



**Ndirangu v Beverly School of Kenya Ltd (Cause E009 of 2021)
[2023] KEELRC 1858 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1858 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E009 OF 2021
DN NDERITU, J
JULY 31, 2023**

BETWEEN

TITUS MURIUKI NDIRANGU CLAIMANT

AND

BEVERLY SCHOOL OF KENYA LTD RESPONDENT

RULING

I. Introduction

1. In a judgment dated and delivered on February 14, 2022 this court awarded the Claimant as follows –
 - (a) A declaration be and is hereby issued that the Claimant’s termination by the Respondent on account of redundancy was unprocedural, unfair, and unlawful.
 - (b) The Claimant is awarded the following against the Respondent:-
 - (i) One month’s salary in lieu of notice
- Kshs.100,000/=
 - (ii) Gross salary arrears for the period between January, 2018 to 13th February, 2019 as per paragraph 39 above -Kshs.1,038,834/=
 - (iii) Severance pay - Kshs. 50,000/=
 - (iv) Compensation for unlawful termination -Kshs. 600,000/= TOTAL -Kshs.1,788,834/
=
 - (c) The Claimant is awarded costs of this cause.



2. This regular judgment was handed down after an ex-parte hearing of the cause following the failure by the Respondent in entering appearance and filing of defence after being duly and properly served with the court process as explained in Part I of the said judgment.
3. The Claimant is represented in these proceedings by Opar Odhiambo & Co Advocates.
4. Subsequently, party and party costs were taxed on May 14, 2022 at Kshs.136,694/=. There is an affidavit of service that the bill of costs and a notice of taxation were duly served upon the Respondent prior to the taxation. Thereafter, a notice of entry of judgment was duly served upon the Respondent before warrants of execution were issued on July 5, 2022. Direct “O” Auctioneers proclaimed some attachable movable properties of the Respondent on July 12, 2022.
5. For avoidance of doubt and for clarity, all the foregoing court process was served upon the Respondent and it is not denied that the Respondent was aware of the court proceedings as above.
6. On August 30, 2022 the Respondent (Applicant) through Onyango Odhiambo & Co Advocates filed a notice of motion (the application) dated August 29, 2022 under certificate of urgency seeking the following orders –
 1. That the Application be certified as urgent and service be dispensed with in the first instance.
 2. That the firm of Onyango Odhiambo & Co Advocates be allowed to come on record for the Respondent herein.
 3. That this Honourable Court be pleased to stay execution of the ex-parte judgment pending the hearing and determination of this Application.
 4. That the ex-parte judgment entered on February 14, 2022 against the 1st Respondent and all other consequential orders be set aside and/or reviewed and the Defendant be granted unconditional leave to defend this suit.
 5. That the costs of this application be provided for.
7. The application is based on the grounds on the face of it and supported with the affidavit of Alice Agam Mudiri, one of the directors of the Respondent, with several annexures thereto.
8. When the application came up in court (Wasilwa J.) for directions on September 1, 2022 the application was certified urgent and the same fixed for hearing on September 20, 2022, an interim order for stay of execution was issued.
9. On September 20, 2022, Mr. Obado appeared for the Respondent while Mr. Opar appeared for the Claimant who filed a replying sworn on September 16, 2022 with several annexures thereto. Counsel for the Respondent applied for leave to file a supplementary affidavit which leave was granted. It was then by consent agreed that the application be canvassed by way of written submissions. The interim orders for stay of execution were extended to last until the application is heard and determined.
10. Counsel for the Respondent filed his written submissions on October 12, 2022 while counsel for the Claimant filed on October 21, 2022. It is important to note that whereas the Respondent had sought and obtained leave to file a supplementary affidavit none was filed as there is none on record.
11. This ruling therefore is in regard to that application that is seeking for the orders set out above.



II. Respondent's Case

12. In the supporting affidavit the Respondent admits that it was properly and duly served with summons in this matter on March 11, 2021. The Respondent alleges that it instructed Asewe & Co Advocates to act for it but the said Advocates, and in particular Mr. Robert Asewe, Advocate, failed and or neglected to act as instructed.
13. It is alleged that the next time that the Respondent allegedly interacted with the matter is on July 5, 2022 when Direct "o" Auctioneers visited their premises to attach their movable properties. Upon perusal of the court file the Respondent realized that the above law-firm had not taken any action and as a result the matter had proceeded ex parte and judgment entered as alluded to above. It is alleged that the Respondent was not served with a notice of entry of judgment.
14. The Respondent has attached a draft response to the claim pleading that it was always ready and willing to defend the claim and that the omissions by the counsel it had originally instructed to act for it should not be visited upon it. It is alleged that the draft response to the claim raises triable issues.
15. It is alleged that if the attachment and execution is allowed to proceed the pupils attending the school will be highly prejudiced. On the other hand, it is deposed that if the stay of execution is granted and the Respondent allowed to defend the claim the Claimant will not be prejudiced.

