



**Ondeyo v Jumba & another (Cause 1001 of 2017)
[2023] KEELRC 245 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 245 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1001 OF 2017
JK GAKERI, J
FEBRUARY 1, 2023**

BETWEEN

JULIE ONDEYO APPLICANT

AND

MARGARET AMANGO JUMBA 1ST RESPONDENT

PYRAMID AUCTIONEERS 2ND RESPONDENT

RULING

vARGUMENTS

1. Before the court for determination is a Notice of Motion dated 16th May, 2022 by the Applicant/ Respondent seeking orders that;
 - i. Spent.
 - ii. There be a stay of the judgement entered herein against the Applicant and all consequential orders pending the hearing and determination of this application inter-partes.
 - iii. The Judgement, subsequent decree and warrants of attachment issued herein be set aside.
 - iv. The proclamation and/or the notification of sale of movable properties by the 2nd Respondent dated 5th May, 2022 and any attachment issued herein be raised and/or lifted pending the hearing and determination of this Application inter-partes.
 - v. The proclamation and/or the notification of sale of movable properties by the 2nd Respondent, Pyramid Auctioneers dated 5th May, 2022 and any attachment issued herein be raised and/or lifted and the 1st Respondent to bear the costs of such attachment.
2. The Application, filed under Certificate of Urgency is expressed under Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and is based



on the grounds set out on its face and is supported by the Affidavit of Julie Waithera Ondeyo sworn on 18th May, 2022.

3. The affiant deposes that the Claimant/Respondent was not an employee but a Mama nguo providing services twice or thrice a week from 2009 – 2014 until the Applicant hired a permanent house manager.
4. It is the Applicant's case that the Claimant/Respondent obtained judgement by misrepresentation of facts and notice of judgement was not given.
5. That the proclamation dated 5th May, 2022 was served upon her by the 2nd Respondent.
6. The affiant states that she should not be condemned unheard.
7. The affiant avers that court documents were not served upon her and the suit was fictitious as she had had no dealings with the Claimant/Respondent and had no duty to issue a Certificate of Service and stood to suffer irreparable loss and harm and prays that the judgement be set aside and execution be stayed pending determination of the suit on merits.
8. That granting of the orders sought will not occasion any prejudice to the 1st Respondent.

Claimant/Respondent's case

9. The decree-holder filed grounds of opposition dated 23rd August, 2022 stating that the Applicant did not comply with the mandatory provisions of Order 9 Rule 9 and 10 of the Civil Procedure Rules, 2010 as counsel did not seek the court's leave to come on record after entry of judgement.
10. That the Respondent/Applicant was represented by the firm of Busaidy Mwaura Ngarua & Co. Advocates and the firm of Waiyaki & Associates Advocates ought to have sought leave of court to come on record.
11. It is the Respondent's case that it was untrue for the Applicant to state that she was not served with the Claimant cause because, a firm of advocates filed a Memorandum of Appearance dated 15th September, 2017.
12. That when the Claimant sought a date for formal proof, the learned judge confirmed that there was counsel on record and directed service to be effected on the advocate and on 16th September, 2019, the Respondent's counsel was in court.
13. The Claimant/Respondent relies on the Affidavit of Service filed on 8th November, 2017 on service of the claim and summons, another sworn on 9th April, 2018 and 18th June, 2018 on mention notices and the hearing notice respectively served via Affidavit of Service filed on 9th September, 2019.
14. That the Hearing Notice and Bill of Costs were served as evidenced by the Affidavit of Service sworn on 25th January, 2022.
15. That the judgement notice dated 17th February, 2020 was issued by the court and the Respondent was called on 19th February, 2022.
16. That the evidence of service remained uncontested.
17. The Claimant states that the Applicant was aware of the judgement delivered on 21st February, 2020 and the Application herein was brought after inordinate, unexplained and unreasonable delay and the proclamation issued by the auctioneers was regular as was the identifiers of the goods to be proclaimed.
18. That the application was brought under wrong principles of law as they do not relate to setting aside of judgement and was intended to deny the Claimant the fruits of her judgement.



19. Finally, the Claimant states that the Applicant was in abuse of court process by enjoining the 2nd Respondent without seeking leave from the court despite the auctioneer not being party to the suit and seeking orders against it.

