



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 989 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KEVIN OCHIENG OCHIENG.....CLAIMANT

VERSUS

FALCON SIGNS LIMITED.....RESPONDENT

RULING

1. Before me for determination is the Respondent's Notice of Motion Application dated 20th August, 2019 seeking the following orders:

- i) That the application herein be certified as urgent and service thereof dispensed with (**Spent**)*
- ii) That temporary stay of execution herein be granted pending the hearing and determination of this Application (**Spent**)*
- iii) That the Judgment dated 20th April, 2018 and ex-parte orders herein be set aside.*
- iv) That the applicant/respondent be granted leave to file defence out of time*
- v) That a stay of execution herein be granted pending hearing and determination of this cause*
- vi) Costs of the application be provided for.*

2. The Application is premised on the grounds THAT:

- a) The Statement of Claim, summons and the Judgment herein was never served upon the applicant as alleged by the Respondent. Applicant's counsel managed to get a copy of the same from the Court file.*
- b) The Claimant herein further filed a party to party of cost which has already been taxed and is likely to instruct auctioneers to proclaim goods at the Respondent's place of business.*
- c) The same is due for execution at anytime, a situation that will paralyse the Applicant/Respondent's business.*
- d) The Claimant herein deserted employment and his employment was never terminated as alleged by the Claimant.*
- e) We pray that the ex-parte judgment and consequent decree thereof be set aside and thereafter we be allowed to file our substantive defence.*
- f) It is fair and just that the applicant be allowed to participate in this matter*
- g) It is in the interest of justice that we are praying that we be allowed to file a defence.*
- h) It is fair and just that the orders herein be granted.*

3. The Application is further supported by the Affidavit of **PATRICK MUKEKU**, a Director of the Respondent sworn on 20th August, 2019 in which he reiterates the grounds on the face of the motion.

4. In opposition to the Application the Claimant filed an affidavit deponed by **KEVIN OCHIENG OCHIENG**, the Claimant herein on 13th September, 2019 in which he avers that proper service of summons was effected upon the Respondent herein who in turn stamped the return copy as proof of service of summons and an Affidavit of service filed in Court on 25th January, 2017.

5. The Claimant further deponed that the Respondent did not enter appearance or file defence in this matter despite proper service of summons and that as a result the matter proceeded as an undefended claim.

6. The Claimant maintains that the instant Application is frivolous, a waste of judicial time and is only meant to delay this case further deterring him from enjoying the fruits of the judgment entered in his favour.

7. The Claimant urged this Court to dismiss the application with costs to the Claimant.

8. In a brief rejoinder the respondent/Applicant filed a further affidavit deponed by **PATRICK MUKEKU** on 25th September, 2019 in which he denies service of any Court summons with respect to this matter.

9. He further attributed the Respondent's failure to enter appearance and file defence to the fact that it was aware the matter existed and that the Claimant had in fact deserted lawful duties.

10. The Affiant maintained that the Application as filed is merited and is not a waste of precious judicial time as contended by the Claimant thus urging this Court to allow it as prayed.

11. The Respondent averred that it has a good defence that raises triable issues as evidenced by the Draft Defence attached to the Application and should therefore not be condemned unheard.

12. The Application was disposed of by way of written submissions.

Submissions by the Parties

13. In its Submissions the Respondent/Applicant maintained that there was no proper service of summons as provided under Order 5 as read with Rule 12 of the Employment and Labour Relations Court (Procedure) Rules.

14. It is further argued that the Affidavits of service filed in this matter annexed by the Claimant herein were falsified in order to deny the Applicant its right to justice as it contained inaccurate information such as office location which is stated as Industrial Area instead of Mombasa Road. The Applicant urged this Court on the above basis to allow the instant Application and set aside the Judgment. To buttress this argument the Respondent/Applicant relied on the case of **Gacau Kariuki & Co. Advocates v Allan Mbugua Ng'ang'a Misc. Application No. 678 of 2011**.