III. The Claimant's Case

16. In opposition to the application the Claimant filed a replying affidavit sworn by himself on September 16, 2022.
17. The Claimant deposes that upon service of summons on March 11, 2021 the Respondent failed, refused, and or neglected to enter appearance and file a response or defence as a result of which the matter proceeded to hearing ex parte and judgment was passed as alluded to in an earlier part of this ruling.
18. It is alluded that upon proclamation in execution there were discussions between counsel for the parties but the Respondent was unable to meet the conditions set by the Claimant. It is the Claimant's view that this application is an abuse of the court process only intended to stop him from enjoying the fruits of a judgment that was lawfully and regularly obtained.
19. It is deposed that there is no evidence that the Respondent ever instructed the law-firm of Asewe & Co Advocates to act for it upon service of summons to enter appearance. It is further stated that besides the summons to enter appearance the Respondent was also served with notice of entry of judgment, party and party bill of costs, and notice of taxation of costs yet it took no action until the proclamation was made. It is only then that this application was filed.
20. It is deposed that the draft defence attached to the application raises no triable issues but instead it contains admissions and mere denials only intended to prolong the conclusion of this cause. It is Claimant's plea that the Respondent's counsel is improperly on record for failure to file and serve a notice of appointment and or obtaining leave to come on record.
21. It is on the foregoing basis that the Claimant prays that the application be dismissed with costs.

IV. Submissions By The Respondent's Counsel

22. Counsel for the Respondent identifies one main issue for determination in this application – Whether the ex-parte judgment delivered on February 14, 2022 should be set aside.



23. The facts on the proceedings from the filing of the cause, the hearing, determination, service of court process, execution, et al, is admitted as analyzed in an earlier part of this ruling. However, counsel has submitted that the failure by the Respondent to defend the cause was occasioned by the counsel who was initially instructed and that such a mistake or error should not be visited upon the Respondent.
24. Counsel has submitted that this court has unfettered discretion in setting aside an ex-parte judgment. He has cited inter alia Patel V East Africa Cargo Handling Services Ltd (1974) EA 75, Wachira Karani V Bildad Wachira (2016) eKLR, and Edney Adaka Ismail V Equity Bank (2014) eKLR among many other decisions in that regard.
25. Counsel argues that if the application is disallowed the Respondent will be prejudiced and placed in some hardship – See Shah V Mbogo (1968) EA 93 and Pithon Waweru Maina V Thuku Mugiria (1983) KLR 78.
26. It is submitted that any loss that may be occasioned to the Claimant if the judgment is set aside may be compensated by way of costs and that the draft response to the claim raises triable issues. Counsel submits that prima facie the draft response raises triable issues which deserve a hearing insisting that the right to be heard is so fundamental that the same may only be denied under exceptional circumstances. Counsel has cited several decisions in support of this argument including Saudi Arabian Airlines Corporation V Premium Petroleum Company Ltd (2014) eKLR and Jubilee Insurance Company Limited V Grace Anyona Mbinda (2016) eKLR.

V. Submissions By Claimant’s Counsel

27. In response, counsel for the Claimant submits that the facts raised in the replying affidavit by the Claimant are uncontroverted and present the true picture in regard to the proceedings and status of this cause. Counsel submits that the Respondent was served with all court process at each stage of the proceedings and only acted after proclamation of its property in execution of the lawful decree in the cause as issued by this court.
28. Counsel has cited several decisions in buttressing the argument that the judgment against the Respondent was regular as the Respondent was served with all the court process but it opted not to defend the cause. The cited cases include K-Rep Bank Limited V Segment Distributors Limited (2017) eKLR and James Kanyiita Nderitu & Another V Marios Philostas Ghikas & Another (2016) eKLR insisting that in case of a regular ex parte judgment as opposed to irregular ex parte judgment (where service is not proper), the regular judgment may only be set aside for a reasonable cause that ought to be demonstrated by the applicant seeking such orders.
29. Further, counsel argues that the only reason given by the Respondent for its failure to enter appearance and file defence is that the counsel originally instructed failed to act. However, counsel submits that there is no evidence whatsoever that the said law-firm or the particular lawyer was instructed. There is no evidence of payment of legal fees or a letter of instruction. Besides, the said lawyer has not filed any affidavit or any other evidence confirming that he was indeed instructed as such and explaining why he failed to act on the instructions. Counsel concludes that the allegation by the Respondent that it had instructed the said lawyer is a lie intended to misleading this court to sympathize with it.
30. Counsel argues that if the Respondent indeed instructed the said lawyer and that the lawyer failed to act the remedy lies with the Respondent suing the lawyer for professional negligence. Counsel submits that the Respondent has not demonstrated that it has a defence to the cause that raises any triable issues. He submits that the Respondent has not demonstrated how the judgment is unjust or unfair and hence there is no just or reasonable cause demonstrated to persuade this court to allowing the application.