Applicant/Respondent's submissions

20. The Applicant submitted that she was not served with summons to enter appearance and was not represented by an advocate as alleged by the Respondent in her grounds of opposition and that her defence raises triable issues and should be granted an opportunity to be heard, file a defence and witness statement and other relevant documents.
21. The Applicant identified three issues for determination; whether the Applicant was served, whether the judgement should be set aside and whether leave should be granted to the Applicant to defend the suit.
22. On the first issue, reliance was made on Order 10 Rule 11 of the *Civil Procedure Rules* on setting aside of judgment. It was urged that the court had discretion to set a judgement aside in the interest of justice as was explained in *David Kiptanui Rono & 134 others V Benjamin Rono & 4 others* (2021) eKLR, where the court upheld the overriding objective of Article 159(2)(d) of the Constitution of Kenya, 2010 as substantive justice.
23. It was further submitted that since the Applicant was not served and was thus unaware of the suit, she ought not be condemned unheard on account of the Claimant's mistake and her intended defence raised triable issues.
24. The decisions in *Patel v E.A. Handling Services Ltd* (1974) EZ P5 and *Tree Shade Motors Ltd v D.T. Dobie Co. Ltd* CA 38 of 1998 and *Maina v Muriuki* (1984) KLR 407 were relied upon to buttress the submission that the discretion under Order 10 Rule 11 should be exercised to avoid injustice or hardship resulting from accident inadvertence and excusable mistake or error.
25. Further, the Applicant submitted that even if she was served, she was unaware of the proceedings until she received the Claimant's Bill of Costs.
26. That the judgement was obtained irregularly as there was no proper service and the decree should not stand as explained in *Mwala V Kenya Bureau of Standards* (2001) 1 E.A. 148 where the court underscored the fact that irregularly obtained judgement should not be allowed to stand.
27. The Applicant prays for the judgement to be set aside as it was obtained irregularly.

Respondents submissions

28. By 19th November, 2022 when the court retired to prepare this judgement, the Respondent/Claimant had not filed submissions.

Determination

29. The issues for determination are;
- i. Whether the Applicant was served and thus aware of the proceedings.
 - ii. Whether the judgement delivered on 21st February, 2020 should be set aside.
30. As regards the 1st issue, it is common ground the Claimant/Respondent herein filed a Statement of Claim dated 22nd May, 2017 on 30th May, 2017.



31. On this issue, the parties have adopted contrasting positions. While the Applicant submits that she was not served and was unaware of the proceedings until execution commenced, the Claimant/Respondent stated that service was effected and indeed the Applicant had a law firm on record which entered appearance on her behalf.
32. The Notice of Summons dated 31st May, 2017 was issued by the court and the statement of claim according to the Affidavit of service on record, sworn by Boniface M. Muinde, dated 8th November, 2017 were served upon the Respondent/Applicant at Mwewe Apartments B6 opposite Birchwood Apartments, through her house helps one, Peninah Nyagah, 072-- and Rebecca Mangeni, 07-- who accepted service and promised to hand over the same to the employer. Service was effected on 21st July, 2017 and the law firm of Busaidy Mwaura Ngarua & Co. Advocates, 3rd Floor Tower A Westcom Point Building, Mahiga Mairu, Waiyaki Way, P.O. Box 20140-00100 Nairobi entered appearance for the Respondent/Applicant on 20th September, 2017.
33. It is puzzling to the Court how the law firm of Busaidy Mwaura Ngarua & Co. Advocates learnt of the suit against the Applicant and entered appearance on her behalf on 20th September, 2017 about 2 months after the alleged service of the claim upon the Applicant.
34. If the Applicant did not give instructions to this firm of advocates, who did?
35. Instructively, the Applicant makes no reference to the fact that she had a law firm on record, nor does she deny that fact and does not attribute any default, mistake or error on the law firm.
36. Finally, on this issue, although the law firm did not appear in court on 5th February, 2018, before the Deputy Registrar, 10th April, 2018 and 18th June, 2018 before Onesmus Makau J., the Applicant was represented by Mr. Busaidy on 16th September, 2018 when proof took place.
37. It is unclear why counsel for the Applicant who was in court raised no objection and had no questions to the witness during cross-examination and did not file submissions. Counsel did not appear for the mentions scheduled for 9th October, 2019 and 13th November, 2019.
38. Similarly, Affidavits of Service on record dated 9th April, 2018 and 18th June, 2018 sworn by Boniface Muinde of Kituo Cha Sheria P.O. Box 7483-00300 Nairobi show that the Mention Notices for 10th April, 2018 and 18th June, 2018 were duly served upon the Applicant's counsel on 2nd March, 2018 and 30th May, 2018 respectively.
39. Lastly, the hearing notice for 16th September, 2019 was served upon the Applicant's counsel on 30th August, 2019.
40. Finally, the date of judgement was communicated by the court on 19th February, 2020. The Applicant was notified through her cell phone number 07-- at 9.25 a.m as court records show.
41. In light of the foregoing and contrary to the Applicant/Respondent's submission that she was not served and was thus unaware of the suit against her until the Proclamation dated 11th May, 2022 was served on her, it is the finding of the court that the Applicant was not only served with the statement of claim but instructed a law firm to represent her in the suit and her advocate appeared in court at least once.
42. It is unclear why the Applicant decided to mislead the court while documentary evidence on record portray a different picture of the state of affairs.



