



Letambul v County Government of Samburu & another (Cause E038 of 2022) [2023] KEELRC 2127 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2127 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E038 OF 2022
ON MAKAU, J
SEPTEMBER 22, 2023**

BETWEEN

SIMON LETAMBUL CLAIMANT

AND

COUNTY GOVERNMENT OF SAMBURU 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD SAMBURU COUNTY 2ND RESPONDENT

RULING

1. The ruling relates to the respondents' notice of motion dated March 2, 2023 seeking the following orders:-
 - a. Setting aside the judgment delivered on February 15, 2023 and all consequential proceedings and orders and the applicant be granted leave to file defence.
 - b. Costs of the application.
2. The application is supported by the affidavits sworn by the 2nd respondent's CEO/Secretary one Josphat Lekamario. In brief he deposes that:
 - a. On February 14, 2023, the respondent's County Attorney informed him that she had learnt that the claimant had obtained a judgment against the 1st and 2nd respondent for Kshs 1,722,710.00.
 - b. No service of notice of summons and statement of claim was served upon the respondents and therefore they were condemned unheard.
 - c. Upon perusal of the court file, his advocates found no affidavit of service on record.



- d. A hearing notice referred to affidavit of service dated November 14, 2022 bears stamp but no signature or name of the recipient.
 - e. All court process ought to be carried only on the county secretary on behalf of 1st respondent, and herself of the 2nd respondent and none can receive for both 1st and 2nd respondent.
 - f. The claimant was fairly and lawfully dismissed since he was notified of the charges and given a hearing before the dismissal.
 - g. The respondents have a good defence which raises triable issues.
 - h. The application ought to be allowed because there was no regular service of the process.
3. The claimant opposed the application by filling a replying affidavit sworn on April 20, 2023. In brief he deposed that;
- a. On August 29, 2022, afternoon the 1st and 2nd respondents were served with notice of summons, statement of claim, claimants list of documents, and the entire annexures.
 - b. The service of the process was acknowledged by the 2nd respondent's administrative secretary the CEO of the 2nd respondent Hilda Leparashen and Penina Loronyokwe (Acting County Attorney by signing and stamping with the official receiving stamp.
 - c. The respondents were also duly served with notice on October 5, 2022 for direction on October 17, 2022 and their agents signed and stamped to acknowledge service.
 - d. The respondents were further served with hearing notice on November 4, 2022 for a hearing on November 14, 2022 and the service was acknowledged by stamping and signature.
 - e. The CEO, Mr Lekamario has lied under oath by deposing that he was unaware of this suit yet he had been in contact with the claimant negotiating settlement. The CEO also attended a meeting chaired by the Governor, County Secretary, County Attorney, Head of the HR and claimant on 31st November 2022 (sic) to discuss an out of court settlement of the claim herein.
 - f. The respondents were fully aware of the suit and they opted not to defend themselves because the dismissal was unfair and unlawful.
 - g. The CEO has lied under oath that he learnt about the judgment from the County Attorney, yet he (claimant) wrote an email to him on February 20, 2023.
 - h. The application lacks merits and has been brought to delay finalization of the litigation.
4. The applicants filed submissions in which they reiterated the averments in the supporting and supplementary affidavit but cited two authorities to fortify the application. They cited *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* (2016) eKLR and *Wachira Karani v Bildad Wachira* (2016) eKLR to urge that the application should be allowed for want of service of summons and because they have a defence which raises triable issues.
5. The claimant also reiterated his averments in his replying affidavit that the respondents were duly served with summons and pleading through their agents and therefore the impugned judgment should not be set aside. Further the respondents were severally served with mention and hearing notices as proved by affidavits of service filed by his counsel. Consequently, he reiterates that the respondents were fully aware of the suit but they deliberately failed to defend themselves.



Issues for Determination

6. The issues for determination are:
 - a. Whether the respondents were made aware of the suit but failed to file defence.
 - b. Whether there is a defence with triable issues
 - c. Whether the application should be allowed.

Service Of Summons Or Awareness Of The Suit

7. The applicants alleges that they were not served with summons and pleadings in this matter and 2nd respondent's CEO further alleges that he was only made aware of it by the County Attorney on February 14, 2023. However the claimant has denied that allegation and annexed to the replying affidavit copies of notice of summons, mention notices and hearing notices bearing signatures and official receiving stamps of the respondents.
8. I have carefully considered the said notices of summons, mention and hearing. I have also perused the court record and it is indeed true that there are copies stamped to acknowledge receipt of hearing notices. There are also affidavits of service in respect of the served hearing notices. There is however no affidavit of service on record in respect of the notice of summons. There is also no copy of the served notice of summons in the court record.
9. The foregoing scenario means that, the service of summons and the pleadings upon the respondent has not been ascertained. However, the respondents were made aware of the suit through various hearing notices served after the notice of summons was issued by the court on August 24, 2022. The question that follows is what action did the respondents take to defend themselves after being served with several hearing notices?
10. The answer is obvious that they ignored the case and the matter proceeded by formal proof. Whereas the court has unfettered jurisdiction to set aside *ex parte* judgments, such discretion must be exercised judiciously. In the case of *Shah v Mbogo* (1967) EA 116 (HCK) the court held that;

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice.”
11. In this case the respondent did not act with diligence upon being made aware of the suit through service of several hearing notices. It is therefore not proper exercise of discretion and substantive justice will be served by this court by setting aside the judgment herein in favour of the respondents who severally ignored invitation by the court to appear before it . Notice of summons and hearing notice in this court serve the same purpose of calling a party to court to defend itself.
12. In view of the observations, made above, I find and hold that the respondents were aware of this suit against them months before it was fixed for formal proof and judgment entered. It is therefore a lie under oath for the 2nd respondent's CEO to depose that he became aware of the suit on February 14, 2023. A party who becomes aware of a suit filed against him before judgment and does nothing to come on record to defend himself should not come to the court seeking for setting aside any adverse decree or orders made *ex parte* against him.



Defence With Triable Issues

13. The applicants allege that they have a good defence that raises triable issues. The defence is that there was valid reason for dismissing the claimant and a fair procedure was followed by according him a hearing. Such defence is reasonable but, why did the respondents waste the chance given to them to appear in court only to come after judgment? As much as this court exists to do justice, the scale of justice should balance between the two sides of the divide.
14. The same ruthlessness that a court uses to set aside an irregular judgment due to want of service on a respondent, should be applied in rejecting an application for setting aside a regular judgment entered after the respondent is made aware of the suit against it.
15. In the end I find that the wider interest of justice is in dismissing the application herein because allowing it would be contrary to the public policy and interest that litigation must come to an end after judgment. Hearing should not be reopened every time an indolent or a party who deliberately ignores court process, screams to the court “wider interest of justice” or “have a good defence with triable issues”. Consequently, I find no merits in the notice of motion dated March 2, 2023 and hereby dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2023.

ONESMUS N MAKAU

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 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

Onesmus N. Makau

Judge