31. To buttress the foregoing arguments counsel has cited *Water Painters International V Benjamin Kogoo t/a Gwako (2014) eKLR*. On the submission that a court should not aid an indolent and indifferent litigant counsel has cited *Michael Kamau Gakundi V Daima Bank Limited & Another (2012) eKLR*.
32. For all the foregoing reasons, counsel for the Claimant prays that the application be dismissed with costs.

VI. Issues For Determination And Decision

33. There is only one main issue for this court to determine – Should the ex-parte judgment and all the consequent and subsequent orders be set aside and the Respondent allowed to defend the cause?
34. The chronology of events leading to the judgment against the Respondent has been explained and detailed in an earlier part of this ruling. Those facts are to a large extent uncontested.
35. The application is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rule 11, and Order 45 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.
36. While it is not in dispute that the *Civil Procedure Act* applies to this court (ELRC) just like any other statutory law does, it is still debatable as to what extent the Civil Procedure Rules apply. Some judges have held that unless expressly provided for (for example on execution under Rule 32 of the Employment and Labour Relations Rules), the Civil Procedure Rules do not apply to this court. Other judges have held, and this court belongs to this school of thought, that where the rules of this court fail to provide for the procedure to be adopted in regard to any specific issue then this court should apply the Civil Procedure Rules to avoid a lacuna. Notably, Rule 38 of the Rules of this court is too general and open-ended and the use of the word may gives this court a leeway to seek refuge elsewhere in matters procedure.
37. It is for the foregoing reasons that this court takes the view that the application as filed and brought under the above cited provisions of the Civil Procedure Rules is properly before this court.
38. The principles upon which a court may set aside an ex parte judgment or order is a well-travelled path. What cannot be overemphasized is that a court of law has unfettered discretion but the decision arrived at should be logical and reasonable based of judicious interrogation of the matter as opposed to whimsical or capricious fiat.
39. An applicant has to demonstrate a reasonable cause to persuade a court to set aside an ex-parte order or judgment. As submitted by counsel for the Claimant the judgment against the Respondent is regular as the Respondent was properly and regularly served with the court process. The judgment was based on formal proof founded on the evidence tendered in court by the Claimant. As it is concluded below no reasonable, logical, or plausible explanation has been offered by the Respondent as to why it failed to defend the cause. A regular judgment in default cannot be set aside as a matter of cause. The court has to be satisfied that there is a reasonable cause. The situation may have been different had the judgment been irregular for want of proper service – See *James Kanyiita Ndiritu & Another V Marios Philostas Ghikas & Another (Supra)*.
40. In an application such as the instant one to set aside an ex-parte judgment this court has a duty to consider the plight of the Claimant who holds a regular and lawful decree whose fruits he is yet to enjoy. However, the court has to be careful not to place the applicant in undue hardship or prejudice – See *Shah V Mbogo (Supra)*.



