



Kenya Union of Commercial Food and Allied Workers v Amar Hardware & Electrical Limited (Cause 12 of 2020) [2023] KEELRC 2579 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2579 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 12 OF 2020
MA ONYANGO, J
OCTOBER 12, 2023**

BETWEEN
**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**
AND
AMAR HARDWARE & ELECTRICAL LIMITED RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 3rd March 2023 brought by the Respondent under the provisions of Section 3A of the *Civil Procedure Act* and order 42 rule 6 of the *Civil Procedure Rules*. It seeks the following orders which I quote verbatim;
 - i. Spent
 - ii. The ex-parte judgment entered in the this suit against the Applicant be set aside and the applicant be granted leave to file Replying Affidavit and defence within such time as this Honourable Court may be pleased to order.
 - iii. While pending the determination of this application this Honourable court be pleased to order stay of execution
 - iv. That this honourable court to order the appearance and cross examination of any court process server over his/her affidavit of service on which he alleges to have served the defendant herein with summons to enter appearance.
 - v. Costs be provided for.
2. The grounds upon which the application is made are contained at the foot of the application. Briefly, they are; that the applicant was never served with summons to enter appearance and the affidavit of service is false; that the applicant was never served with the notice of entry of judgment as mandatorily



required by order 22 rule 6 of the [CPR](#); that no notice of entry of judgment was filed with the application for execution ; that the applicant has a good defence to the claimant’s claim which he desires to ventilate; that the applicant is extremely prejudiced by the flawed process in the suit ; and lastly that is in the interest of justice that both parties be heard.

3. In opposition, the Respondent filed a replying affidavit on 5th April 2023 sworn by its Branch Secretary, Rodgers Ombati. Mr Ombati deposes that the instant application is an abuse of the court process and has been brought to delay the cause of justice. That on 28th February 2020, the Claimant approached the court through the application and Memorandum of Claim both dated 28th February 2022. The court on 4th March and 9th March 2020 issued summons to enter appearance and an order directing that the application be heard on 17th March 2020. Mr Ombati further deposes that on 10th March 2020, the Claimant proceeded and served the Respondent with the court order, the application, the summons and the Memorandum of Claim. He maintained that when the matter came up for hearing of the application, the same did not proceed since the Respondent was absent hence the court issued another date for hearing of the application; that around 20th March 2020, the Covid-19 virus struck the country and court operations were halted for some time thus the hearing of Application was deferred; that the matter was scheduled for mention on 8th July 2020 and the Claimant prepared a mention notice to that effect and served upon the Respondent on 4th July 2020 and they acknowledged receipt; that on 7th July 2020, the Claimant filed an affidavit of service sworn by the court process server as proof of service. He deposes further that on 4th January 2021, the Claimant filed submissions and served the same upon the Respondent on 12th January 2021. That on 21st June 2021 and 26th July 2021 the matter was mentioned and the court directed that judgment would be delivered on notice; that on 3rd February 2023, judgment was delivered in favour of the Claimant and the same was served upon the Respondent on 4th February 2023 by the court through email. The Claimant avers that on 28th February 2023, they again served the same on the Respondent. According to the Claimant, the Respondent was properly served with all pleadings and the judgment.
4. It was submitted that the Respondent’s averments as captured in their supporting affidavit are misleading, false and deceptive as they were given numerous chances to defend this suit but failed and ignored court summons and the notices issued upon them.
5. It is submitted that the instant application has been brought to delay the course of justice and curtail the employees’ right to enjoy their collective bargaining.
6. The application was disposed of by way of written submissions. The Respondent filed its submissions of 5th April 2023 while the Claimant’s submissions were filed on 20th September 2023.

Determination

7. Having considered the application dated 3rd March 2023, the response thereto as well as the submissions on record, the only issue falling for my determination is whether the Respondent has made a case for grant of the orders sought.
8. Setting aside an ex parte judgement is a matter of the discretion of the court. The law on setting aside of ex parte orders is found in order 12, rule 7 of the [Civil Procedure Rules](#), 2010 and provides thus:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”



9. In the case of *Captain Philip Ongom v Catherine Nyero Owota* SCCA 14/2/2001 [2003] KALR, the court when dealing with an issue of setting aside an ex parte judgment observed that when deciding whether to set aside an ex parte judgment, the court must satisfy itself that;
 - (a) either that the defendant was not properly served with summons;
 - (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.
10. In this case, the Respondent has maintained that they were never served with pleadings nor notices on the hearing of this case.
11. The Claimant on the other hand has maintained that the Respondent was all along aware of these proceedings and as such, the instant application has been brought to delay the cause of justice.
12. The Claimant has in the replying affidavit annexed evidence that the Applicant received and acknowledged receipt of summons and both mention and hearing notices by initialling and affixing its rubber stamp. This evidence has not been rebutted by the Applicant.
13. In the case of *Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others* [2004] eKLR, the court held;

“The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.”
14. I have carefully considered the pleadings in totality and particularly the annexures to the Claimant’s replying affidavit. From the said annexures, I am convinced that the Respondent was properly served with the pleadings, mention and hearing notices and acknowledged receipt by stamping on them. It is also evident from the returns of service annexed to the replying affidavit that the Respondent was aware of the proceedings against it. This court cannot therefore come to the aid of an indolent party.
15. I have further considered the draft defence filed with the application and it appears to me that it is composed of mere denials. The court would only consider setting aside a valid judgment under the present circumstances if the Respondent demonstrated that it has a good defence to the claim.
16. I thus find that the application dated 3rd March 2023 has no merit and the same is accordingly dismissed with costs.

DATED AND DELIVERED VITUALLY AT ELDORET THIS 12TH DAY OF OCTOBER 2023

MAUREEN ONYANGO

JUDGE

