



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karanja v Maxland Restaurant, Bar & Lounge (Cause 866 of 2016)  
[2023] KEELRC 639 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 639 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 866 OF 2016  
JK GAKERI, J  
MARCH 14, 2023**

**BETWEEN**

**JOSEPHAT KIMANI KARANJA ..... CLAIMANT**

**AND**

**MAXLAND RESTAURANT, BAR & LOUNGE ..... RESPONDENT**

**RULING**

1. Before the court for determination is a notice of motion by the applicant/respondent dated September 21, 2022 seeking orders that;
  1. Spent.
  2. Spent.
  3. This honourable court be pleased to review, set aside, discharge and/or vary its judgement entered on June 8, 2021 and the consequential orders.
  4. The respondent/judgement debtor be granted leave to defend this matter as it has a strong defence.
  5. Costs of this application be provided for.
2. The application filed under certificate of urgency is expressed under section 1A, 1B, 3A and 80 of the *Civil Procedure Act* and order 10 rule 11 of the *Civil Procedure Rules, 2010* and all other enabling provisions of law and is based on the grounds set out on its face and the supporting affidavit sworn by Anthony Njoroge Gachiri dated September 21, 2022.
3. The affiant deposes that the claimant instituted proceedings against the respondent for an unknown claim of Kshs 89,500/= and failed to follow the prescribed procedure of serving the respondent with the demand statement of claim, notice of judgement, decree and application for execution as prescribed



by law and the respondent learnt of the proceedings on September 20, 2022 when the Warrants of attachment were served, issued to Dikemwa Auctioneers arising out of the judgement delivered on June 8, 2021.

4. The affiant further deposes that the respondent was not served with any summons or other documents relating to the claim and the claimant had failed to prove acknowledgement of the certificate of service on record and the same are falsehoods, sham and gross misrepresentation of facts to mislead the court.
5. The affiant avers that the ex parte judgement entered and the decree was irregular and unjust and ought to be set aside for the respondent was not heard.
6. That efforts by counsel of the respondent to obtain pleadings had been futile as the claimant's counsel had not disclosed his physical address.
7. That the decree itself was never served upon the respondent and had therefore no opportunity to settle the decretal sum.
8. That the respondent was a law abiding entity and would have participated in the proceedings had it been served and should execution proceed it will suffer irreparable loss and harm.
9. That the respondent be allowed to defend its case as there are issues of law and fact to be brought out for a just determination of the suit.
10. The affiant finally deposes that it is in the interest of justice that the judgement delivered on June 8, 2021 be set aside, reviewed and varied.

#### **Respondent/Claimant's case**

11. In its grounds of opposition, the claimant/respondent urges that the application was misconceived and unsustainable as no valid grounds had been disclosed by the respondent to warrant the setting aside of the judgement and decree and the firm of Gachie Mwanza & Co. Advocates were improperly on record for the respondent rendering the application fatally defective and there were no valid grounds for stay of execution as no sufficient explanation has been provided for the failure to appear in the cause.
12. The claimant states that the respondent had no reasonable defence with a triable issue as the application was an afterthought and a delaying tactic.
13. In his replying affidavit, the claimant states that in May 2016, he instructed the firm of Ochieng, Ochieng Advocates to issue a demand letter to the respondent for unfair termination of employment.
14. That counsel had notified him the memorandum of claim was served on the respondent on June 17, 2016 by one Dan Otieno Achando, a process server and one Gabriel Kibicha Munene received the pleadings but the respondent failed to enter appearance and/or file a response to the claim.
15. That at the instigation of his counsel, the matter was mentioned on November 30, 2016 and the court directed that it proceeds as undefended on account of the respondent's non-responsiveness and the same was set for hearing and the respondent was notified. A further invitation to the respondent for purposes of fixing a hearing date failed but hearing was fixed for March 10, 2020 and the respondent was notified of the hearing date but did not attend.
16. The claimant testified and closed his case as was the respondent's case based on prove of service of the hearing notice and judgement was delivered on September 24, 2020 and the draft decree was forwarded to the respondent vide letter dated November 5, 2020 and a bill of costs was filed on November 23, 2021 and the same was served upon the respondent and was taxed at Kshs 81,560/= and Dikemwa Auctioneers were instructed to recover the sum.



