



Alwanga v Cedar Springs Limited (Employment and Labour Relations Cause 1600 of 2016) [2023] KEELRC 3324 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3324 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1600 OF 2016
AN MWAURE, J
DECEMBER 21, 2023**

BETWEEN

RUBEN ONDELE ALWANGA CLAIMANT

AND

CEDAR SPRINGS LIMITED RESPONDENT

RULING

1. The Respondent filed a Notice of Motion dated 18th May 2023 seeking orders that:
 1. the default judgment entered on the 16th day of December 2021 against the Respondent and all subsequent orders be set aside.
 2. there be a stay of execution of the judgment entered herein against the Respondent and all consequential orders pending the hearing and determination of this application.
 3. during the hearing of this application the process server be availed for purposes of cross examination on his affidavit of service.
 4. the Respondent be granted unconditional leave to defend this suit and file defence out of time in terms of the draft annexed hereto.
 5. the costs of this application be provided for.
2. The Application was supported by an Affidavit sworn by Anthony Hombe.

Respondent/ Applicant's Case

3. The Respondent/ Applicant avers that it never received any pleadings in respect to this matter or served with the requisite 10 days' notice of entry of judgment by the Claimant.



4. The Respondent/ Applicant avers that it was made aware of the matter for the first time when it received a Notice of Taxation from Kanyoli Lewis & Co. Advocates.
5. The Respondent/ Applicant avers that owing to no service, it was not aware of this suit and the failure to enter appearance and defend the suit is unintended thus excusable.
6. The Respondent/ Applicant avers that the management company having its shareholders as the apartment owners of Cedar Springs Apartments, there has never been an owner/director by the name Vivian.
7. The Respondent/ Applicant avers that Order 5 rule 3 of the Civil Procedure Rules require that service be done on a secretary, director principal officer of the company which the Claimant did not do so.

Claimant's Case

8. In opposition to the application, the Claimant filed an affidavit dated 10th August 2023.
9. The Claimant avers that this is a 2016 matter wherein the summons and pleadings were served upon the Applicant on 20th September 2016. The name of the caretaker and Managing Director were well captured in the affidavits of service.
10. The Claimant avers that the draft defence does not raise any triable issues at all and this application only intends to further delay the matter.

Respondent/ Applicant's Submissions

11. The Respondent/Applicant submitted that according to the affidavit of service sworn by John Omundanga, it was deponed that the pleadings were served upon one 'Vivian' who was a managing director of the Respondent/Applicant, which fact is untrue and it has never had director or managing director with that name.
12. The Respondent/ Applicant submitted that the Claimant averred he constantly updated the Respondent with the court proceedings but there is only one affidavit of service on record until the taxation notice was served on 26th January 2023.
13. The Respondent/ Applicant submitted that the judgment entered on 16th December 2021 is irregular as there was no proper service. It relied on the case of *David Kiptanui Yego & 134 others V Benjamin Rono & 3 others* [2021] eKLR.
14. The Respondent/ Applicant submitted that the court appreciated the sentiments raised on triable issues in *Postal Corporation of Kenya v I.T.Inamdar & 2 others* [2004] eKLR where the court stated:

“We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”
15. The Respondent/ Applicant submitted that the draft defence states the Claimant was let go after he was found stealing company properties which is a valid reason for summary dismissal as per Section 44 of the *Employment Act*.



Claimant's Submissions

16. The Claimant submitted that the draft defence raises no triable issues to warrant a re trial as it is only a ploy to delay the execution of judgment.
17. The Claimant submitted that order 10 rule 11 of the *Civil Procedure Rules* provides that ex parte discretionary judgment in default of appearance or defence may be set aside. He relied on *Kenya Commercial Bank Ltd v Nyataige & another* [1990] eKLR where the court held:

“Order IXA rule 10 Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”
18. The Claimant submitted that the key factors to consider when setting aside an ex parte judgment is whether the defendant has a defence on merit and relied in the case of *Sebei District Administration V Gasyali & others* (1968) EA 300.
19. The Claimant submitted that there is no dispute that the Applicant was properly served with the summons and pleadings were served and the Respondent had not filed a reply and/or defence thereto. Therefore, the judgment is valid and regular.

Analysis and Determination

20. The issues determination before this court are:
 1. Whether the judgment entered on 16th December 2021 is an irregular judgment.
 2. Whether the judgment should be set aside.

Whether the judgment entered on 16th December 2021 is an irregular judgment

21. Service of summons on a corporation or a company is properly laid down in order 5 rule 3 of the *Civil Procedure Rules* and rule 12 of the ELRC Rules which states as follows:

“Subject to any other written law, where the suit is against a corporation the summons may be served –

 - a. on the secretary, director or other principal officer of the corporation; or
 - b. if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) –
 - i. by leaving it at the registered office of the corporation;
 - ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
 - iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
 - iv. by sending it by registered post to the last known postal address of the corporation.”



22. In *Ephantus Gathua Muiyuro v Kenya Power & Lighting Company Ltd* [2016] eKLR the court held:

“It is of course the law that Order 5 Rule 3 (a) of the Civil Procedure Rules provides that the first option by a process server serving a Corporation is to serve the secretary, director or other principal officer of the Corporation. Only when any of those officers cannot be found is the process server allowed to exercise any of the other options of service provided for under order 5 rule 3 (b) of the *Civil Procedure Rules*.”

23. The Respondent/Applicant submitted that the Claimant’s process server swore in his affidavit of service that the pleadings were served upon one ‘Vivian’ who is neither managing director nor director of the Respondent/Applicant. This fact was not canvassed by the Claimant in any way, the Claimant did not clarify whether any effort was made to identify ‘Vivian’ and the position she holds at the Respondent’s company. The process server avers that Vivian refused to sign the summons. The process server furthermore says he was with claimant and he should have been able to introduce him to the Company officials.

24. Accordingly, this court holds that the service was improper and in breach of order 5 rule 3 (a) of the *Civil Procedure Rules* and rule 12 of the *ELRC Rules*, rendering the ex parte judgment irregular.

25. The court in *Babs Security Services Ltd v Mwarua Yawa Nzao & 19 others* [2019] eKLR held that:

“This Court in *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another* [2016] eKLR drew a distinction between a default judgment entered regularly and irregularly. The distinction being that a regular default judgment is where service of summons to enter appearance was properly effected while it defined an irregular default judgment and the effect thereof in the following terms;

“In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. [Emphasis added]

Consequently, the learned Judge ought to have set aside the ex parte judgment which was irregularly entered as a matter of right and allowed the appellant to file its defence.”

26. In view of the fact that the default judgment dated 16th December 2021 was entered irregularly due to irregular service, which was not in the purview of the court the application herein is merited and the Respondent’s/ Application is therefore allowed.

27. The respondent is allowed to file his defence within 35 days herein failure of which the judgement entered hereinbefore will be upheld and execution will proceed.

Orders accordingly



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF DECEMBER, 2023.

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

