



**Thuita v Mount Kenya University (Cause E6519 of 2020)
[2022] KEELRC 1210 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1210 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6519 OF 2020
AN MWAURE, J
MAY 19, 2022**

BETWEEN

CATHERINE THUITA CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

1. The Respondent by its application of 13th January, 2022 prays for the following orders;-
 - (a) The application be certified urgent and be heard ex parte in the first instance on account of extreme urgency.
 - (b) The Honourable court be pleased to grant stay of execution pending the hearing and determination of this application inter parties.
 - (c) The court be pleased to set aside the ex-parte judgment and decree delivered on 16th December, 2021.
2. Respondent through his Human Resource Officer Janet Kajwang deponed o 13th January, 2022 and stated as follows;-
3. That on a routine perusal of National Council of Law reporting on 11th January 2022 their advocates came upon judgment delivered against the Respondent on 16th December, 2021.
4. The case proceeded ex-parte due to Claimant failure to abide rules of the court in failing to serve the pleadings, statement of claim upon the Respondent as required by Rule 11(2) of the [Employment and Labour Relations Court \(Practice\) Rules 2016](#).
5. That the Respondents were only served with the summons via email but not the pleadings.



That the university being a corporate body should have been served under Rule 12 of the *Employment and Labour Relations Court Rules*.

6. That Respondent further states that upon service via email requested for pleadings on 26th January, 2021.
7. The Respondent therefore states that the Claimant failed to comply with the legal requirements of service in that she failed to serve the pleadings together with the summons.
8. The Respondent states it had satisfied the legitimate and verifiable part of the claim before Judgment was delivered.
9. That the Respondent requested to be served with the statement of claim which they claim upto now they have not had the physical right of the said pleadings. They claim once they are served with the pleadings they will raise arguable issues and unassailable defence to the claim.
10. That there is no prejudice upon the Claimant that cannot be compensated.
11. That the application was brought without delay.
12. The Respondent further states that they should have been served with the pleadings and that the procedure leading to the judgment and decree was mired by procedural unfairness and unreasonableness.
13. The Respondent says that it is in the interest of justice protection of fundamental right to fair hearing and fair adjudication that this application be allowed.
14. The Claimant filed her replying affidavit dated 1st February, 2022 as deponed by her advocate Ms. Lilian Wanjira.
15. The advocate depones that the matter was filed in the height of Covid Pandemic when different modes of service were acceptable including service via email.
16. She says when the claim was filed the court acknowledged filing of claim showing hyper link for documents filed which the Respondent was supposed to access.
She claims the acknowledgement of filing was forwarded to the Respondent via email on 14th December, 2020.
17. The court issued summons and were served on the Respondent on 9th February, 2021.
She says she forwarded the acknowledgement of filing of claim on 1st March, 2021 to the Claimant.
18. She says they complied with the directions on Gazette Notice 2357 of 4th March, 2020 and furthermore they kept the Respondent informed of all proceedings every step of the way.
19. She says it is fallacious to say they should not have used email to serve summons yet is the same mode the Respondents have used to serve this application. The Claimant says any money paid to her were exclusive of the claim and will be deducted from the decretal sum.
20. She states that there is no ground to set aside the judgment as the Respondent was always aware of the claim and could have defended it.
21. She further says she has continued to suffer damage and should be allowed to enjoy the fruit of her judgment. She prays the application be dismissed with costs.



22. The court has also well studied the submissions by the respective parties and the cited authority and has referenced them hereto.

Decision

23. The issue for determination is whether this court should set aside the judgment delivered on 16th December, 2021. The jurisdiction of the court to review and set aside its decision is wide and unfettered.

The court considers whether the applicant has demonstrated sufficient cause to set aside an *ex parte* judgment or proceedings.

24. In the case of *Wachira Karani vs Bildad Wachira* (2016) eKLR it was held that sufficient cause is where the defendant cannot be blamed for his absence.

It is a question of fact and the court has to exercise its discretion in the varying circumstances of each case.

25. In this case the reason given by the Applicant is that they were not served with the pleadings and the statement of claim. They claim they were only served with summons via email and once they requested for the pleadings the Claimant referred them to the court link.

They claim to date they have not been served with the pleadings and have not cited them.

26. The Claimant on her part avers they served the summons by the mode of service provided due to court Covid protocols and more so as per gazette no.2357 of 2020 dated 4th March, 2020.

The Respondent was supposed then to use a hyper link for accessing documents on the court portal.

27. The Applicant claims they were to be served physically with the pleadings as per Rule 12 (1) (a) of the *Employment and Labour Relations Court (Practice) Rules 2016*.

The claim that the Claimant needed to serve pleadings only physically is not a genuine claim as the service via email has now been accepted and in use in the last two years since the Covid pandemic hit the world. The applicant as a regular practitioner must be aware of the process and court is not convinced that they have made efforts to retrieve the pleadings from the portal without success.

In any case they could have even made effort all the while to get copies from the court registry. This seems to be a mere excuse and is not convincing.

28. The court in considering if to set aside its *ex parte* decision it must consider whether the Applicant has any defence which raises triable issues.

In the case *Patel vs East Africa Cargo Handling Services Limited* (1974) EA 75 the court held that the main concern of the court is 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. The court will not set aside its judgment unless is convinced has a defence on its merits. This is not a defence that must succeed but one that has “triable issues” or an issue which raises a prima facie defence and should go to trial for adjudication.

29. In this case the Applicant did not even file a draft defence as it claimed that it was not served with the statement of claim.

The Applicant therefore claims that once it is served with the statement of claim, “it will raise serious arguable issues that will provide complete and unassailable response and defence to the claim”.



30. The court is not convinced how the Applicant can summarise it well, have a good defence if they have not made efforts to get the statement of claim and to peruse the same.
- The court has no draft defence in the court file to consider if there are triable issues or not. Mere allegation by the Applicant that it will raise serious arguable issues and unassailable response and yet claims it has not seen the pleadings is not convincing.
31. The Applicant therefore seems not to candid in its averments and in fact the court finds the Applicant did not do a thorough preparation in filing this application.
32. Being supported by the findings in the case of *Jomo Kenyatta University of Agriculture And Technology vs Musa Ezekiel Oebah 2014* (eKLR) CA 217 of 2009 it was observed that the requirements for court to exercise its discretion to set aside a regular ex-parte judgment is to avoid injustice or hardship resulting from an accident, inadvertence or excusable error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay a cause of justice.
33. The court is not convinced that the Applicant in this case demonstrated it was at all material times unaware of the proceedings and was unable to access the proceedings and also not aware of all the subsequent mention dates.
34. The court finds that the Applicant has not given reasonable grounds to justify setting aside the courts judgment delivered on 16th December, 2021 and so dismisses this application with costs.
35. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY, 2022.

ANNA NGIBUINI MWAURE

JUDGE

Delivered in presence of:

Miss Gachui Kariuki holding brief for Wanjira & Company Advocates for the Claimant.

Mr. Omondi holding brief for Mr. Kenyatta for the Respondent.

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.

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

ANNA NGIBUINI MWAURE

JUDGE