17. That the court satisfied itself of the receipt of service of all processes by the claimant before the judgment was delivered.
18. That the respondent had sufficient opportunity to defend the suit but ignored it and had not tendered anything to corroborate any of the allegations in the notice of motion or supporting affidavit or the irreparable loss or damage it stood to suffer if the orders sought were not granted.
19. The affiant states that the notice of motion was intended to manipulate and delay the court process and defeat the cause of justice to the detriment of the claimant.
20. That the respondent's advocates were not properly on record as the court had not granted them leave to appear.
21. That it was in the interest of justice that the court declines to exercise discretion in the applicant/respondent's favour.
22. In its further affidavit sworn by Mr Anthony Njoroge Gachiri dated October 31, 2022, the affiant deposes that that replying affidavit sworn by one Jackline Kaingu on October 17, 2022 be disregarded as the respondent's application was warranted and no physical evidence of service of summons and pleadings had been provided and as a consequence the respondent neither entered appearance nor file a defence or participate in the taxation.
23. In a further replying affidavit by Jackline Kaingu, sworn on October 17, 2022, the affiant states that Dikemwa Auctioneers received instructions on September 8, 2022 and proceeded to the Respondent's premises within Juja City Mall, ground floor on Thika Super Highway and served the proclamation notice to the receptionist who declined to sign citing lack of authority.
24. That on expiration of the notice period on September 21, 2022, they proceeded to the Respondent's premises within Juja City Mall, where the general manager, one Mr Kabata called in security to block them from taking away the proclaimed goods.
25. That they had to abandon the execution to avoid violence and breach of peace so as to seek assistance of the police in the execution.

#### **Claimant/Respondent's submissions**

26. The respondent's counsel raises several issues for determination, namely; whether the applicant's advocate were properly on record, whether the judgement should be set aside and whether the court should exercise its discretion in favour of the applicant.
27. As to whether the applicant's advocate was properly on record, reliance was made on order 9 rule 7 of the *Civil Procedure Rules, 2010* on notice of appointment of Advocates. The submission was buttressed with the sentiments of L. Njuguna J. in *Elias Muturi Njiru V Nawiri Sacco Society Ltd* (2022) eKLR where the learned judge struck off the notice of motion and record of appeal. The court was urged to follow the decision of L. Njuguna J.
28. As to whether the judgment should be set aside, it was submitted that based on the claimant's averments and issues established, the notice of motion was unsustainable as it was an abuse of the process of the court.
29. That the respondent prevented execution of lawful warrants on September 21, 2022 only to file the instant application the following day to sanitize its unlawful actions and its conduct did not deserve the exercise of the court's discretion in its favour having elected not to enter appearance and defend the suit.



30. That no valid grounds had been disclosed by the respondent to warrant the setting aside of the judgement and decree for the grant of stay of execution.
31. It was submitted that service of summons and pleadings was done as well as hearing notices and the suit proceeded undefended.
32. Reliance was made on the sentiments of the court in *Shah V Mbogo* (1967) EA 116 on the exercise of discretion.
33. The court was invited to hold that the judgement herein was regular as service had been effected.
34. In the alternative, the court was urged that if it was inclined to set aside the judgement, it orders the applicant to deposit the decretal sum in an interest earning bank account in the name of the advocates and the auctioneers charges be paid in full within 7 days of the ruling.
35. Finally, on exercise of discretion, it was submitted that the draft defence annexed to the further affidavit consisted of mere denials of the claim but admits that claimant was an employee of the respondent.

### **Applicant/Respondent's submissions**

36. Counsel for the applicant isolated three issues for determination, namely;
  - i. Whether the applicant's advocates are properly on record.
  - ii. Whether the court should set aside the default judgement entered on September 24, 2020.
  - iii. Whether the applicant should be granted leave to defend the claim.
37. On the 1<sup>st</sup> issue, reliance was made on order 9 rule 9 of the *Civil Procedure Rules, 2010* to urge that the rule was only applicable where a party changes an advocate after judgment is entered and the Respondent had not participated in the proceedings in this case.
38. Counsel submitted that Gachie Mwanza & Co. Advocates were properly on record and there was no previous advocate and order 9 rule 9 was inapplicable as holding otherwise would be an absurdity.
39. Reliance was made on the decision in *K-Rep Bank Ltd v Segment Distributors Ltd* (2017) eKLR which cited with approval the sentiments of Radido J. in *Kazungu Ngari Yaa vs Mistry V. Naran Mulji & Co.* (2014) eKLR in similar circumstances.
40. It was urged that the applicant's advocate was properly on record.
41. As regards the 2<sup>nd</sup> and 3<sup>rd</sup> issues, it was urged that setting aside of judgement was a discretionary power liberally exercised under order 10 rule 11 of the *Civil Procedure Rules.*
42. Further reliance was made on the sentiments of the court in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* (2016) eKLR to underline the factors relevant in determining how court should exercise discretion.
43. It was further submitted courts are enjoined by Article 159 (2) (d) of *the Constitution* of Kenya, 2010 to administer justice without undue regard to technicalities such as failure to file a response by the respondent/applicant.
44. The court was invited to set aside the judgement entered on September 24, 2020 and allow the application dated September 21, 2021 to enable the respondent to defend its case.



