Amagove v Ultimate Manpower & General Supplies Ltd (Cause 343 of 2017) [2024] KEELRC 918 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 918 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 343 OF 2017

BOM MANANI, J

APRIL 8, 2024

BETWEEN

MILDRED AMAGOVE ..... CLAIMANT

AND

ULTIMATE MANPOWER & GENERAL SUPPLIES LTD ..... RESPONDENT

RULING

1. The application before me is dated 19th May 2022. Through it, the Respondent/Applicant seeks to set aside the judgment that was delivered on 21st September 2021.The Respondent/Applicant avers that it was not served with Summons to Enter Appearance and as well the Claimant's pleadings in the cause. Further, the Respondent/Applicant avers that it was not served with a Mention Notice for the pretrial conference at which the matter was certified for hearing as an undefended cause.

2. As such, the Respondent/Applicant contends that the proceedings that resulted in the judgment were based on a false premise that it (the Respondent/Applicant) had been served when it had not. Proceeding on this premise, the Respondent/Applicant argues that the decision of the court ought to be set aside as a matter of right.

3. The Respondent/Applicant also argues that it has a solid defense to the action. As such, it should be permitted the opportunity to present the said defense.

4. The Respondent/Applicant contends that no prejudice will be occasioned to the Claimant should the impugned judgment be set aside. Conversely, it argues that should the orders sought not be issued, it (the Respondent/Applicant) will suffer immense prejudice since it will have been denied the chance to be heard.

5. The application is opposed. The Claimant argues that contrary to the Respondent's/Applicant's assertions, it was served with the court processes in the cause. The Claimant points out that there are affidavits of service on the court record to confirm this fact and that the said affidavits have not

been impeached by the Respondent/Applicant. Consequently, it is the Claimant's position that the judgment on record was entered regularly and the Respondent/Applicant is not entitled to have it set aside as a matter of right.

6. The Claimant avers that the Respondent/Applicant has no reasonable defense to the cause. She argues that the draft defense that is on the court record does not disclose a viable defense to the action. It is her case that the draft is a copy and paste document with many gaps rendering it unworthy of consideration. As such, the court should not exercise its discretion to set aside the impugned judgment.

Analysis

7. The law on setting aside of *ex parte* proceedings is now well settled. It contemplates a two pronged approach to the matter: -

   a. Where the proceedings were undertaken without service of court processes on the opponent, they are deemed as irregular. As such, the court is obligated to set aside the resultant orders as a matter of right to the aggrieved party.

   b. Where the proceedings were regularly conducted after service of pleadings and other processes on the aggrieved party, he has no right to insist on setting aside the resultant orders. However, the court may exercise its discretion to set aside the orders if the aggrieved party is able to demonstrate that he has a good defense to the action or that he was prevented from being present in court during the hearing due to justifiable reasons.

8. In *Yooshin Engineering Corporation v Aia Architects Limited* (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), the Court of Appeal observed as follows on the issue of irregular proceedings:-

> ''What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.''

9. The court in the *Yooshin Engineering Corporation* (*supra*) quoted another decision in *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR where the court commented on the matter as follows: -

> " 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 [be] 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."

10. Where an Applicant is challenging the regularity of a decision on grounds of non-service of court pleadings, it is incumbent on him to impugn the contested service. Ordinarily, this is done by, inter alia, challenging the validity of the affidavit of service. As such, it is expected that such applicant will cross examine the deponent to the affidavit of service to demonstrate that it is founded on falsehoods.

11. In*Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR, the Court of Appeal observed as follows on the matter:-

> ‘’There is a presumption of services as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”

12. The court in the *Shadrack Arap Baiywo Case* (*supra*) went further to comment as follows:-

> ‘’ All that can be concluded is that the appellant had the burden of proof to disprove service, and on the strength of the return of service and affidavit of the process server, the burden of proof was not discharged by the appellant’s mere denials. The affidavit of the process server appears much the stronger evidence.’’

13. The Respondent/Applicant in the instant case has asserted that it was not served with Summons to Enter Appearance in the cause or Mention Notices for pretrial conference during which the matter was ordered to proceed *ex parte*. However, the court file shows that there is an affidavit of service sworn on 4th July 2017 indicating that one Amutallah Robert, an advocate of the court served the Respondent with Summons to Enter Appearance on 22nd February 2017.

