



**Kenya National Private Security Workers Union v Vickers Security Services Limited (Employment and Labour Relations Cause 2057 of 2016)  
[2024] KEELRC 13201 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13201 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2057 OF 2016**

**JW KELL, J  
NOVEMBER 21, 2024**

**BETWEEN  
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION ..... CLAIMANT  
AND  
VICKERS SECURITY SERVICES LIMITED ..... RESPONDENT**

**RULING**

1. The application was filed by the respondent following the entry of a default judgment and consequential execution proceedings. The application was way of Notice of Motion dated 11<sup>th</sup> June 2023 under Order 10 Rules 10 and 11, Order 50 Rule 6, Order 51, Rules 1, 3, 4 and 10, of the [Civil Procedure Rules, 2010](#) and Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Cap 21 and all other enabling provisions of Law seeking the following Orders:-
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this Application, there be a stay of execution of the decree ensuing from the default judgment entered herein against the Defendant/Applicant, and all consequential decrees or orders arising therefrom.
  4. That this Honorable Court be and is hereby pleased to set aside the default judgment entered herein against the Respondent, all consequential decrees or orders arising therefrom and all court proceedings thereof and thereby issue an order that the suit herein begins de novo.
  5. That this Honourable Court be pleased to grant the Respondent/Applicant leave to file its Memorandum of Response out of time within 14 days of court order.
  6. The costs of this application be in the cause.



## 2. Grounds of the application

1. This Honourable Court was moved to enter a Judgment in this suit and judgment was indeed delivered against the Applicant/Respondent on 29th November 2021 awarding some of the prayers in the Claimant's statement of claim together with costs thereof to the Claimant herein.
2. The above notwithstanding, the Claimant/Respondent has further brazenly opted to disregard process as equally, the Applicant was not served with a Notice of entry of Judgment in accordance with Order 10 of the Civil Procedure Rules.
3. In light of the foregoing, it is therefore clear that the default judgment entered against the Applicant herein is irregular and in following the decision in *James Kanyita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR it is trite law that the laws of procedure are grounded on a principle of natural justice which requires that parties 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.
4. Indeed, the right to be heard before an adverse decision is taken against a party is fundamental and permeates our entire justice system and as such the consequences of the said irregular judgment herein ought not be visited upon the Applicant by denying it an opportunity to canvass their defence on merit. In that regard the Applicant seeks this Honourable court's indulgence and pray it is granted an opportunity to be heard before a determination is made in respect of the suit herein.
5. The Claimant's actions herein having been conducted without strict compliance with the law, then the proceedings herein are therefore a nullity and it is in the interests of justice that the default judgment entered be set aside and the Applicant be granted leave to file its Defence out of time.
6. Further and without prejudice to the foregoing, it is trite law that where a Defendant has a bona fide defence, the interests of justice dictate the default judgment ought to be set aside and the matter be heard on its merits. Indeed, the Applicant has a bona fide Defence in law against the Plaintiff's claim that raise several triable issues of law and fact with high probability of success and it is in the interests of justice that the Applicant be given an opportunity to prosecute the same with a view to upholding the integrity of the judicial process.
7. The Application has been brought timeously without any undue delay, the Applicant having only recently learnt that default judgment has been entered in the matter and it is only fair, prudent and within the overriding objective of this Court that the same be allowed as prayed.
8. Further, the valuations indicated in the proclamation are oppressive and ridiculously below forced valuation to enable quick sale, to the disadvantage of the Respondents. For example, The Auctioneer states that he has proclaimed office desks and puts the price at Kshs 15,000/= without stating how many they are and the cost of each, while they are valued at more than Kshs 1M cumulatively. The Auctioneer states that he has proclaimed three motor vehicles and puts the price at Kshs 1,200,000.00 cumulatively without stating how many they are and the cost of each, while they are valued at more than Kshs 3 million cumulatively.
9. Unless this application is certified urgent and the orders herein granted as prayed, the Applicant stands to suffer irreparable loss and damage and gross injustice as the right to prosecute and prove its case will be gravely prejudiced occasioning it irreparable harm, driving it away from



the seat of justice, denying it an opportunity to be heard and condemning it unheard contrary to the dictates of natural justice; and the Plaintiff/1st Respondent will have benefited from undeserving orders.