43. Analogous to the assertion that the Claimant/Respondent obtained judgement through misrepresentation, which has not been demonstrated, the Applicant has by omitting essential facts misrepresented the circumstances and further muddled up the facts.
44. As to whether the judgement obtained by the Claimant/Respondent should be set aside, the first port of call are the principles governing the setting aside of judgements.
45. Order 10 Rule 11 of the [Civil Procedure Rules](#), 2010 provides;
Where judgement, has been entered under this Order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.
46. Clearly, the power granted to the courts is discretionary and dependent on the circumstances of each case.
47. In *Magon V Ottoman Bank* (1968) EA 156, Duffus JA stated as follows;
“ . . . whereas the power to set aside judgement was discretionary upon such terms as may be just, but in a case where obtaining of judgement was irregular, and not in accordance with the law and practice as laid down under the relevant cited provisions of the Civil Procedure Rules, the Respondent is entitled as a matter of right to have the judgement set aside without any conditions imposed.”
48. Similarly, in [Gulf Fabricators V County Government of Siaya](#) (2020), Aburili J. stated as follows;
“ Even if there is a regular judgement on record which I find non-existent, the power to set aside ex-parte judgement entered in default is discretionary. The principles upon which such discretion is to be exercised were set out by the Court of Appeal in *Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd V Augustine Kubende* (1982 – 1988) KAR 1036 where it held inter alia citing the English case of *Evans V Bartlam* (1973) A.C 473
“The discretion is in terms unconditional. The courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgement was obtained regularly, there must be an affidavit of the merits meaning that the Applicant must produce to the court evidence that he has a prima facie defence.
The reason, if any allowing judgement and thereafter applying to set it aside is one of the matters to much the court will have regard, in the exercise of its discretion. The principle is that witness and until the court has pronounced a judgement upon the merits or by consent, it is to have the power to revoke the expression of coercive power where that has only been obtained by a failing to follow any of the rules of procedure.”
49. Evidently, whereas an irregularly obtained judgement cannot stand under the discretionary power of the court to set aside the judgement as held in [Mwala V Kenya Bureau of Standards](#) (*Supra*), a regular Judgement could if the Applicant is unable to demonstrate that he/she has a *prima facie* defence or intends to delay or obstruct justice as held in *Shah V Mbogo & another* (1967) EA as follows;
“The courts discretion to set aside an ex-parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should therefore be refused.”



50. Similar sentiments were expressed by Aburili J. in *Gulf Fabricators V County Government of Siaya (Supra)*.
51. Applying the foregoing principles to the facts of the instant case, it is clear that the thrust of the appellant's case is that the judgement sought to be set aside was irregular on the ground that the claim was not served and she was therefore unaware of the proceedings, but as demonstrated elsewhere in this judgement documentary evidence on record points elsewhere.
52. Secondly, the Applicant did not file any documentary evidence to establish that she has a prima facie defense. There is no indicative defence on record.
53. Although the grounds upon which the Application is grounded and the submissions make reference to the Applicant having a strong defence and the defence raising triable issues, neither the evidence nor the indicative defence was filed.
54. Finally, it is not in contest that the judgement sought to be set aside was delivered on 21st February, 2020 and the Application herein was made on 24th May, 2022 more than 2 years 2 months later which in the court's view may not be classified as timeous in the circumstances of this case.
55. For the above stated reasons, the court is satisfied and finds that the Applicant has not demonstrated a sustainable case for the setting aside or variation of the judgement delivered on 21st February, 2020.
56. In the upshot, the Notice of Motion dated 16th May, 2022 is unmeritorious and is accordingly dismissed in light of the circumstances of the case.
57. Parties to bear own costs.
58. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B. of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

