



**Bakery Confectionery Food Manufacturing & Allied Workers Union (K)
v Satisfaction Fine Bakers (Employment and Labour Relations Cause
124 of 2017) [2023] KEELRC 2781 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 124 OF 2017
MA ONYANGO, J
OCTOBER 31, 2023**

BETWEEN

**BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED
WORKERS UNION (K) CLAIMANT**

AND

SATISFACTION FINE BAKERS RESPONDENT

RULING

1. The application dated 2nd May 2021 is filed by the Respondent and seeks orders that:
 - i. Spent
 - ii. That pending the hearing and determination of this Application inter-partes, there be a temporary stay of execution of the Judgment entered herein against the Applicant on 12th June 2020 and any other and/or other consequential Decree and/or Orders extracted therefrom, and any other applications that may be pending in this Court until further Orders of this Honorable Court.
 - iii. That pending the hearing and determination of this Application, inter-partes, there be a temporary stay of execution of any and/or other consequential Decree and/or Orders that may be made in this matter, or from any other applications that may be pending in this Court until further Orders of this Honourable Court, as the Applicant has been notified of a Notice of Motion dated 13th October 2020 seeking to have the Applicant’s Directors cited for contempt and committed to civil jail , which has a hearing date, and whereas the Respondent will be responding separately to that application, there is the danger of the same being heard and orders granted that may lead to



the Applicant's application being compromised and/or overtaken and the Applicant condemned unheard.

- iv. That the Honourable Court be pleased to set aside the ex-parte judgment entered herein against the Applicant on 12th June 2020 and any consequential Decree or Orders extracted therefrom, and the Applicant be granted leave to file its Statement of Defence in terms of the draft Statement of Defence hereto annexed and the supporting documents, being Witness statements and Annexures.
 - v. That the Applicant be at liberty to apply for further Orders and/or Directions as the Honourable Court may deem fit to grant
 - vi. That the costs of this Application be provided
2. The application is expressed under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules 2010.
 3. The application is supported by the grounds stated on the face thereof which are that the Applicant has never been served with summons to enter appearance or the Memorandum of Claim; that as it has never been served as such, it could not have instructed any law firm to act for it in this matter; that the Applicant only learned of the ex-parte judgment entered on 12th June 2020 when one of the Respondent's directors was on 11th February 2021 served with a hearing notice dated 13th October 2020 coming up for hearing on 12th May 2021; that if the Memorandum of Claim is correctly amended and accordingly rectified to reflect that the Applicant is sued with the name upon which it was lawfully incorporated, namely Satisfaction Bakers Limited, it has a good draft Statement of Defence on merit that raises key triable issues in this matter and craves not to be condemned unheard.
 4. On 19th May 2021, the court directed that the application be disposed of by way of written submissions. The Respondent filed its submissions dated 30th October 2021 while the Claimant's submissions are dated 27th May 2022.
 5. I have considered the submissions filed by the parties. The only issue that presents itself for determination by this court is whether the Respondent is entitled to orders setting aside the ex-parte judgment entered on the 12th June 2020 and all consequential orders.
 6. The Principles for setting aside ex parte judgments were stated by Duffus J in the case of *Patel v East Africa Cargo Handling Services Ltd (1974)* as follows: -

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”



7. The Court of Appeal restated the principles in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR as restated in *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] eKLR as: -

- “(a) Firstly, 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 conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E
- (b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA”.

8. In *Mbogo v Shah* [1968] EA 93 the court of Appeal held that:

“...the discretion to set aside an ex parte 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 person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

9. In the instant case, the Respondent has averred that it did not defend the claim herein as it was never served with summons to enter appearance and the memorandum of claim. The Respondent further avers that the affidavit of service sworn on 25th February 2019 states that the mention notice dated 15th January 2019 which was for mention to confirm filing of submissions was served on 20th January 2019 which was a Sunday. The Respondent insists that it was never served with any pleadings or documents in this case.
10. The Claimant on the other hand insists that the Respondent was served with summons and memorandum of claim and that all mention and hearing notices were also served. In support of its assertions the Claimant annexed the affidavits of service for the summons to enter appearance, mention and hearing notices to the replying affidavit and further affidavit of Danchael Mwangure, the Claimant’s General Secretary.
11. The Claimant submits that the summons to enter appearance were served upon the Respondent’s Weston Kinyua who appended his signature on the reverse side of the same on 10th September 2017. It is further the submission of the Claimant that apart from pointing out that service was on a Sunday, the Respondent has not contested the signature on the summons annexed as exhibit 1 in the Claimant’s further affidavit.
12. It is further the submission of the Claimant that the Respondent ignored the proceedings herein and only acted after it was served with the application for contempt when it filed the instant application.
13. From the evidence on record I am persuaded that the Respondent was properly served with summons and with the Judgment but deliberately ignored the same until it felt under threat when the Claimant filed the application for contempt which is still pending before this court.
14. The case of *John Nyangena v Okoth Jamali t/a Alpha Bridge Security Services* [2018] cited by the Respondent is not relevant to this case as in that case the issue was that the Respondent declined to



accept service on grounds that it was not a working day. In the instant case summons was accepted and acknowledged.

15. I also do not agree with the Respondent's quote from the decision in *Peter Kamau Ikigu v Peterson Ogino Ongaro* [2007] eKLR which refers to Order 39 Rule 8(2) of the *Civil Procedure Act*. The provisions quoted in the decision which was delivered in 2007 are now in order 50 rule 9 as reproduced below:

[Order 50, rule 8.] Time of day of service.

9.

- (1) This rule applies to pleadings, notices, summonses (other than summonses on complaints), orders, rules and other proceedings.
- (2) Service shall normally be effected on a weekday other than Saturday and before the hour of five in the afternoon.
- (3) For the purpose of computing any period of time subsequent to service outside the times specified in subrule (2)—
 - (a) service effected after five in the afternoon on a weekday other than Friday or Saturday is deemed to have been effected on the following day;
 - (b) service effected after five in the afternoon on Friday is deemed to have been effected on the following Monday.

16. It is clear that the rule does not prohibit service of summons or any other pleadings after 5 pm on any day of the week or on Saturday or Sunday or on a public holiday. It only provides that such service will be deemed to have been effected on the next working day.

17. The said judgment does not aid the Respondent herein.

18. The only reason I will set aside the judgment is the fact that the name of the Respondent was wrongly stated in the proceedings. However, this is not because the Respondent is prejudiced, for the Respondent was all along aware that it was the party that had been sued, but because the contempt proceedings which catapulted the Respondent into action are by nature criminal proceedings and I doubt that such proceedings can be maintained with the name of the Respondent as stated in the pleadings, especially taking into account the issue of legal personality (see *Salomon v Salomon*).

19. The Respondent shall in any event bear the costs of this application. I shall also award the Claimant throw away costs of Kshs. 50,000 taking into account all that transpired before and after the impugned judgment that would have been avoided had the Respondent filed a defense to the memorandum of claim in the manner provided in the rules, and especially the fact that summons were received and acknowledged by Weston Kinyua Nguni who has technically committed perjury in his 2 affidavits sworn on 2nd May 2021, one in support of the application of the same date and the other in opposition to the Claimant's application dated 13th October 2020.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER, 2023.



M. ONYANGO
JUDGE