3. The Application is further supported by the annexed affidavit of Joseph Kiogora annexing the default judgment (JK01), warrants of attachment (JK02) and the proclamation notice (JK03).
4. The application was opposed vide the replying affidavit of Beatrice Ndunge Wanyama sworn on the 5<sup>th</sup> of July 2024. She averred, among others, that they served the Respondent with a summons to enter an appearance and the memorandum of claim and list of documents physically at their main offices located at south C, Vicker Plaza but declined to receive by stamping and signing on the return copy filed before the court. The Court noted that the return was not annexed. She averred that they served the respondent via email at info@vickersecurity.com the judgment was delivered in the 29<sup>th</sup> of November 2022 (BN-2 was the email). The advocate also stated she had been in communication with officers of the respondent and stated their mobile numbers

### Written Submissions

5. The application was canvassed by way of written submissions. The parties complied. The court perused the submissions.

### Decision

6. The question for consideration by the Court in the application is whether or not there was sufficient evidence of service of summons to enter appearance and the memorandum of claim on the Respondent to justify the default judgment. Rule 11 of the *Employment and Labour Relations Court (procedure) Rules 2016 (revised in 2024)* provides for the procedure to be followed for the case to proceed in the absence of the other party which entails filing of affidavit of service as follows: \_

“(5) A party shall, upon effecting service of pleadings on any other party, prepare and file in Court an affidavit of service in Form 3 set out in the First Schedule.

“(6) An affidavit of service shall be accompanied by evidence of acknowledgement of receipt of the served document signed by the recipient, respondent, claimant or appellant as the case may be or the persons accepting service on their behalf.

(7) If for any reason the signature of the recipient cannot be secured, the process server shall state so in the affidavit of service.”

7. From the replying affidavit of Wanyama for the claimant, the court finds no evidence of return of service to support the averments that the summons and claim were served on the applicant. An affidavit of service is the only acceptable evidence of service to give opportunity to the respondent to file defence in civil proceedings. The Court perused the entire court record, the court being a court of record, and found no evidence of service of the cause. The same was also not annexed by the Claimant. The applicant is entitled to be heard before condemnation under the hallowed principle of natural justice that no man shall be condemned unheard. The Supreme Court of India stated in *Sangram Singh vs. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711 cited in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that: “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.”

8. On this issue of service, the court returned there was no evidence of service of the summons and the memorandum of claim before entry of the default judgment on the 29<sup>th</sup> November 2024. The Applicant is entitled as a matter of right to the setting aside of the irregular default judgment. The Court in so holding is guided by the Court of Appeal decision in *James Kanyitta Nderitu & Another vs. Marios Philotas Ghikas & Another* [2016] eKLR, where in determining what a regular judgement is held as follows: “In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defense, resulting in default judgment. 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.” The court further opined that: - “The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right the court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment.” The court further made reference to the case of *Onyango Oloo v Attorney General* [1986] EA 456 where to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”
9. In the upshot application is allowed as follows: - The Court sets aside the default judgment dated 29<sup>th</sup> November 2023 entered herein against the applicant /Respondent for the claimant for being irregular, and all consequential decrees or orders arising therefrom and all court proceedings thereof and hereby issues an Order that the suit herein begins de novo. The Court grants the Respondent/Applicant leave to file its Memorandum of Response together with witness statements if any and documents out of time within 21 days of court order. The claimant has right of reply in 7 days of service. Costs in the cause.
10. Mention on the 14<sup>th</sup> January 2025 for pre-trial directions. The matter be heard on a priority basis having been filed on 5<sup>th</sup> October, 2016.
11. It is so Ordered.

**READ, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

**JEMIMAH KELI**

**JUDGE**

**IN THE PRESENCE OF:**

C/A Caleb

Applicant: Absent



Respondent :Absent

