



**Kenya Union of Commercial Food Allied Workers v Jamii Distributors EA Limited  
(Cause E009 of 2021) [2024] KEELRC 1003 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1003 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E009 OF 2021  
MA ONYANGO, J  
APRIL 12, 2024**

**BETWEEN  
KENYA UNION OF COMMERCIAL FOOD ALLIED WORKERS .... CLAIMANT  
AND  
JAMII DISTRIBUTORS EA LIMITED ..... RESPONDENT**

**RULING**

1. The application dated 7<sup>th</sup> March 2023 was filed by the Respondent seeking the following orders: -
  - i. Spent
  - ii. That there be stay of execution of the judgment/decreed issued against the Respondent in the instant case together with all consequential orders pending hearing and determination of this application
  - iii. That the ex-parte resultant judgment and all consequential orders be set aside and the main suit be heard afresh on merit
  - iv. That the Respondent be granted leave to defend this suit and the response to the statement of claim dated 7<sup>th</sup> March 2023 and filed in court on the same day be deemed to be properly on record.
  - v. That costs of this application be provided for.
2. The application is supported by the affidavit of Marni Ermiah, the Respondent's Director in which he deposes that the Respondent was never served with pleadings in this case; that it was shocked when the Claimant served it with a Bill of Costs due for taxation on 8<sup>th</sup> March 2023; that if the application is not allowed, the Respondent will suffer an injustice; that the Respondent has a strong response with high chances of success and lastly, that the application has been brought promptly and in utmost good faith.



3. The application is opposed. The Claimant filed its Replying Affidavit sworn on 3<sup>rd</sup> April 2023 by Rogers Ombati Momanyi, its Eldoret Branch Secretary. Mr Momanyi avers that on 2<sup>nd</sup> March 2021, the Respondent was served with Notice of Summons dated 1<sup>st</sup> March 2021, Statement of Claim, verifying affidavit and annexures thereto dated 9<sup>th</sup> February 2021 whereupon the Respondent received the said documents and acknowledged the same by stamping on the Claimant's copies. Mr. Momanyi deposes that on 12<sup>th</sup> March 2021, the Claimant filed an affidavit of service sworn by the process server attesting to the aforementioned service; that the Respondent has never entered appearance and has never filed its pleadings; that on 4<sup>th</sup> May 2021, the Claimant served the Respondent with a mention notice dated 27<sup>th</sup> April 2021 which notice, the Respondent acknowledged receipt of and the initials of the receiver are clearly indicated therein; that the Claimant filed its affidavit of service of the said mention notice on 12<sup>th</sup> May 2023.
4. The Claimant further avers that on 25<sup>th</sup> November 2021 it served the Respondent through its official email address with a hearing notice dated 12<sup>th</sup> November 2021; that the hearing did not proceed on the said date as the court was not sitting and the suit was fixed for hearing on 23<sup>rd</sup> March 2022 at the registry which date was served upon the Respondent on 31<sup>st</sup> January 2021 but that the Respondent refused to accept service necessitating the said service via its official email address on 9<sup>th</sup> March 2022.
5. It is the Claimant's case that the matter was certified for hearing as an undefended suit on 9<sup>th</sup> June 2022; that thereafter the court issued a mention date for 17<sup>th</sup> July 2022 to confirm filing of submissions and that judgment was delivered on 21<sup>st</sup> November 2022 in favor of the Claimant.
6. The Claimant states that on 19<sup>th</sup> December 2022 it proceeded to serve the Respondent through its official email address and that since there was no response from the Respondent, the Claimant went ahead and filed a bill of costs and served the Respondent which document was never acknowledged either by stamping or signing.
7. It is the Claimant's contention that the Respondent was properly served with all the pleadings, bundle of documents and notices and that the averments of Marni Ermiah in the Respondent's supporting affidavit are dishonest, insincere and disingenuous as the Respondent was given numerous chances to defend this suit but ignored court summons and notices issued upon it.
8. The Claimant avers that the instant application has been brought to delay the course of justice; that the draft Statement of Response is frivolous, lacks substance and does not raise any triable issues. The court was thus urged to dismiss the application with costs.
9. In a rejoinder, the Respondent filed a Supplementary Affidavit sworn by its Director, Marni Ermiah on 22<sup>nd</sup> September 2023 reiterating the contents of his Supporting Affidavit filed with the application herein. The Respondent contends that it has an arguable defence on grounds that it has been wrongly sued and that unless the judgment herein is set aside, it will suffer an injustice.
10. Pursuant to the directions of the court made on 13<sup>th</sup> June 2023, the application was canvassed by way of written submissions. From a perusal of the record, The Respondent's submissions are filed on 2<sup>nd</sup> October 2023. the Claimant's submissions were filed on 1<sup>st</sup> November 2023.