## Determination

45. The singular issues for determination are;
- i. Whether the applicant/respondent's advocate was properly on record.
  - ii. Whether the application is merited.
46. As to whether the applicant's advocate was properly on record, parties adopted contrasting positions. While the claimant/respondent relies on order 9 rule 7 to urge that counsel was not properly on record for want of notice of appointment, the applicant/respondent's counsel relies on order 9 rule 7 to urge that he was properly on record.
47. Order 9 rule 7 of the [Civil Procedure Rules, 2010](#) provides that;
- Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.
48. On the other hand, order 9 rule 9 of the [Civil Procedure Rules](#) provides that;
- When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court –
- a. Upon an application with notice to all the parties; or
  - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
49. Having considered the opposing submissions by the parties on this issue, the court is satisfied that none of the provisions relied upon captures the circumstances of this case and the applicant/respondent's counsel is properly on record.
50. As to whether the application is merited, the starting point are the principles governing the setting aside of judgements.
51. It is trite law that whether or not to set aside ex parte judgement is a matter of discretion by the court typically exercised to avoid injustices.
52. Equally, the discretion must be exercised judicially. See [Kimani v McConnel](#) (1966) EA 547, [Pindoria Construction Ltd v Ironmongers Sanytaryware](#) Civil Appeal No. 16 of 1976 as was held in [Shah v Mbogo](#) (Supra), the Court of Appeal stated as follows;
- “ . . . as I understand his judgement, that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the court of justice . . . ”
53. In [CMC Holdings Ltd v Nzioki](#) (2004) KLR 173, the Court of Appeal stated;
- “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.”

54. Similarly, in the words of Odunga J. (as he then was) in *Mureithi Charles & another v Jacob Atina Nyagesuka* (2022) eKLR,

“In considering whether or not to set aside a judgement, a judge has to consider the matter in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that unless and until the court has pronounced a judgement upon the merits or by consent, 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 procedures . . . Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing than the judge who acts *ex parte*. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defense, there is a *prima facie* defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate but nevertheless he may hold that it would be just to set aside the *ex parte* judgement.”

55. The court is in agreement with these sentiments and is guided accordingly.
56. In the instant case, while the applicant/respondent urges that the judgement delivered on September 24, 2020 was irregular, the claimant/respondent urges that it was regular.
57. From the record, it is discernible that claimant/respondent filed the claim on May 16, 2016 and summons were issued on May 18, 2016.
58. In addition, an affidavit of service dated July 18, 2016 by Mr Dan Otieno Achando filed on July 21, 2016 reveals that the process server went to the respondent’s office at Mountain Mall (Naivas) on 3<sup>rd</sup> Floor, along the Thika Super Highway but was directed to the head office in Westlands, Maxland Restaurant, next to Shell Service Station, opposite Safaricom House, Waiyaki Way and served the documents upon one Mr Gabriel Kibicha Munene, the general manager who declined to sign the principal copy in acknowledgment of service. Prima facie the notice of summons and the claimant’s memorandum of claim from the claimant’s advocates were served upon the respondent.
59. At the claimant counsel’s instigation, the suit was listed on mention November 30, 2016 and the respondent was absent. The court directed as follows;

“The respondent having been served with summons to enter appearance but has neither entered appearance nor filed a defense, the matter shall proceed as undefended cause on a date to be fixed at the registry.”



