



**Obura v Reliance Protection Services Limited (Cause 1440 of 2016)
[2022] KEELRC 3832 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3832 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1440 OF 2016
MN NDUMA, J
JUNE 23, 2022**

BETWEEN

KIZITO OPIYO OBURA CLAIMANT

AND

RELIANCE PROTECTION SERVICES LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed notice of motion application dated 30th June, 2021 seeking the following orders: -
 1. Spent.
 2. That the leave be granted to the Firm of Angaya, Nasimiyu & Associates to come on record for the Respondent.
 3. The execution of the judgment entered herein on 8th June, 2021 and all the consequential decree, orders, proclamation, attachment and processes be stayed, suspended and/or lifted pending inter partes hearing of this application.
 4. This Honourable Court be pleased to set aside and/or discharge the judgment entered herein on 8th June, 2021 and all consequential processes arising.
 5. This Honourable Court do issue summons to the process server for purposes of cross-examination on alleged service.
 6. The Honourable Court do order the claimant to serve the statement of claim to the Respondent's advocates herein and the Respondent be granted leave to put in the Reply to Memorandum of Claim.
 7. That any other relief that this Honourable Court may deem fit.



2. The application is premised on grounds set out on the face of the Notice of Motion and in the supporting affidavit of Mr. Patrick Kingoro Juma, the Managing Director of the respondent to wit that the claimant obtained an ex parte judgment on 8th June, 2021 and is about to execute the same against the applicant.
3. That the judgment came as a surprise to the respondent as they have never been served with the suit papers in order to defend the claim accordingly.
4. That the only document received by the respondents was the judgment which was served vide email.
5. That the respondent has a good case against the claimant and it be allowed to defend the suit on the merits.
6. That the judgment of Kshs 742,305.80 is colossal and it is fair and just for the Court to stay its execution and proceed to set aside the judgment after hearing the application.
7. That the application has been filed in good faith and without any delay.
8. That the claimant was never employed by the respondent and the respondent should not be condemned unheard for failure of service of summons on them.
9. That the application be allowed.

Replying Affidavit

10. The claimant /respondent filed a replying affidavit of M/s Stellar Njoki Kariuki, the advocate on record for the claimant who deposes that the application lacks any merit since the respondent was duly served with summons to enter appearance on 3rd August, 2016 by Felix Odiwuor Adero, a Court process Server duly licensed and authorized to serve Court process. That the process server filed an affidavit of service dated 25th May, 2017 in which he deposes that he served the summons to enter appearance and the memorandum of claim on the applicant at Delight Apartments, along Ngong road on the 2nd floor where the applicant's offices are located.
11. That a lady called Nafula, received copies of the documents, she perused them and declined to stamp or sign on the service copy stating that she has no permission to sign such documents.
12. That Affidavit of service and the principle copy of the said documents were returned to Court duly served as per the affidavit.
13. The claimant/respondent deposes further that in addition, on 24th June, 2020, 16th July, 2020 and 23rd November, 2020, is an email to the Employment Court registry to request for a date for formal proof hearing, the applicant was copied on their email; info@relianceprotection.com which emails are attached to the replying affidavit and marked SNK 2(a) (b) and (c).
14. That also on 13th January, 2021, a Hearing Notice dated 17th December, 2020 for 8th January 2021 was served upon the Respondent on the same email and is attached to the replying affidavit together with the affidavit of service and a covering email all marked K005 (a) (b) and (c).
15. That the applicant is not candid with the Court and has no viable defence to the suit.
16. That the matter was heard ex parte on 8th February, 2021 and a judgment delivered on 8th June, 2021. That the judgment was sent to the applicant on the same email through which all other notices were sent and the applicant acknowledges receipt of the same whilst feigning lack of knowledge of all other correspondence sent to them vide the same email address.



17. That the respondent deliberately failed to defend the suit and had ample time to do so.
18. That the application lacks merit and it be dismissed with costs.
19. The applicant was granted leave to file supplementary affidavit to join issues with the deponent of the replying affidavit together with written submissions on 18th January, 2021. The applicant filed written submissions but did not contest the facts set out in the replying affidavit of the claimant. The claimant has also filed written submissions.

Determination

20. The Court has considered the facts set out in the depositions and the submissions by the parties and has noted that the applicant has not in the Notice of Motion and in the supporting affidavit stated where its offices are situated nor has it denied facts set out by the process server that its offices are situated at Delight Apartments, 2nd Floor and that a lady by the name Nafula received the summons and statement of claim on 3rd August, 2016 from the said Felix Adero.
21. The applicant has not in the application and in the supporting affidavit denied that its official email was info@relianceprotection.com through which advocates for the claimant served various notices on the respondent including the judgment of the Court.
22. A mere denial of service was instead made in the written submissions of the applicant which submissions do not amount to evidence adduced in a sworn affidavit and the said allegation is thus inadmissible.
23. It is the considered conclusion by the Court that the applicant has not been candid to the Court on the matter of service and having failed to rebut the evidence placed before Court by the claimant, the Court is satisfied that the applicant was properly served with the summons to enter appearance and Statement of Claim on 3rd August, 2016 and failed to enter appearance nor defend the suit for a period of over five (5) years, when judgment was delivered by the Court on 8th June, 2021.
24. Clearly, the applicant has not satisfied the criteria for grant of Court discretion to set aside the judgment.
25. There is no justifiable reason placed before Court to set aside the judgment.
26. The Court relies on the decision by Maureen Onyango, J. in *Kennedy Makasembo -vs- Kenya Union of Post Primary Education Teachers* [2017] eKLR where the Court held; -

“I find no just cause to set aside the judgment. I am persuaded the applicant had ample opportunity to defend this case before judgment”
27. I am equally persuaded in this matter that the applicant was indolent and sat on its right to defend this suit for a grossly inordinate period of five (5) years since service of the suit documents on it.
28. The application by the applicant is too late in the hour and granting it would be prejudicial to the claimant since justice delayed is justice denied, which would be the result, were the Court to set aside the judgment and start the matter afresh.
29. Accordingly, the application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23RD DAY OF JUNE, 2022.

MATHEWS N. NDUMA



JUDGE

Appearances

Angaya & Co. Advocates for the Applicant

Mwaure & Mwaure Wahiga Advocates for the claimant/respondent

Ekale – Court Assistant

