



**Wandor v Riley Falcon Security Services Limited (Employment and Labour Relations Cause 497 of 2017) [2023] KEELRC 1813 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1813 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 497 OF 2017**

**HS WASILWA, J  
JULY 27, 2023**

**BETWEEN**

**DAVID OTIENO WANDOR ..... CLAIMANT**

**AND**

**RILEY FALCON SECURITY SERVICES LIMITED ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the respondent/ applicant's notice of motion dated May 15, 2023, filed pursuant to article 159(2)(d) &(e) of the Constitution, section 12 of the Employment and Labour Relations Act, sections 1A, 1B, & 3A of the Civil Procedure Act, rule 22(1) of the Employment and Labour Relations Court(Procedure) Rules, order 10 rule 11, order 50 rule 1 and order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, seeking for the following orders;-
  1. Spent.
  2. Spent.
  3. That the honourable court be pleased to set aside the *ex parte* proceedings of July 27, 2022 and the *ex parte* judgement on December 12, 2022 and all consequential orders thereto.
  4. That the costs of this application be provided for.
2. The applicant stated that this matter came up for hearing on July 27, 2022, which date has been fixed *ex parte* by the claimant/respondent's advocates on June 14, 2022 but the same was not served on the firm of Owiti,Otieno & Ragot advocates, who are and were on record for the respondent/applicant.
3. This case was later mentioned on September 27, 2022 and judgement delivered on December 12, 2022 and in both dates the applicant was not served with the notice or informed of the said dates. Therefore, that the proceedings of July 27, 2022 were irregular having proceeded without notice of the applicant.



4. That unless stay is granted and the suit judgement set aside, the claimant/respondent herein will proceed to tax its bill and commence execution proceedings to the detriment of the applicant.
5. This application is also supported by the affidavit of Nancy K. Machage, the applicant's legal and communication officer, deposed upon on the May 15, 2023. The affiant herein reiterated the grounds of the application and maintained that their advocates on record was not served with the hearing notice and subsequent notices as such the suit proceeded *ex parte*.
6. She contends that, the applicant has been condemned unheard, when they have a defence on record that raises triable issues and urged this court to give it a chance to argue its defence.
7. The application is opposed by the respondent who filed a replying affidavit, deposed upon by its advocate on record Mr Steve Odhiambo Opar, on the May 30, 2023. In his affidavit, the deponent stated indeed the firm of Owiti, Otieno and Ragot was on record for the applicant but that they filed a chamber summons dated February 28, 2022 to cease acting for the applicant.
8. That its upon, the applicant's advocates, raising the issue of ceasing to act, that this case, which was scheduled for hearing on March 10, 2022 was deferred for mention for directions on March 22, 2022 On the March 22, 2022 and having satisfied the court that it served the application to cease acting on the applicant herein, the application was allowed.
9. The main suit was then slated for hearing on May 30, 2022 but was adjourned to June 14, 2022 for a mention to fix a hearing date. Considering now that service of the hearing of the main suit was to be effected on the applicant in person, the applicant herein was served with a mention notice of dated June 10, 2022 in their Nakuru branch offices.
10. On the date of hearing, the applicant did not appear in court and the court adjourned the matter to July 27, 2022. Consequently, the respondent herein served the applicant with a hearing notice dated June 14, 2022 but they failed once against to attend court, forcing this court to proceeded for the hearing in their absence.
11. He stated that the applicant was served at all times with the court hearing notices and its failure to attend hearing cannot be blamed on the respondent herein. Also that the applicant only woke up from slumber when they were served with taxation notice for January 31, 2023 and moved this court 5 months down the line in May, 2023.
12. It is his case that the judgement entered was proper and the the orders sought are not merited in the circumstances.
13. The applicant filed a further affidavit sworn on June 21, 2023. In this affidavit, the applicant stated that contrary to the allegation that the application dated February 28, 2023 to cease acting was allowed, that the said application was instead withdrawn after service on the client was not unsuccessful and the court marked it as withdrawn in the proceedings of March 22, 2022. Therefore that the firm of Owiti, Otieno and Ragot was and is still properly on record and the one that should have been served with the hearing notices and all other court processes.
14. He stated that even if the applicant was to be served in person, then its secretary, director and or the principal officers should have been the one to receive service as contemplated under rule 12 (1) of the Employment and Labour Relations Court (Procedure) Rules , 2016 , which was not the case in this matter. In any case that they did not receive any hearing notice and their receptionist at Nakuru branch is called Angela Nthumba and not Agnes as the process server allege in his affidavit.



15. He stated further that they were not served with the bill of costs, a fact which they raised before the taxing master. Also that they only became aware of the matter on January 31, 2023, when it was listed alongside Nakuru ELRC cause number 248 of 2015 which their current advocates are on record.
16. The affiant maintained that they were not served with any notices of hearing and urged this court to stay execution of the judgement and give them a chance to defend this case.
17. Directions were taken for the application herein to be canvassed by written submissions.