60. The respondent did not attend court for the mentions slated for July 25, 2017, July 11, 2018 and November 22, 2019 when the hearing date was fixed for March 10, 2020.
61. Records reveal that the hearing notice dated February 24, 2020 was served upon the Respondent's office at Juja City Mall, ground floor along the Thika Super Highway, on February 25, 2020 and received by one Ms Roxana, the secretary who allegedly declined to sign the principal copy in acknowledgement of service.
62. Hearing proceeded on March 10, 2020 as envisaged before O. Makau J. and judgement delivered on September 24, 2020 contrary to the applicant/respondent's submission that the judgement was delivered on June 8, 2021.
63. Similarly, documents on record show that the claimant's counsel posted the notice of taxation of the bill of costs dated November 23, 2021 before the deputy registrar on April 26, 2022.
64. The same was posted to the manager, Maxland Restaurant Bar & Lodge, P.O. Box 70310-00400, Nairobi and a Postage Certificate No. M00100-032-29454691 dated March 10, 2022 at 1430 issued and filed and a certificate of taxation dated August 5, 2022 was issued.
65. Puzzlingly, the applicant averred that it learnt of the existence of these proceedings on September 20, 2022 when the claimant/decreed holder served the warrants of attachment via whatsapp and further stated that the certificates of service on record were falsehoods, sham and gross misrepresentation of facts in an attempt to mislead the court and leave would be sought to cross-examine the process servers. Instructively, leave to cross-examine the process server was never sought.
66. Similarly, the applicant did not attach a copy of the judgement allegedly delivered on June 21, 2021 for records.
67. More significantly and noticeable is the fact that the applicant has not denied that any of the venues mentioned in the affidavits were not its offices or restaurant or that the persons mentioned were not its employees or the postal address on the postage certificate did not belong to it or that its registered office was situated elsewhere. The further replying affidavit of Jackline Kaingu confirms the current location of the respondent's offices where service of hearing notice was previously effected on the secretary, one Roxana on February 25, 2020.
68. This finding is supported by the fact that when the mention notice dated October 20, 2016 was served upon the respondent at its offices in Waiyaki Way on October 27, 2016 for the mention slated for 30<sup>th</sup> November, 2016, the process server deposes that he met the same general manager, one Mr Gabriel Kibicha Munene having met him previously on June 17, 2016.
69. The applicant tendered no evidence that Mr Gabriel Kibicha Munene was not its General Manager.
70. Contrary to the applicant's counsel submission that the respondent was not served with the summons and memorandum of claim among other document, documentary evidence on record leave no doubt that the claimant's counsel made reasonable attempts and served the claim, mention, hearing notice and mention of taxation of bill of costs.
71. Noteworthy, counsel for the applicant did not plead mistake or error or inadvertence by anyone as the applicant did not enlist the services of counsel before attachment commenced.
72. In the court's view, this is a case where the respondent received the claim, summons and other notices but failed, refused or neglected to act hoping that the matter would fade away.



73. The blunder in this case is wholly attributable to the applicant/respondent's inaction to engage the services of counsel or respond to the claim.
74. For the above stated reasons, it is the finding of the court that applicant/respondent has on a balance of probability failed to demonstrate that the claimant did not effect service of the claim and other documents.
75. The applicant/respondent having failed, refused or neglected to act upon service of the requisite documents cannot rely on its inaction to allege that it was denied the right to be heard or was condemned unheard something akin to approbation and reprobation as explained by lord russel of killowen in *Evans v Bartlam* (1937) 2 ALL ER 649 at 652 cited with approval in *Republic v Institute of Certified Secretaries of Kenya ex parte Mundia Njeru Geteria* (2010) eKLR.
76. In other words, the applicant/respondent is estopped from alleging that it was condemned unheard.
77. As correctly submitted by the applicant, in exercising its unfettered discretion in determining whether or not to set aside a judgment, the court must take into account a wide spectrum of circumstances including reason for the respondent's default to enter appearance or file a response or participate in the proceedings, length of time that has passed since the judgement was entered, whether the defense raises triable issues, respective prejudice each party is likely to suffer, whether on the whole it is in the interest of justice to set aside the judgement.
78. From the evidence on record, it is clear that the applicant's non-participation in the suit was not attributable to absence of service by the claimant as alleged.
79. What is patently discernible is the respondent's failure, refusal or neglect to act despite having been aware of the suit.
80. Relatedly, the application herein was filed on September 22, 2022 almost two (2) years after the judgement sought to be set aside was delivered on September 24, 2020 which is inordinately long.
81. From the applicant's documents, it does not appear to have been aware of the date of judgement as the date cited is incorrect.
82. Finally, having perused the applicant/respondent's defence on record, the court is in agreement with the claimant's submissions that it consists of mere and bare denials of the claimant's case without substantial allegations of the applicant's case.
83. The court is not persuaded that the applicant has a prima facie defence to the claimant's case.
84. While the court is enjoined to administer justice without undue regard to procedural technicalities, article 159(2)(d) of *the Constitution of Kenya, 2010*, it is also trite law that refusal, failure or neglect to respond to and defend a suit in court while aware of its existence is not a procedural technicality but a substantive issue.
85. As explained by Ojwang J (as he then was) in *Haile Selassie Avenue Development Co Ltd v Josphat Muriithi & 10 others* (2004) eKLR,

“The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials and facilitating judicial decision making with finality. These rules cannot be said to be oppressive to parties or that they necessarily wreck injustice. On the facts of this particular case, the defendants ought to have complied with these rules of procedure.”



86. In the instant case, the applicant slept on its rights and cannot after more than two (2) years allege that it was unaware of the suit yet documentary evidence demonstrates otherwise.
87. The court is of the view that allowing the notice of motion dated September 21, 2022 would be tantamount to assisting “a person who has deliberately sought to obstruct or delay the course of justice.” Sir Clement De Lestang V.P in *Mbogo and another v Shah* (Supra).
88. For the foregoing reasons, the notice of motion dated September 21, 2022 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF MARCH 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

