



**Fast Energy Limited & another v Hamisi & 4 others (Employment and Labour Relations Cause 84, 87, 90, 91 & 92 of 2016 (Consolidated)) [2023] KEELRC 1273 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1273 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE  
84, 87, 90, 91 & 92 OF 2016 (CONSOLIDATED)**

**HS WASILWA, J**

**MAY 30, 2023**

**BETWEEN**

**FAST ENERGY LIMITED ..... 1<sup>ST</sup> APPLICANT**

**ALI JAMA ALI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ISSA HASSAN HAMISI & 4 OTHERS ..... RESPONDENT**

**RULING**

1. Before me for determination is the Applicants notice of motion dated February 14, 2022, filed under certificate of urgency pursuant to Article 50 & 159 of the Constitution, Order 22 Rule 6 & 22, Order 12 Rule 7, Order 51 Rule 1, Order 45 Rule 1, Order 7 Rule 1, Order 10 Rule 11 of the Civil Procedure Rules, Sections 1A, 1B, 3A, & 63(e) of the Civil Procedure Act and all enabling provisions of law seeking for the following Orders;
  - a) Spent.
  - b) That there be stay of execution and or further execution proceedings and or further proceedings herein pending the hearing and determination of the the application interpartes.
  - c) That the Honourable Court be pleased to lift and or suspend the warrant of arrest and or Order to commit the Applicant herein to civil jail for a period of not less than six months pending interpartes of this Application.
  - d) That this Honourable Court be pleased to Review, vary and or vacate the Orders by setting aside and or staying orders issued on the January 31, 2023, decree(s) issued on March 25, 2021, ex parte proceedings, the judgement entered and or endorsed on March 16, 2021 in



these matters in favour of the claimant/ Respondents against the Respondent/Applicant and subsequent proceedings, execution and Orders.

- e) That this Honourable Court be pleased to grant the Applicant leave herein to file its Defence and defend the claim albeit out of time as per draft response/ Defence annexed to this Application that raise cogent triable issues.
  - f) That the costs of this Application be provided for.
2. The application is supported by the grounds on the face of it and the supporting affidavit of, Ali Jama Ali, the 2<sup>nd</sup> Applicant and the director of the 1<sup>st</sup> Applicant deposed upon on the February 14, 2023.
  3. The affiant stated that the judgement entered in default of appearance was irregular having been obtained when the pleadings and summons to Enter Appearance were not served on the Respondent/ Applicants herein and any service effected, if at all, was flawed having been done outside the direction provided in the rules. On that basis, they sought to cross examine the process server that effected the said service.
  4. He stated that no notice of Entry of Judgement was served on him or the 1<sup>st</sup> Applicant, before execution proceedings were commenced.
  5. He stated that he became aware of the Orders of the Court on being served with Orders on the January 31, 2023, upon receiving service Via WhatsApp / Email.
  6. It is the Applicant's contention that unless the Orders sought are issued, they stand to suffer loss that cannot be compensated by monetary terms. Further that their application will be rendered nugatory if the Orders sought are not granted.
  7. The affiant stated further that the Orders for Committal to Civil Jail are likely to be executed when he was not served personally, as per the Rules, with the said Notice to show cause to enable him defend himself and show cause why committal orders should not issue.
  8. The Applicant stated that the Respondents have obtained orders unfairly by withholding material facts to secure the Orders in these causes in their favour. Further that they approached this Court with unclean hands.
  9. He urged this Court to allow him and the 1<sup>st</sup> Applicant defend this claim and shed more light on the claim before Court. He added that the Respondents will not be prejudiced in any way.
  10. In response to the Application, the Respondents filed a joint replying affidavit deposed upon by Issa Hassan Hamisi, the claimant in the Cause 84 of 2016(The lead file herein), deposed upon on the February 28, 2023.
  11. In the the affidavit, the affiant stated that the Applicants were served through substituted service in the standard Newspaper as ordered by this Court on the July 4, 2018 and thus service was effected as provided for under the law.
  12. Subsequently, that since there was no appearance, the matter proceeded for hearing on account of non-attendance. He stated further that the Applicant was eventually served with an application of September 20, 2022 on the September 25, 2022 by their official email, which they failed to respond but appeared in Court, through a representative and sought for time to respond but failed to make any response to date.
  13. The affiant stated that when the application of September 20, 2022 was scheduled for hearing, the Applicant was represented by an Advocate who sought for time to respond to the application however



on December 6, 2022, no response had been filed and the Advocate together with the Applicant were not in Court prompting the Court to make the Orders against them which were issued on the January 31, 2023 which are the subject of this Application.