14. The said Robert Amutala states that he served the Summons on the Respondent’s secretary. He avers that the Respondent’s/Applicant’s official that was served acknowledged service of the court processes by endorsing on the return copy.

15. I have looked at the copy of the Notice of Summons that was allegedly served. Indeed, it bears an endorsement by one Daniel stating that he received the pleadings on 22nd February 2017 at Cussons, Ruaraka.

16. Although the Respondent/Applicant indicated that it will be moving the court to cross examine the said advocate on the affidavit, this was not done. As such, the affidavit of service dated 4th July 2017 remains unchallenged.

17. As was indicated in *Shadrack Arap Baiywo* (*supra*), in the face of an affidavit purporting to state that service of summons was effected, it is not sufficient for an applicant seeking to set aside the resultant proceedings to merely make plain denials of service. He must do more by seeking to dislodge the affidavit through cross examination of the affiant.

18. The Respondent’s/Applicant’s bare denials of service without challenging the affidavit of service on record cannot be the basis for the court to arrive at the conclusion that there was no service of Summons to Enter Appearance in the matter. It was up to the Respondent/Applicant to validly challenge the

fact of service. As the record shows, it (the Respondent/Applicant) did not. Commenting on a similar scenario, the court *In Re MWO (Minor)* [2021] eKLR said as follows:-

> ''The Appellant merely disputed the averments made in the Affidavit of service but took no steps to challenge and/or controvert the said averments. This he ought to have done. In the circumstances, I find that the learned trial magistrate did not err in dismissing the Appellants application for his failure to summon the process server for cross-examination.''

19. Although the Respondent/Applicant complains about having not been served with Mention Notices for the pretrial conference, I do not think that the Claimant had an obligation to issue such notices. This obligation would only have arisen if the Respondent/Applicant had entered appearance in the cause pursuant to service of the Summons to Enter Appearance.

20. That said and contrary to the Respondent's/Applicant's assertions, the court record shows that despite the Respondent's/Applicant's failure to enter appearance in the cause, the Claimant still served it (the Respondent/Applicant) with a Mention Notice for pretrial directions on 19th February 2019. Again, the affidavit of service evidencing this fact has not been impugned by the Respondent/Applicant.

21. On 19th February 2019, the court certified that the Respondent/Applicant had been properly served with the court processes but had failed to enter appearance in the cause. As a result, the matter was certified as ready for hearing as an undefended claim.

22. Having regard to the foregoing, it is apparent that the Respondent/Applicant was properly served with Summons to Enter Appearance in the cause. As a result, the subsequent proceedings that were taken in the cause were regular. Consequently, the Respondent/Applicant is not entitled to have the judgment on record set aside as a matter of right.

23. Despite the aforesaid, the court may still set aside the *ex parte* judgment if it is satisfied that the Respondent/Applicant failed to file its pleading due to inadvertent mistake or that it has a genuine defense to the cause. In such case, the court will be invoking its discretion to reopen the proceedings.

24. However, this discretion must not be exercised whimsically. It must be exercised judiciously in strict compliance with the principles that guide the exercise of discretion in such circumstances.

25. In *CMC Holdings Ltd v Nzioki* [2004] KLR 173, the Court of Appeal expressed itself on the matter as follows:-

> " In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other[s] an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.....The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the 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 draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement."

26. In*Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, the court observed as follows regarding the exercise of the aforesaid discretion:-

> ''That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and 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.''

27. In the instant case, it is not the Respondent's/Applicant's case that although it was served with Summons to Enter Appearance, it inadvertently failed to enter appearance and file defense. As such, the issue of mistake does not arise in determining whether or not to exercise the discretion to set aside the impugned judgment.

28. The only matter that remains for consideration is whether the draft defense, as filed, raises triable issues. The Respondent/Applicant contends that it does. On the other hand, the Claimant contends that it does not.

29. I have looked at the draft defense as filed. It is apparent that the instrument is incomplete. As presented, it is not possible to discern a plausible line of defense from it.

30. The instrument has gaps, for instance, in paragraphs 4, 5, 6 and 9 suggesting that it was a template that was prepared by counsel pending supply of further particulars by the Respondent/Applicant. Such instrument cannot be considered as a defense that raises triable issues.

Determination

31. The upshot is that the Respondent's/Applicant's application dated 19th May 2022 is devoid of merit.

32. Consequently, it (the application) is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant/Respondent

.....for the Respondent/Applicant

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI