



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.2239 OF 2016**

**JOHN OYIER.....CLAIMANT**

**VERSUS**

**STEADFAST SECURITY LIMITED.....RESPONDENT**

**RULING**

1 Through a notice of motion application dated 27<sup>th</sup> October, 2021, the Respondent/Applicant has approached this court for the following orders: -

*(a) That this application be dispensed with in the first instance.*

*(b) That pending the hearing and determination of this application interparties this Honourable court be pleased to issue a temporary stay of execution of the judgment delivered on the 28<sup>th</sup> September, 2021 and all consequential orders arising or likely to arise there from in the first instance.*

*(c) That this Honourable court be pleased to set aside the ex-parte proceedings and the consequential judgment delivered on the 28<sup>th</sup> September, 2021 and all consequential orders thereto.*

*(d) That the Respondent/Applicant be granted leave to defend this claim and to file the statement of response out of time ex debito justitiae.*

*(e) That the draft memorandum of response annexed herewith be deemed to have been duly filed and served.*

*(f) Costs of this application be provided for.*

2. The application is expressed to be anchored on the many grounds obtaining on the face of the same and on the affidavit sworn by Ms Esther Adhiambo, the administrator of the Respondent/Applicant.

3. The application is opposed by the Claimant/Respondent upon the affidavit he swore on the 3<sup>rd</sup> December, 2021.

4. The Respondent/Applicant stated that it filed a memorandum of appearance herein on the 24<sup>th</sup> November, 2016. That thereafter the Claimant never took a step to have the matter set down for directions for a period of over 4 years.

5. The Respondent/Applicant went further to contend that following the Claimant's/Applicant's indolence, its counsel even misplaced their file with a result that on the 5<sup>th</sup> July, 2021, when the notice to show cause was served on them [the counsel], the same was received without the benefit of their registry file.

6. That by reason of the premises foregoing, when the matter came up for the notice to show cause on the 26<sup>th</sup> July, 2021, counsel for Federation of Kenya Employees attended court without their file, consequently it escaped counsel's mind to diarize the Court's directions of the day.

7. That the date for formal proof was not communicated to the Respondent's/Applicant's counsel. The Respondent/Applicant was therefore not aware of the formal proof proceedings.

8. The Respondent/Applicant argued that it was not served with notices for directions, hearing as well as entry of judgment, making the judgment irregular.

9. The Respondent urged the court not to visit its counsel's mistakes on it. That they are desirous to prosecute their defence.
10. The Respondent/Applicant contended that it has a good defence with triable issues, they should be allowed to prosecute the same.
11. The Claimant/Respondent on his part contended that both parties were served with the courts' notice to show cause why the suit should not be dismissed and only the Claimant responded to it.
12. The Claimant argued that the reasons for inaction in this matter prior to its confirmation for hearing, were satisfactorily explained to the court through an affidavit in support of continuance for the suit, that was sworn on 12<sup>th</sup> April, 2021 and filed on the 21<sup>st</sup> April, 2021. The issue should not be raised again.
13. It was further stated that the hearing date, 20<sup>th</sup> September, 2021, was taken by consent on the 26<sup>th</sup> July, 2021. Both parties were represented in court.
14. That the Respondent/Applicant has not sufficiently explained the difficulty it had in attending court on the 20<sup>th</sup> September, 2021. The judgment was delivered on the 28<sup>th</sup> September, 2021, and apparently the Respondent/applicant had knowledge of the date.
15. It was further argued by the Claimant/Respondent that a failure to issue a judgment notice renders not a duly delivered judgment irregular. The law only requires issuance of a notice before execution; the notice is yet to be issued because party and party bill of costs has not been filed for taxation and taxed.
16. The date for hearing having been taken by consent, it is inconceivable what the essence of a final hearing notice would be.

### **DETERMINATION**

17. The Respondent/Applicant's application seeks that this court addresses two aspects, first setting aside of the proceedings herein of the 21<sup>st</sup> September, 2021 and the consequential judgment of 28<sup>th</sup> September, 2021, second, leave to file a response to the Claimant's/Respondent's claim.
18. To adequately deal with the two aspects of the application, it is imperative that a brief history of the matter herein, be brought forth.
19. Through his memorandum of claim dated the 9<sup>th</sup> September, 2016, the Claimant/Respondent sued the Respondent/Applicant for those orders and reliefs that were put forth therein. The memorandum was filed on the 2<sup>nd</sup> November, 2016.
20. Upon being served with summons to enter appearance, the Respondent did on the 24<sup>th</sup> November, 2016.
21. On the 16<sup>th</sup> June, 2021, the registry due to non-action by either of the parties herein in taking any step towards having the matter set down for hearing, listed it for notice to show cause why it would not be dismissed for want of prosecution.
22. On the 26<sup>th</sup> July, 2021, when this matter was placed before me for the purpose afore-stated, Mr. Muchiri appeared for the Claimant and Mr. Ouma for the Respondent. Mr. Muchiri indicated to court that the Claimant had filed a detailed affidavit indicating why the matter was not fit for dismissal for want of prosecution.  
  
Mr. Ouma intimated to court that they had not been served with the affidavit. He however proposed that the matter be given a hearing date on priority, he therefore didn't support the Notice to Show cause. Consequently, the matter got fixed for hearing for the 20<sup>th</sup> September, 2021, by consent.
23. On the hearing date, the Respondent and/or its counsel were not in attendance of Court.
24. In my view, it is trite that a party whose matter has proceeded in its absence due to a failure to attend court on a date that was appointed for the hearing and a judgment ensued against it, such judgment can only be set aside if the party shows that he or she was prevented by a sufficient reason from attending. However, I should state that the "sufficient cause" must be liberally construed to enable the court do justice between the parties. The term has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed.
25. The court has unfettered discretion in deciding what amounts to sufficient cause keeping in view the peculiar circumstances of each case.
26. The Respondent/Applicant advanced a reason that they were not served with a hearing notice, as the cause for the non-attendance of court on the material date. This reason does not make any sense at all considering the fact that as herein above expressed, the date for hearing was taken by consent.
27. The Respondent/Applicant further contended that the Claimant/Respondent did not invite them for picking of the Judgment or notify them of the judgment, therefore making the judgment irregular and liable to be set aside.

I find considerable difficulty in understanding this reason. The notice for entry of judgment is to shield the judgement creditor from any ambush resulting from an action taken on the judgement and or consequential decree. It is a post judgment step, and one that can only have effect on post judgment activities where it is alleged that it was not properly taken out and served or that it was not at all.

28. The law does not specify within which period the notice has to be taken out and served. However, what is certain is that it has to be taken out and served after judgment but before commencement of execution proceedings. In this matter party and party costs have not been taxed, or cannot be said that the Claimant/Respondent has acted in a manner that is not in accord with the purpose for which the notice has to be issued therefore.

29. The Respondent/Applicant has urged this court to consider that the Claimant/Applicant did not take any step towards having the matter set down for hearing until the Court in its own motion listed the matter for notice to show cause.

This cannot be a relevant factor for consideration. "Sufficient cause for non-appearance refers to the date on which the absence was made on ground for proceedings *ex-parte* remote of other circumstance anterior in time.

30. I note the Respondent has in the instant application sought too that it be granted leave to file its response to the claim herein out of time. Keenly considering the material before me, by the Respondent I am unable to see any sufficient reason advanced that can justify grant of the order, which is never given as a matter of course. The Respondent did not get bothered to even bring out the reason why it took it more than five years to conceive the idea of seeking the leave.

31. By reason of the previous foregoing, I am not persuaded that the application has merit. Consequently, it is hereby dismissed with costs.

**READ AND DELIVERED VIRTUALLY THIS 19TH DAY OF APRIL, 2022.**

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**OCHARO KEBIRA**

**JUDGE**

**IN THE PRESENCE OF**

**MR. MUCHIRI FOR THE CLAIMANT.**

**NO APPEARANCE FOR THE RESPONDENT.**