



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gatahi v Simba Fresh Produce Limited (Cause E482 of 2020)  
[2023] KEELRC 1320 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1320 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E482 OF 2020  
NZIOKI WA MAKAU, J  
MAY 3, 2023**

**BETWEEN**

**MARIA ANGELINE WANJIRU GATAHI ..... CLAIMANT**

**AND**

**SIMBA FRESH PRODUCE LIMITED ..... RESPONDENT**

**RULING**

1. The respondent/applicant vide the notice of motion application dated November 29, 2022 seeks for the following orders:
  - i. Spent
  - ii. Spent
  - iii. That the warrants of attachment of the defendant's moveable property issued herein on November 10, 2022 and the subsequent proclamation of the respondent's property on November 25, 2022 be set aside and/or lifted.
  - iv. That the judgment on record and all consequential orders be set aside.
  - v. That the respondent be granted leave to defend this suit.
  - vi. That the firm of Wesonga Masinde & Company Advocates be granted leave to represent the respondent and the notice of appointment filed herein be deemed as properly filed.
  - vii. That the costs of this application and of the execution process underway be borne by the claimant.
2. The application is supported by the annexed affidavit of Mr Dionysious Wahome Munyoro as well as grounds on the face of the motion, to wit:-



- a. That the respondent was never served with summons to enter appearance as required by law or at all.
  - b. That the respondent has a good defence to the claimant's claim which raises triable issues.
  - c. That the failure on the respondent's part to enter appearance and or file a statement of defence was neither deliberate nor intentional but was caused by the claimant's failure to serve the summons to enter appearance.
  - d. That the respondent is willing and able to deposit such sum as this honourable court may order to be deposited in court as a condition for stay.
  - e. That in the circumstances, it is only just, mete and proper that the execution proceedings underway be nullified and the warrants of attachment of the respondent's moveable property and the subsequent proclamation of the respondent's property be set aside and/or lifted and the respondent be granted an opportunity to defend this action.
3. The claimant/respondent was opposed and filed a replying affidavit sworn December 19, 2022. In it she deponed that the Respondent was always aware of the suit as it was served with all process but never entered appearance nor filed defence. She asserts the respondent only came to court after execution commenced and that the application is an abuse of the court process and is designed to deny her the fruits of judgment.
  4. The motion was canvassed through written submissions. The respondent/applicant submits that there are two issues for determination by the court in this application.
    - (a) Whether the ex parte proceedings and orders should be set aside.
    - (b) Whether the claimant will suffer any prejudice.

It submits that the powers of the court to set aside ex parte proceedings and orders are wide. But it must be exercised judicially. In the case of *Patel v EA Cargo Handling Services Limited* (1974) EA 75 the court was of the view that the discretion of the court in setting aside ex parte judgments or rulings is very wide. It was stated:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose no condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

5. The respondent submits that even then, where it is clear that either there was no service of a document or that the service was erroneous and judgment has been entered thereto, the court will set aside the proceedings *ex debito justitiae*. The respondent submits the court can be guided by the Court of Appeal case of *Patrick Omondi Opiyo T/A Dallas Pub v Shaban Keah & another* [2018] eKLR where court stated as follows:

“Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal



systems applaud. Where therefore judgment is entered against a party who has not been served and hence not been heard, such judgment will be set aside *ex debito justitiae*.”

6. The respondent submits that this was the similar holding in [James Kanyita Nderitu & another v Marios Philotas Ghikas & another](#) [2016] eKLR where the court stated as follows:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a Judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

7. Further it was submitted that in [Winnie Wambui Kibinge & 2 others v Match Electricals Limited](#) [2012] eKLR the court held that,

“...it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit...”

8. The respondent submits that the entry of default judgment is not cast in stone as the court has discretionary powers under order 10 rule 11 of the [Civil Procedure Rules, 2010](#) to set aside or vary such judgment and consequential decree or order upon such terms as are just. In so doing, however, the court has to ensure that the decree holder is not prejudiced. It submits that the alleged service of summons and other court documents to the respondent through the email address of [info@simbafreshproduce.com](mailto:info@simbafreshproduce.com) was done by the claimant for reasons well known to her. It submits that a quick look at the claimant’s supporting documents in the memorandum of claim, shows that the demand letter was addressed to the chairman of the respondent and all other communication between the claimant and the respondent including the email welcoming her to company and the one terminating her employment was through [pndungu@gnorth.co.ke](mailto:pndungu@gnorth.co.ke), a fact well known to the claimant. It submits that throughout the claimant’s stay at the company, she never received any communication from the email address which she alleges to have served the summons to enter appearance through. The respondent thus urges the grant of the prayers in its notice of motion with costs to the respondent.
9. The claimant submitted that she served the respondent through its official email address [info@simbafreshproduce.com](mailto:info@simbafreshproduce.com) as indicated on its official website. She submits that despite being duly served the respondent never entered appearance or filed a defence. The claimant submits that she has diligently prosecuted this matter for almost 3 years making sure the appropriate notices were served upon the respondent at every given stage. She submitted that the application seeks to deny her the fruits of her judgment.
10. The claimant submitted that she served the respondent through its official email address [info@simbafreshproduce.com](mailto:info@simbafreshproduce.com) as indicated on its official website. This was the email address she used to send the summons, the mention and hearing notices, the taxation notice and as such seems to be the means the claimant preferred to use.
11. The respondent has laid out a case for the grant of the relief sought. The claimant curiously served the summons on the email address she asserts is the official email address of the respondent yet in all her communications with the respondent and the chairman of the respondent, she used different email addresses. This shows a degree of deceit on the part of the claimant which vitiates her defence that she served the respondent with all the processes.
12. The court grants the stay sought and sets aside its judgment entered on June 22, 2022 as well as all subsequent decrees and warrants issued. The costs of this application and the ensuing costs on



execution will abide the outcome of the hearing to be held before another court. The property of the respondent subject of any attachment be released immediately and unconditionally.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