14. The affiant stated that no Notice to show cause was extracted or served upon the 2<sup>nd</sup> Applicant, neither did they issue any warrants of arrest against him to warrant the prayers for lifting of the said warrants.
15. On the defence attached to the application, the deponent stated that the defence is full of denials and a sham that cannot stand the test of time because the allegation that there is no employment relationship between the parties is thwarted by the NHIF statement produced in Court. Also that the idea of introducing the director of the 1<sup>st</sup> Respondent as a 2<sup>nd</sup> Respondent when he is the sole director of the 1<sup>st</sup> Applicant is meant to confuse the Court further instead of bringing the clarity required in the claim.
16. The Respondent avers that in the event that the Court is inclined to allow the Application and re-open this case then, make an Orders for the deposit of the entire decretal sum and costs of Kshs 1,378,200 to ensure compliance by the Applicant considering that they have not indicated their physical place of abode.
17. The Application herein proceeded by written submissions.

#### **Applicants' Submissions.**

18. The Applicants submitted on two issues; whether there was proper service of Court documents appertaining this case and whether the defence annexed herein contains valid and reasonable defence.
19. On the first issue, it was submitted that alleged service was effected on a wrong address of service when the Claimants ought to have known the physical address of their employer and effect personal service of the Court pleadings and Summons to Enter Appearance.
20. The applicant submitted that the basis upon which the Claimants were allowed to serve them by registered post is unknown as the record does not indicate any attempts made by the Respondents in effecting personal service on the Applicant and the failure to serve thereof. On that basis, the Applicants submitted that the Respondents herein mislead the Court into receiving orders in their favour to serve them by substituted service.
21. The Applicant denied instructing any advocate to act for them prior to 2023 and argued that the allegation that an advocate appeared for them on the application of September 20, 2022 is meant to mislead the Court and they reiterated that they became aware of this Suit when they were served with the Orders dated January 31, 2023. He argued further that since the email indicated in the pleadings and the postal address is wrong, the pleadings in this suit were never served upon them and urged this Court to find as such and hold that service was not properly effected on them and set aside the the default judgement. To support this argument, the Applicant relied on the case of *Patel Vs EA Cargo Handling Services Ltd*[1974] EA 75 where the Court held that;

“there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. I would add that before the court can set aside the judgment it must be satisfied there is a valid defence. In the present suit a defence was filed and even third party notice issued and a defence filed by the third party. This discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”



22. They also relied on the case of *Kenya Commercial Bank Ltd vs Nyantange & Another* [1990] KLR where court held that;-

“Order IXA rule 10 Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”

23. Accordingly, he submitted that the discretion of a court to set aside or vary ex-parte judgement is a free one. The discretion is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

24. On the annexed drafted defence, the applicant submitted that for ex parte judgement to be set aside, a judge must consider among other things the nature of defence, the period of delay and any prejudice that will be visited on the claimant and the overriding objectives. On that note it submitted that the main issue raised in the defence is with regard to forged expired employment contract which issue is substantial and need to be determined in defence hearing. To support their argument, they relied on the case of *Philip Keptoo Chemwolo & Mumias Sugar Company Ltd v Augustine Kubende* [1982-1988] KAR where the Court held that;-

“the Court an unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just...in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

25. The Applicant submitted that one of the conditions to be considered by the court in setting aside judgement is whether there is a draft defence on record. In this he relied on the case of *Sebei District Administration V Gasyali and others* [1968] EA 300 where the Court held that;

“the nature of the action should be considered; the defence, if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and it should always be remembered that to deny a person a hearing should be the last resort of a court;

26. Accordingly, it was submitted that even when an ex parte judgement is entered into regularly, the Court should still consider the draft defence and see if it contains triable issues. On that note, the Applicant urged this Court to consider its defence and allow the Application.

### **Respondent's Submissions.**

27. The Respondents submitted on five issues; whether the service was by registered post of substituted service, whether leave was granted to serve by substituted service, whether the Applicant has provided any physical contract address that would enable their personal service, whether the Applicant was represented in Court as alluded to under paragraph 7 of the Replying affidavit and whether the Applicant raises any triable issue that warrant the setting aside of the judgement.

28. The Respondents herein submitted that contrary to the allegations by the Applicants that the service of pleadings and Summons to enter Appearance was effected by registered post, the pleadings in the cases herein were effected by substituted service through the standard newspaper as ordered by the Court. It was argued further that if the means in which the pleadings were served did not reach the



Applicants, then they could not have received the information regarding the application seeking to lift the corporate veil, which was served in the same way as the initial leadings.

29. The Respondent also submitted that the Applicant has not provided its physical address either in the Application herein or submissions filed to enable them serve them personally as argued. Therefore, informing their earlier decision of seeking leave to serve them by substituted service.
30. On whether the Applicant has earlier been represented on the Application, the Respondent submitted that an advocate appeared for the Applicants on the October 4, 2022 and sought for time to respond to the Application but failed thereafter. Confirming that indeed the Applicants were aware of the Application and their allegation that they were made aware of the proceedings before Court on execution in 2023 is far from the truth.
31. On the draft defence filed, the Respondents submitted that the same is a sham as it contains mere denials that cannot constitute triable issue for the purposes of starting the suit de novo. It was submitted that the Applicants denied existence of Employment Relationship but the NHIF statement clearly show there was employment relationship. Further that the employment contract produced is signed by Ali Jama Ali, the director of the 1<sup>st</sup> Applicant herein. Further that even if the allegations that the employment contract was forged was to go by, then the Applicant ought to have tabled evidence of the alleged forgery inform of report to the Police. From the foregoing it was submitted that the defence herein is not valid as was held in the case of *Tree Shade Motor Limited V DT Dobie Co Ltd* CA 38/98. He added that for a judgment to be set aside the validity of the draft defence need to be put to test as was held in *Morris & Company Limited vs Victoria Minerals & Chemicals Limited & Another* (2007) eKLR where Justice HPG Waweru held as follows:

“The main concern of the court is to do justice to the parties before it. Its discretion will be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error..... Each case will depend on its own facts and circumstances. The court will look at the nature of the case, the conduct of the parties prior to, during and after judgment sought to be set aside. It will also consider if the Defendant has an arguable defence to the claim.”

32. It was submitted that the discretion of the Court granted at Order 10 Rule 11 is not only limited to setting aside a judgement but also to refusing to set a side such judgement. In support of this argument, the Respondent relied on the case of *K v K* [1993] Eklr, where the Court held that; -

“In all circumstances, each case has to be considered on its own merit but it cannot be overlooked that the conduct of the appellant as portrayed in these proceedings indicate that the appellant has not been serious in prosecuting her petition for judicial separation. That being the position, when the Court is requested to vacate its earlier order which I have already stated the respondent validly obtained a decree nisi the dictum of Sir Clement de Lestang, VP in *Mbogo v Shah* at page 94 letter G is meritorious,

“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 had deliberately sought to obstruct or delay the cause of justice .....



33. They also relied on the case of *Gabriel Maina V SOS Children's Villages Kenya* [2021] eKLR where the Court relied on the case of *Egal Mohamed Osman v Inspector General of Police & 3 Others* [2015] eKLR where Court held:-

“Thus far, it is clear that the right to be heard is not absolute and is not necessarily always strictly applied. It is a right that can be limited under the provisions of Article 25 of the Constitution and to the extent set out under Article 24 of the Constitution.”

34. On the need to balance the interest of the parties being the right of the Applicant to be heard and the right of the Respondents to enjoy their fruits of judgement, the Respondent relied on the case of *Gabriel Maina v SOS Children's Villages Kenya* [2021] eKLR where the Court opined that ;

“As to whether the applicant should be granted leave and opportunity to present their case the Claimant submitted that by examining indispensable canons that should guide the courts in conducting proceedings from the date of instituting of a suit to the date of delivery of judgment/ruling the Claimant urged that we remind ourselves of the widely embraced doctrine, ‘litigation must come to an end’. The Claimant asserted that this doctrine undeniably rubberstamps the requirement that cases should be dispensed with as quickly as possible and this cannot be achieved without considering the “overriding objective” under Sections 3 of the Employment and Labour Relations Court Act, 2011 and the provisions of Article 159(2)(b) of the Constitution of Kenya 2010. The Claimant argued that the purpose of the overriding objective is for the dispute resolution process to be fair, fast and inexpensive. The Claimant asserted that the courts' duty in performing such mandate under Section 3 of the Employment and Labour Relations Court Act, 2011 requires the just determination of the proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. The Claimant submitted that this is fortified by the provisions of Article 159(2)(b) of the Kenya Constitution 2010 which propounds that in exercising judicial authority, the courts and tribunals shall not delay justice. The Claimant urged the Court to bear in mind is whether by allowing this application and by extension granting prayer 3, 4 and 5 of the application, it will be advancing the overriding objective principle and the spirit and letter of Article 159(2)(b) of the Constitution. The Claimant submitted the Applicant is engaging the Court and the Claimant in games aimed at defeating the whole process of justice. The Claimant submitted that judicial process has never been at the whim of the litigants and their corporation to ensure that matters is dispensed with expeditiously is not only a requirement but an obligation.”

35. On that basis, the Respondent submitted that litigation has to come to an end and even if the Court re-opens up the cases herein, it will arrive at the same conclusion. They urged the Court to dismiss the application herein with costs.
36. I have examined all the averments and submissions of the parties herein.
37. The applicants contend that they were never served with the summons to enter appearance in this case and therefore were condemned unheard.
38. The respondents aver that service was indeed effected as ordered by court on 12/4/2018 through substituted service.



39. The respondents exhibited evidence that the applicants were served by adverts in the Standard Newspaper of 4/7/2018.
40. I also note that there were further notices served upon the applicants for mention for further directions on 17/8/2018 and 26/9/2022 but still the respondents never appeared.
41. Judgment was delivered on 16/3/2021. The claimants respondents then filed an application to lift the veil on the directions of the respondents applicants herein.
42. The respondents were served on the 6/12/2022 but failed to appear. The application to lift the veil was then allowed.
43. In view of the applicants chronic absenteeism and failure to attend court and to summons served upon them, their contention that they were never served holds no water.
44. They have always been aware of this claim since 2016 and they exhibited a don't care attitude.
45. I find the application not merited and I dismiss it accordingly with costs to the respondents.

**RULING DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Mr. Maragia for Claimant – present

Respondents/Applicants - absent

Court Assistant – Fred

