and which hearing was to proceed on 5th March, 2024, which is then confirmation that the matter was to proceed *ex parte*.

17. The issue is whether to allow the Applicant/Respondent to defend the suit. In *Shah v Mbogo & Another* [1967] EA 116, the Court of Appeal of East Africa stated:-

“This discretion (to set aside *ex parte* proceedings or decision) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

18. Further, in the case of, *Republic v Minister for Lands & another Ex-Parte Catherine Mateta Musinga*, also cited by the applicants *Murigi J* held *inter alia*;

“It is the finding of this court that where a party has not been heard, a decision made is in breach of the rules of natural justice is null and void *ab initio*. It Is my view that the rules of natural justice were flouted. The proceedings and the decision made by the 1st Respondent were null and void. ”

19. The Applicant/Respondent’s position is that their failure to file a response in the matter, is pure inadvertent and a mistake on the part of their advocate, which should not be visited upon them.

20. In the often cited case of *Lolwerikoi v Cabinet Secretary, Ministry of Agriculture, Livestoc & Fisheries & another* the Court opined thus on mistake of counsel: -

“In light of the foregoing, the court is satisfied that the mistake or negligence of the advocate to whom the file had been assigned in 2021 should not be visited upon the applicants. ”

21. Further, the Court of Appeal in *CFC Stanbic Limited v John Maina Githaiga & another* held as follows: -

“In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”

22. I note that the firm of advocates earlier acting for the Respondent/Applicant filed an application to cease acting, and which application was allowed on 1st February, 2022.

23. Considering that the failure to respond to the claim herein is largely attributed to the mistake on the part of the Respondent’s counsel, and further taking into account the Respondent’s right to be heard per Article 50 of *the Constitution*, I am inclined to allow the Applicant’s motion in the interest of justice, and which I hereby do in the following terms: -

- a. That decision to have this matter proceed undefended on formal proof be and is hereby set aside/vacated
- b. That the Respondent be and is hereby granted leave to file its response to the Claimant’s claim out of time, and the draft response filed herewith, is deemed duly filed and served upon payment of the requisite filing charges /fees
- c. Costs shall be in the cause.

24. Orders accordingly.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 8TH
DAY OF MAY, 2025.**

C. N. BAARI

JUDGE

Appearance:

Mr. Ng'ang'a present for the Claimant

N/A for the Respondent

Ms. Esther S – C/A

