



**Ngichiri v Sirville Investments Limited (Cause 484 of 2017)  
[2022] KEELRC 1581 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1581 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 484 OF 2017  
MN NDUMA, J  
MAY 26, 2022**

**BETWEEN**

**BRIAN KIMANI NGICHIRI ..... CLAIMANT**

**AND**

**SIRVILLE INVESTMENTS LIMITED ..... RESPONDENT**

**RULING**

1. The applicant in the notice of motion dated 21<sup>st</sup> July, 2021 prays for an order that this Court do set aside the judgment/Order made on the 8<sup>th</sup> July, 2021 against the Respondent/Applicant who did not have the benefit of defending the suit and that the applicant be granted leave to defend the suit.
2. The application is premised on grounds set out on the face of the notice of motion and in the supporting affidavit of Charles Njogu the Director of the respondent company.
3. The applicant deposes that the respondent is a former employee of the respondent. That the respondent has obtained an exparte judgment against the applicant whose previous counsel on record failed to defend the suit.
4. That the company was served with summons to enter appearance on 3<sup>rd</sup> March, 2021 and passed the same to M/s Bon Begi & Co. Advocates to represent the company but the firm failed to do so.
5. That the matter proceeded to formal proof and judgment was delivered on 8<sup>th</sup> July, 2021.
6. That the company has a good defence to the claim as shown in the annexed draft statement of defence.
7. That the application be granted.
8. The application is opposed by the respondent who states that the applicant ought to have applied for the setting aside of the Order of Justice Abuodha dated 29<sup>th</sup> June, 2017 directing that the matter proceeds as an undefended cause.



9. That the respondent failed to do so despite having been represented by Counsel on 8<sup>th</sup> March, 2021 and being advised as much by the Court.
10. That the applicant failed to take any steps itself and cannot be heard to solely rely on mistake of counsel.
11. That the judgment is proper and regular and should not be set aside.
12. That the draft memorandum of response contain mere denials and evasions and is a sham.
13. That the conditions of setting aside a judgment have not been satisfied.
14. That the application be dismissed with costs.
15. The parties filed written submissions and the issue for determination is whether the applicant has satisfied the preliquisites for setting aside an exparte judgment of the Court.

### **Determination**

16. This suit was filed on 13<sup>th</sup> March, 2017 and the respondent was served with the summons to enter appearance and Statement of Claim on 24<sup>th</sup> March, 2017.
17. The applicant deceitfully, deposed in the application that summons to enter appearance were served on the company on 3<sup>rd</sup> March, 2021 despite an affidavit of service on record to the contrary.
18. Indeed, as early as 29<sup>th</sup> June, 2017, Hon. Abuodha, J. made a ruling upon being satisfied that the cause was served on the respondent as follows:-

“The cause shall proceed as undefended cause on a date to be fixed at the Registry.”

19. The respondent nor its advocate did not move to have the aforesaid ruling set aside. The suit was set down for formal proof on 8<sup>th</sup> March, 2021, when Mr. Wachira advocate appeared for the claimant and one Mr. Simiyu holding brief for Bon Begi Advocate appeared for the respondent.
20. The Court observed that the firm of Bon Begi advocate was not yet on record and no formal application had been filed for leave to come on record and file a statement of defence. The matter proceeded on the day as undefended suit. The claimant testified and judgment was delivered on 8<sup>th</sup> July, 2021.
21. This application was then filed on 21<sup>st</sup> July, 2021 after delivery of judgment.
22. The application is clearly founded on false facts. The applicant ought to have filed application to set aside the order of Abuodha, J. directing the matter to proceed exparte issued on 29<sup>th</sup> June, 2017. The applicants having failed to challenge that ruling cannot be heard to challenge the judgment of the Court delivered more than (4) years from the date the Court made the ruling that the matter was to proceed exparte.
23. The application is therefore misconceived and bad in law.
24. As was held in *Mbogo & Another v Shah* [1968] E.A. 93,  

“the discretion of the Court to set aside proceedings is to be exercised so as to avert an injustice or hardship that may be caused by an inadvertent or excusable mistake. It should by no means be used to delay or obstruct the cause Of justice.”



25. The applicant has not demonstrated that it had taken any step at all to follow up the matter. It purports to blame its advocate who was allegedly served with summons four years after the suit was filed as per the affidavit of the applicant.
26. No excusable mistake has been disclosed by the applicant. Indeed this is a clear case where the applicant is using clever means to delay and or obstruct the cause of justice.
27. This was the view taken by Hon. Ndolo, J. in *Jared Maragga Ochungo v Kenya Safari Lodges and Hotels Limited* [2021] eKLR where the Court observed:-

“in the instant application, the respondent not only failed to demonstrate any inadvertent or excusable mistake but also soiled its hands by blatantly lying to the Court. Such a party does not merit the discretion of the Court.”

28. The present application is on fours with the conduct depicted above.
29. The applicant is not therefore deserving of the exercise of discretion by the Court in its favour.
30. The application is accordingly dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Museve for Applicant

Mr. Wachira for Respondent

Ekale – Court clerk