41. Judgment in this matter was delivered on February 14, 2022 yet the application herein was filed on August 30, 2022, after a period of over six months had lapsed. This undue and unreasonable delay has not been explained by the Respondent. Once the Respondent was served with the summons to enter appearance it was upon it to keep in touch with the matter as the cause belongs to the litigant and not its counsel – see *Water Painters International V Benjamin Kogo t/a Gwako* (Supra).
42. Even if this court was for a moment to assume that the Respondent had instructed Mr. Robert Asewe, Advocate, to act for it in this cause, its conduct and indolence points towards a complete lack of interest and concern in a serious matter. Its remedy then lies in taking legal action against the said lawyer for professional negligence or other appropriate remedy. The differences between the Respondent and its alleged former counsel should not be allowed to stand in the way of the Claimant enjoying the lawful fruits of the regular judgment in the cause.
43. The Claimant has raised the issue that the application is improperly filed as the counsel for the Respondent has not been granted leave to come on record as no notice of appointment was filed. I have perused through the court record and there is no express order allowing counsel for the Respondent to come on record. Further, no notice of appointment was filed on record. However, on September 1, 2022 the court (Wasilwa J.) certified the application urgent and directed that the same be heard on September 20, 2022. Thereafter the matter has proceeded as alluded to above with counsel for the Respondent acting as such. It would appear that the absence of an express order allowing the counsel for the Respondent to come on record is due to an oversight on the part of the court. In my opinion no prejudice has been occasioned to the Claimant for this omission by the court. It would be too punitive to disqualify counsel for the Respondent this late in the proceedings. The court shall thus proceed on the fair and just presumption that counsel for the Respondent is properly on record and that leave was granted to that effect on September 1, 2022, notwithstanding that no notice of appointment was filed on record.
44. The reason articulated by the Respondent to explain its failure to defend the cause is that its instructed counsel Mr. Robert Asewe failed and or neglected to act as instructed. The instructions to the said lawyer were allegedly given immediately after the Respondent was served with summons to enter appearance on March 11, 2021. However, and this is well articulated by the Claimant in the replying affidavit and in the written submissions by his counsel, there is no evidence whatsoever that the Respondent had instructed the said counsel to act for it as alleged.
45. There is no evidence of payment of legal fees by the Respondent to the said lawyer or any instructions note. It is a basic and fundamental presumption of the law that he who alleges must prove. Once the issue of the said instructions became contested by the Claimant in the replying affidavit, the Respondent bore the burden of proof that indeed such instructions were issued. There is no evidence whatsoever that the Respondent gave instructions to the said lawyer to act for it in this matter or indeed any other lawyer.
46. This court therefore holds that upon receipt of the summons to enter appearance the Respondent opted to take no action. At that point the Respondent took the risk of whatever consequences that followed its failure, refusal, and or neglect to defend the cause. And for sure the consequences therefor are that the matter proceeded to hearing ex parte and a judgment was entered in favour of the Claimant as alluded to in the foregoing paragraphs of this ruling. Costs were thereafter taxed, after due service upon the Respondent, and the court issued warrants of execution of the decree and properties of the Respondent were proclaimed.
47. It is only upon proclamation of its properties in attachment that the Respondent rushed to court and obtained interim orders for stay of execution pending the hearing and determination of the application.



As far as the court can tell the Respondent has not made any efforts in engaging the Claimant to either settle the decree or compromise the application notwithstanding that it has enjoyed the said interim orders for over six months.

48. I have no doubt in my mind that what the Respondent failed, refused, and or neglected to defend the cause upon lawful and due service of summons to enter appearance, notice of entry of judgment, and bill of costs and notice of taxation. The Respondent took an indolent, casual, and indifferent approach to this cause and only rushed to court to deny the Claimant the fruits of a lawfully and regularly obtained judgment and decree.
49. I have looked at the draft response to the claim or defence annexed to the application and the same does not raise any triable issue that would persuade this court to set aside the judgment and allow the Respondent to defend the cause. The draft defence contains partial admissions and mere denials. There is nothing in the application to suggest that the judgment is unfair or unjust to the Respondent. It is not denied that the Claimant was terminated in the unfair and unlawful manner alluded to in the Claim and it is not denied that no terminal dues were paid to the Claimant upon termination.
50. It is my view that allowing this application would highly prejudice the Claimant who has been waiting to be compensated since he was unfairly and unlawfully terminated by the Respondent in February, 2019. The parties had agreed on a settlement but the Respondent dishonoured the same as a result of which the Claimant filed this cause. This court holds that any further delay in settlement of this cause shall highly prejudice the Claimant and aid an indolent Respondent who deliberately took and assumed the risk of not defending the cause notwithstanding proper and regular service of all the court process at all the stages of the proceedings as provided for by the law.
51. For all the foregoing reasons, the application by the Respondent is denied in its totality and the interim order for stay is hereby set aside.

VII. Costs

52. Costs shall follow event and the Claimant is awarded the costs of the application which are hereby assessed at Kshs.15,000/=.

VIII. ORDERS

53. Flowing from the foregoing, the notice of motion dated August 29, 2022 by the Respondent is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF JULY, 2023.

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DAVID NDERITU

JUDGE

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