### **Applicant's Submissions.**

18. The applicant submitted on two issues; whether the proceedings of July 27, 2023 and the *ex parte* judgement are regular and whether the applicant has a defence that raises triable issues.
19. It was submitted that for a court to consider any application to set aside a judgement, the said court must satisfy itself that the *exparte* proceedings and the Judgement are regular then proceed to consider the reasons advanced by the applicant in seeking to set aside such a judgement and whether the defence filed raises any triable issues. To support this position, they relied on the case of *James Kanyiita Nderitu & Another v Marios Philatos Ghikas & another* [2016] eklr, where the court of appeal emphasized that if a court becomes aware of an irregular judgement, it has to set it aside as a matter of right, which can be done suo moto or on an application of the affected party.
20. Similarly, that in this case, its not disputed that the hearing of July 27, 2022, was taken by the claimant in absence of the respondent. Further that it is not disputed that the hearing notice was not served on the firm of Owiti, Otieno and Ragot, who are on record for the applicant. It was argued that the first bone of contention was whether the aforementioned firm was on record for the applicant as at the time of hearing on July 27, 2022 so that a hearing notice was to be served on the firm of advocates. He argued that indeed the firm of Owiti, Otieno and Ragot had filed an application to cease acting vide a chamber summons dated February 28, 2022 which was withdrawn on March 22, 2022. Affirming that the advocates herein were still on record and ought to have been served with hearing notice. In this they relied on the case of *Joseph M Rukiri v thangicia M Imunya* [2021] eklr where the court held that;-

“This court thus agrees with the applicant’s/respondent’s submission that the firm of M/S Haron Gitonga & Co Advocates, being the firm which was on record on his behalf in the trial court including up to the point of delivery of judgment, remains on record for him, including in any review or appeal, unless and until a consent is recorded or leave of court is sought to change advocates. This court has perused the record and has confirmed that the firm of Haron Gitonga & Co Advocates is the very firm which was on record for the applicant/respondent who was the plaintiff in the trial court. On a balance of probabilities, this court is inclined to believe the applicant/respondent whose advocate has also sworn an affidavit indicating that he was not served with either the submissions or hearing notice. The appellant has not challenged the contents of the applicant’s/respondent’s supporting affidavit and that of his advocate in his affidavit... This notwithstanding, it is clear that the said affidavit makes reference to service being done on the respondent in person at his home. The question to ask is why the appellant would serve the respondent in person when in fact the respondent was represented by an advocate who had previously appeared in court. This court finds that proper service would require service to be effected on the applicant’s/respondent’s Advocate M/S Haron Gitonga & Co Advocates who was indeed on record.”

21. The second bone of contention is whether the respondent/ applicant herein was served with the hearing notice as alleged by the respondent. It was submitted that rule 12(1) of the *Employment and*



Labour Relations Court (Procedure) Rules, 2016 provides for persons that can be served in a company and none of those officers were served as alleged. Also that none of the officers as captured in the CR12 of the company bears the name Agnes, whom the Respondent herein allege to have served the hearing notice. This he argued ascertains that the alleged service was improper and the *ex parte* proceedings together with the judgement are irregular as stated in *James Kanyiita Nderitu v Marios Philotas Ghika and another*(supra).

22. The applicant also submitted that it has a defence dated March 5, 2015 that raises serious triable issues that needs consideration by this court. In this they cited the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eklr where the Court of Appeal opined that a court, in considering an application to set aside *ex parte* judgement, must consider if it has a defence which raises triable issues and in the event that court finds even one issue , its bound to set aside such default judgement. In thus they relied on the Court of Appeal decision in *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio*[ 2015] eklr which held that a defence that raises triable issues , is one that raises issues for interrogation by the court during a full trial.
23. Accordingly, that the defence on record raises various triable issues such as employment relationship between the parties herein , whether the termination was unfair, whether the claimant left the respondent's employment and whether any terminal dues are owing to the claimant. He urged this court to allow them argues these issues and in effect grant them a chance of hearing.
24. It was also submitted that the claimant/ respondent herein will not be prejudiced in any way and if any prejudice will be occasioned, the same can be compensated by award of costs. On the other hand the applicant will be greatly prejudiced as it has been condemned unheard.

