



**Charles v Chebwayi Adventist Complex (College) (Cause
322 of 2017) [2023] KEELRC 364 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 364 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 322 OF 2017
NJ ABUODHA, J
FEBRUARY 3, 2023**

BETWEEN
CLEMENT MURUNGA CHARLES CLAIMANT
AND
CHEBWAYI ADVENTIST COMPLEX (COLLEGE) RESPONDENT

RULING

1. The respondent herein filed the application dated December 9, 2020 seeking for the following orders;
 - i. Spent
 - ii. Pending the hearing inter partes and determination of the application there be an order staying the execution of the decree
 - iii. The default judgment/award be set aside and the respondent be accorded leave to defend the claim.
 - iv. Costs of the application be borne by the claimant.
2. An affidavit sworn by Stanley Kimaru Busienei, the deputy principal of the respondent on December 9, 2020 was annexed to the notice of motion in support of the grounds.
3. The background of the application is that default judgment was entered after the respondent was allegedly served with the claim documents but failed to enter appearance and defend the claim.
4. The respondent averred that it has never been served with the claim documents and that it has a good defense to the claim.
5. It was deposed that the affidavits of service before the court were false and that it would be in the interest of justice that the default award judgment be set aside.



6. The application was opposed. The claimant filed a replying affidavit on September 8, 2021 where he averred that the claim that the respondent was never served with the claim documents was unfounded and was an effort to try and mislead the court.
7. According to the claimant, the respondent was not honest and sincere in seeking leave to file defense since it was on a trial; and error mission after its objection against execution was dismissed.
8. It was contended that the instant application had been brought in bad faith since the respondent had since preferred to appeal to the Court of Appeal against the ruling of the court that dismissed an objection against execution herein.
9. It was the claimant's case that setting aside of the award judgment will in fact occasion a miscarriage of justice on the claimant as no grounds or exceptional circumstances had been proved to warrant the setting aside of the award.
10. The respondent filed its submissions on October 31, 2022. Counsel for the respondent cited the cases of *Frigonken Ltd v Value Park Food Ltd* HCC NO. 424 of 2010, *Gulf Fabricators v County Government of Siaya* [2020]eKLR, *John Akasirwa v Alfred Inat Kimuso* Civil Appeal No. 16 of 1999, *Mwala v Kenya Bureau of Standards* EA LR[2001]1 EA 148, *Kabutha v Mucheru* [2004]eKLR and *Gandhi Brothers v Njage T/A HK Enterprises* Nairobi(Milimani) HCCC No. 1330 of 2001
11. The claimant filed his submissions on November 16, 2022. He cited the case of *Ben Otieno Owaga & 2 others v Eliakim Owalla & another* [2020]eKLR
12. The issue arising in this application is whether there is sufficient evidence to warrant the setting aside of the judgment on record.
13. I have considered the evidence regarding service in the application before me and I do not need to belabor much on the issue as I find that the claims that the respondent was not served does not hold any water.
14. Having found that service was effected upon the respondent, it is important that I examine whether there was any other ground that may warrant the setting aside of the ex-parte judgment.
15. From the respondent's application, it would appear that all the respondent is banking on is the averment that it was never served.
16. I find that the respondent has not convinced this court that there is any other ground upon which the judgment of this court can be set aside.
17. In the circumstances, I find that the respondent's application dated December 9, 2020 is not merited and the same is dismissed with costs.
18. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF FEBRUARY, 2023

ABUODHA NELSON JORUM

JUDGE ELRC