15. The Respondent/Applicant argued that it has met the threshold for grant of the Orders sought in the instant Application and therefore urged this Court to exercise its discretion to set aside the interlocutory judgment dated 20th April, 2018. It maintained that it ought to be accorded a chance to defend its case in the interest of justice. For emphasis the Applicant relied on the case of **Gatts (K) Limited v Peter Awendo Godial & Others (2015) eKLR** where the Court set aside default judgment.

16. The Respondent further argued that this Court ought to be guided by the provisions of Article 48 of the Constitution of Kenya, 2010 and allow the Application.

Claimant's Submissions

17. The Claimant on the other hand submitted that proper service was effected upon the Respondent herein as evidenced by the Affidavits of Service, which remain unchallenged by the Respondent. It is further submitted that the contention that summons were not served as advanced by Patrick Mukeku is an afterthought and should be disregarded by this Court.

18. The Claimant further submitted that the instant Application has been made with inordinate delay, which remains unexplained. That the application was filed three years after service of summons was effected.

19. The Claimant further submitted that the draft defence as filed is a mere denial and that it does not raise any triable issues to warrant the setting aside of Judgment as prayed in the instant application.

20. In conclusion the Claimant urged this Court to find the instant Application devoid of merit and to accordingly dismiss it with costs to the Claimant.

Analysis and Determination

21. I have considered the application, affidavits, submissions and Authorities cited by the parties and in my view the only issue for determination is whether the Application dated 20th August, 2019 is merited. The Applicant seeks to set aside the Court's judgment delivered on 20th April 2018 and to be allowed to file its defence out of time.

22. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

[Order 10, rule 11.] Setting aside judgment

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

23. From the foregoing this Court is bestowed with unfettered discretion to set aside and/or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations. In **Patel v East Africa Cargo Services Ltd (1974) EA 75** this principle was expressed 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 ... 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."

24. The Applicant in the instant Application attributes the failure to file Defence to the Claimant's failure to serve it with the notice of summons and Claim. The Applicant further avers that the Affidavit of Service filed is falsified as it denied being served with any court processes in this matter. It goes further to state that the location indicated in the affidavit of service – Industrial Area is not the location of its offices as the same are located along Mombasa Road.

25. The Claimant on the other hand maintains that he personally accompanied the process server to identify the person upon whom service was effected and that the location was authentic. The Claimant further stated that the Respondent did accept service by affixing its stamp on the return copy of the summons and is therefore estopped from denying service at this juncture.

26. Although the name of the Director who was served with summons is stated in the affidavit of service, his affidavit, was not procured denying the same. It has further not been denied that Chetan Magdani is or was a Director of the Respondent/Applicant at the material time.

27. In the case of **Shah v Mbogo (1967) E.A 166 at page 128B** the Court held –

"This discretion to set aside an ex-parte judgement is intended 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 cause of justice."

28. The applicant has submitted that it has a defence that raises triable issues and prays that it be allowed to proceed with the matter on merit.

29. The Claimant maintains that the draft defence does not raise any triable issues and that the same consists of mere denials.

30. I have perused the Affidavit of service sworn by JOSEPH ROMINO ADEDE on 23rd January, 2017 and agree with the Claimant that the Respondent was properly served but failed to file defence. I further note from the record that the case was fixed for hearing as an undefended cause on 10th July, 2017.

31. Should the respondent have wished to file defence, it would have filed an application soon after 2nd May 2017 for setting aside of the orders made on that day to the effect that the suit proceeds to formal proof as there was no defence on record.

32. I find that no sufficient reason has been given by the Respondent for its failure to file defence despite acknowledging receipt of the summons by affixing the Company stamp on the served Notice of Summons dated 3rd June, 2016.

33. I have further perused the draft defence and agree with the Claimant's submission that the same consists of mere denials and thus there is no reason to reopen the case.

34. I accordingly find no justification to exercise my discretion in favour of the Applicant with the result that the application is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

MAUREEN ONYANGO

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 **Civil 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.

MAUREEN ONYANGO

JUDGE