#### **a. Analysis and Determination**

11. Having considered the application dated 7<sup>th</sup> March 2023, the rival affidavits and the submissions on record, the only issue for determination is whether the ex-parte judgment delivered in this suit on 21<sup>st</sup> November 2022 should be set aside.



12. Order 12 Rule 7 of the *Civil Procedure Rules*, 2010 gives this court discretion to set aside an ex-parte judgment as follows:
  - a. “Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
13. In the case of *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR, the Court of Appeal held as follows;
  - a. “The law is now well settled that in an application for setting aside Exparte Judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application raises triable issues.”
14. In summary, in considering whether or not to set aside ex-parte judgment, the court ought to consider:
  - i. The reasons advanced by the Applicant for failure to defend the suit
  - ii. Whether the Applicant has a reasonable defence to the claim
  - iii. Whether the Applicant has moved the court with prompt and;
  - iv. Whether substantive justice for all the parties will be achieved.
15. In the instant case, from the annexures to the Claimant’s Replying Affidavit, there is no doubt that the Respondent was properly served with the pleadings in this suit, mention and hearing notices which it acknowledged receipt of by stamping on them. The service was either in persn or via email. I am therefore convinced that the Respondent was aware of the proceedings herein. The explanation by the Respondent that it was never served with pleadings in this suit is not supported by the evidence on record.
16. In the Respondent’s Supplementary Affidavit filed in court on 5<sup>th</sup> October 2023 it has attached an Amended Draft Response to Statement of Claim in which the Respondent has raised a plea that it was wrongly sued in this case.
17. it is curious that such a plea should be made in an amended draft defence after the Respondent has seen the averments in the replying affidavit. When the Claimant had no opportunity to rebut the same. A supplementary affidavit is supposed to respond to issues raised in a replying affidavit and not to raise new issues.
18. I have all the same considered the Amended Draft Response and in my very considered opinion, it does not raise a reasonable defence to the Claim. The Respondent has attached agreements for outsourcing of Labour signed between the Respondent and a third party and alleges that it is the 3<sup>rd</sup> party who employed the Grievants.
19. In the first place, those agreements are for the periods July 2018, August 2019 and June 2020. There is no indication in the agreements that the grievants were engaged by the third party. Secondly, all the Grievants were according to the Claim, engaged before the July 2018 when the 1<sup>st</sup> agreement allegedly signed with the third party was entered into.
20. Thirdly in the original draft the Respondent stated that it engaged the Grievants as casuals. What is the correct position? Were the Grievants engaged by the Respondent as casuals or were they engaged by the third party?



21. I find the defence to be a sham. I further find that the Respondent was properly served and ignored the summons and pleadings served upon it. It further ignored the mention and hearing notices properly served upon it as is evident from the replying affidavit and the court's record.
22. In *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193 the Court of Appeal stated that:

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
23. In this case it is my view that this application is intended to delay the course of justice in this old case as the Applicant has not demonstrated that it has valid reason for failure to responded to the summons. It has further not demonstrated that it has a defence worthy of consideration by the court.
24. Further, the delay in bringing the application herein has not been explained. According to the Replying affidavit, the Applicant was served with a copy of the judgment on 19<sup>th</sup> December, 2022 but did nothing about it. It was not until 7<sup>th</sup> March that it filed the instant application on the eve of the date for taxation of the Bill of Costs.
25. Consequently, I find no merit in the application and dismiss the same with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 12<sup>TH</sup> DAY OF APRIL 2024**

**MAUREEN ONYANGO**

**JUDGE**

