



**Adika v Security 24 Limited & another (Appeal E048 of 2023)
[2024] KEELRC 1639 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1639 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E048 OF 2023
CN BAARI, J
JUNE 27, 2024**

BETWEEN

GEOFFREY OMONDI ADIKA APPELLANT

AND

SECURITY 24 LIMITED 1ST RESPONDENT

HOMES UNIVERSAL LIMITED 2ND RESPONDENT

*(Being an Appeal from the Judgment of Hon. F. M. Rashid (PM)
in Winam ELRC No. E001 of 2023 delivered on 25th July, 2023)*

RULING

1. This ruling relates to a Notice of Motion dated 2nd February, 2024, expressed to be brought pursuant to Order 10 Rule 11, Order 22 Rule 6, 22(1), Order 51 Rule 1 & 15 of the Civil Procedure Rules, Articles 50 and 159 (1) (a, d, and e) of the Constitution and Sections 1, 1A, 3 and 3A of the Civil Procedure Act. The Applicant seeks orders that:
 - i. Spent
 - ii. This Honourable Court be pleased to set aside the ex-parte proceedings of the 19th October, 2023 and 30th November, 2023.
 - iii. Spent
 - iv. This Honourable Court be pleased to set aside the ex parte judgment entered on 24th January, 2024 and all other consequential orders
 - v. Spent
 - vi. The costs of the application be in the cause.



2. The application is premised on the grounds on the face of the motion and the supporting affidavit of Daniel Ojjo. The crux of the application is that the appeal herein was set down for directions on two occasions; the 19th October, 2023 and again on 30th November, 2023, when the court directed parties to file submissions on the appeal, and which dates were not communicated on the Respondents/Applicants herein, hence did not prosecute their case.
3. The Applicants/Respondents aver that they were only made aware of the progress of the suit when they were served with notice of entry of judgment dated 1st February, 2024 together with the decree dated 30th January, 2024.
4. It is their assertion that their non-attendance was not intentional, hence the need for the court to allow this application to afford them an opportunity to defend the suit. The Applicants aver that no prejudice that cannot be compensated by way of costs will be occasioned to the Appellant should the prayers herein be granted.
5. The Appellant/Respondent opposed the motion vide a replying affidavit sworn on 20th February, 2024. He states that the court noted that the Applicants were served with summons to enter appearance but had failed to enter appearance and/or file a defence.
6. The Applicants state that in the directions issued on 19th October 2023, the court directed that the Appellant files a record of appeal and serves the same upon the Applicants/Respondents, and that the same was served and a mention date given to confirm service on 30th November 2023.
7. It is the Appellant/Respondent's position that all the notices as regards the status of the appeal and the suit before the lower court (trial court in Winam Pm ELRC No. EOOI of 2023) were served upon the Respondents' via the following emails; info@security24.co.ke/ info@homesuniversal.com or through G4S courier to their offices located on 6th Floor New Rehema House Westlands, Nairobi
8. The Appellant states that the notice of entry of judgment was equally served upon the Respondents' via the same courier company being G4S at the same offices, thus they are feigning ignorance only when they have found themselves on the wall.
9. He states further that the Applicants have not in any way disputed the employment of the Appellant/Respondent herein, service of summons and pleadings of the lower court matter and the trial court only erred on the part of the employment contract which the court found that the same was an error and awarded the claimant as per the decree.
10. It is the Appellant/Respondent's assertion that the Applicants have not demonstrated that they have an arguable case as the appeal is on merit and has not been disputed.
11. The Appellant/Respondent avers that the Applicant never participated in the hearing of the matter in the lower court, and the instant application was brought more than 2 months after they were served with a record of appeal.
12. He prays that this motion be dismissed and he be allowed to enjoy the fruits of his judgment.
13. Parties canvassed the application by way of written submissions and which have been duly considered.

Determination

14. I have considered the motion, the replying affidavit and the parties' submissions.
15. It is now settled that the decision of whether or not to set aside an ex parte judgment is discretionary. Such discretion is aimed at avoiding injustice and hardship resulting from inadvertence, accidental or



excusable mistake or error, and not to assist a person who has deliberately sought to obstruct or delay the course of justice. (See *Shah vs. Mbogo & Another* [1967] EA 116).

16. The Applicants' motion is premised on the allegation that they were never served with notices of mentions for directions nor were they served with the Appellant's record of appeal, with the result that the appeal proceeded to its determination without them putting in their submissions on the appeal.

17. The Court of Appeal in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173 opined thus: -

“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 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.

18. The first question for determination is whether the judgment sought to be set aside was procedurally entered. This court (differently constituted) first issued directions on the appeal on 19th October, 2023 as correctly submitted by the Applicants. Counsel holding brief for the Appellant/Respondent (Mr. Indimuli), informed court that the Applicants/Respondents were acting in person.

19. When the matter came up on 30th November, 2023 for further directions, the Applicants/Respondents were again not present, though the Appellant/Respondent indicated to court that he had served and that an affidavit of service was on record and further sought to file submissions on the appeal.

20. The court then proceeded to reserve judgment and subsequently delivered the judgment on the date set, again in the absence of the Applicants.

21. The issue in contention is service of the various notices for mention as well as the court's directions on the appeal, where parties were directed to file submissions. The court record does not bear a single affidavit of service on the matter and all there is in the court file is a notice issued to both Applicants/ Respondents on the entry of judgment.

22. There is no prove that similar notices were issued inviting the Applicants to attend court for directions in the matter or even indicating the progress of the matter prior to judgment.

23. In the case of *Samuel Musingila Mwinzi v Esther Maasa Kaesa* (On behalf of the Estate of Kaesa Kiiti) [2021] eKLR the court noted as follows:

“The court in this matter directed that the Appeal do proceed by way of written submissions. The Respondent could not have filed his submissions before being served with the Appellant's submissions. Having not served the Respondent's advocate with submissions even after being directed to do so, and the Judgment of this court having being delivered without the benefit of the court reading the submissions of the Respondent, it is my finding that the Respondent was condemned unheard (emphasis own).”



24. Further, the Supreme Court of India in Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 664, at 711 also cited in the case of Gerita Nasipondi Bukunya & 2 others v Attorney General [2019] eKLR had this to say on the right to be heard:

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

25. In David Gicheru v Gicheha Farms Limited & another [2020] eKLR the Court held that: -

“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”

26. By dint of the foregoing, it is clear that unless and until the court has pronounced a judgment upon the merits or by consent of the parties, it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.

27. The Applicants herein did not at all participate in the appeal nor did they take part in the proceedings before the lower court where the matter proceeded undefended. Further, they have attributed their failure to participate in the proceedings to lack of service and which service has in my view not been proven.

28. For the reasons foregone, I find the motion merited. Accordingly, the judgment delivered on 24th January, 2024 is hereby set aside, and the Applicants/Respondent granted leave to file their submissions on the appeal.

29. Costs shall abide the appeal.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JUNE, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Kageha h/b for Mr. Nyamagwa for the Applicant/Respondent

N/A for the Appellant/Respondent

Ms. Anjeline Wanjofu & Debra – C/AS