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

25. The respondent submitted that the legal principles applicable in an application for setting aside an *ex parte* judgement are now legion as held in *Kanji Naran v Velji Ranji*[1954] 21 EACA, 202 and the case of *Pitbon Waweru Maina v Thuka Mugiria* [1983] eklr , which principle states that there is no limit to a court's discretion in setting aside an *ex parte* judgement, however that the courts should exercise such discretion judiciously.
26. It was submitted that in this case, the applicant was served with a hearing notice of July 27, 2022 at its Nakuru Branch Office which it duly acknowledged by stamping upon the principal copy as evident in the affidavit of service filed in court on the July 19, 2022 and produced in the replying affidavit dated May 30, 2023. Further that the claimant has demonstrated in his response that besides service of the hearing notice for the hearing on July 27, 2022, he had also effected service of his reply to the statement of response, witness statement together with a mention notice all dated May 30, 2022 for mention on the June 14, 2022 upon the respondent at its Nakuru Branch office on the June 10, 2022 which service was duly acknowledged by the respondent. Therefore, the judgment by this court was valid and regular as the respondent was aware of the hearing date but failed to attend court.
27. It was argued that the reason advanced by the respondent that the alleged service upon its Nakuru office was not compliant with rule 12(1) of the *Employment and Labour Relations Court (Procedure ) Rules 2016*, is flimsy and has no merit and maintained that the service upon the respondent at its Nakuru branch office was proper and in any event ,such service was duly acknowledged by the respondent's receptionist/ secretary who duly stamped and signed on the face of the said hearing notice.
28. It was also submitted that where service of a hearing notice, is contested, the only avenue to challenge the same is by making an order for cross examination of the process server in an application of



this nature. However that in this case, the respondent has not sought such order from this court, ascertaining further that services was duly effected on them.

29. The respondent submitted that it filed its party and party bill of costs and served upon the respondent on the December 22, 2022 together with a taxation notice for taxation on the January 31, 2023, a fact which is admitted but the applicant took another five months to move this court on the May 15, 2023 in filling the current application to set aside the judgment. This in the respondent's view is a delay tactic employed by the respondent/ applicant herein to obstruct justice and deliberately delay implementation of the judgement. Further that if the application is allowed, there will be prejudice occasioned to the claimant/ respondent as he is yet to enjoy his terminal dues upon his termination on the July 2, 2015 by the respondent almost 8 years down the line.
30. In view of the foregoing, the respondent urged this court to find no merit in the application herein and dismiss the same with costs. However, in the event the court finds any merit in the application, the orders to be issued be granted on terms to wit ,that the entire decretal sum plus accrued interest as at the date of this ruling be deposited in a joint interest earning account within 14 days from the date of the ruling and that the claimant also be paid thrown away costs of Kshs 50,000 within 14 days from the date of the ruling and in default ,the claimant be at liberty to proceed with execution.
31. I have examined all averments and submissions of the parties herein.
32. The applicants have sought orders to set aside the exparte proceedings of this court of July 27, 2022 and a subsequent judgment of December 12, 2022 and all subsequent orders thereto.
33. The applicants have cited lack of service as being the reason for the orders being sought.
34. The respondents on their part has opposed this application indicating that the firm on record ceased to act and therefore the matter proceeded upon service of the respondents directly.
35. From the record the firm of Owiti, Otieno & Ragot filed their defence in this case on March 7, 2018.
36. On June 11, 2021, the firm of Owiti, Otieno & Ragot filed notice of change of advocates to come on record for the respondents instead of the firm of Messrs Otieno, Ragot & Co Advocates.
37. Thereafter the firm of Otieno, Ragot & Co Advocates filed an application dated February 28, 2022 to cease acting for the respondents herein citing lack of instructions.
38. This claim claim came up for hearing on March 10, 2022 and the respondents counsel one Kamunza indicated to court that they had filed an application to cease acting for the respondents.
39. This court ordered the application to be served upon the respondents for mention on March 22, 2022.
40. On March 22, 2022 when the application came for hearing, the counsel now indicated that they were withdrawing the application seeking to cease acting.
41. The court now set the case for hearing on May 30, 2022. On May 30, 2022, the respondents were now absent in court and I directed that they be served mention on June 14, 2023. On June 14, 2022, the respondents nor counsel were present.
42. The court ordered the case to proceed on July 27, 2022 and directed a hearing notice to issue.
43. On July 27, 2022 when the matter came for hearing, the court proceeded upon proof that the respondents had been served. The respondents counsel had not been served though having chosen to stay on record.



44. It is apparent that there was an error on record where the respondents had been served and not their counsel prompting this court to proceed for hearing *ex parte* in the absence of counsels for respondents who had not been served.
45. Due to this error it is apparent that there was a miscarriage of justice which necessitates this court to allow the application and set aside the proceedings of July 27, 2022 and the subsequent judgment of December 6, 2022.
46. This is allowed on condition that the respondents pay thrown away costs of 20,000/= to the claimants before further directions given their own absence from court on the date of hearing on May 30, 2022 when they were aware that the cause was set for hearing.
47. The ensuing confusion is also attributable to counsel filing an application to cease acting for respondents and reinstating it and thereafter being absent from court.
48. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 27TH DAY OF JULY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

**Opar for Claimant Respondent – present**

**Kaminza for Respondent Applicant – present**

**Court Assistant – Fred**

