



**Okello v Glosec Services Limited (Cause 219 of 2015)
[2022] KEELRC 1517 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1517 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 219 OF 2015
DN NDERITU, J
JUNE 16, 2022**

BETWEEN

ERICK OMONDI OKELLO CLAIMANT

AND

GLOSEC SERVICES LIMITED RESPONDENT

RULING

1. 1. In a Notice of motion dated January 28, 2022 the respondent/applicant prays for
 1. -Spent -
 2. -Spent-
 3. That this Honourable court be pleased to set aside its judgment entered in default of appearance and defence on the part of the Respondent, and reinstate the suit for hearing and determination on merits, and to grant leave to the Respondent to file and serve its response to the Memorandum of claim.
 4. That The costs of the application be met by the claimant.
2. The said application is expressed to be brought under the provisions of order 10 rule 11, Order 51 rule 1 of the *Civil Procedure Rules*, and all other enabling provisions of the law. It is based on the grounds on its face and the supporting affidavit of John Njuguna sworn on January 28, 2022.
3. In response to the application the claimant/respondent filed two replying affidavits, one by Gladys Achieng Ndeda, Advocate, and the other by Erick Omondi Okello, the claimant, both sworn on February 9, 2022.
4. The applicant filed a further affidavit sworn by John Njuguna on February 14, 2022.



5. On February 10, 2022 this court issued interim orders for stay of execution of the judgment and decree pending the hearing and determination of the application. It was agreed that the application be argued by way of written submissions, Applicant's submissions were filed on February 18, 2022 and Claimant's on February 28, 2022.

Issues for Determination

6. From the supporting affidavit, replying affidavits, further affidavit, and the written submissions filed by or on behalf of the parties herein, there is only one main issue for determination in this matter.
 - (a) Should the judgment and the decree in this cause be set aside?
 - (b) Costs

Factual Findings

7. While the application is seeking to set aside the judgment "and reinstate the suit for hearing and determination on merits" the right approach should be to pray for setting aside of the judgment and decree and the entire ex-parte proceedings and that leave be granted to the respondent applicant to defend the suit. This is so because even if the judgment and decree is set aside the proceedings would remain and hence such an order would be futile and complicate the matter even further.
8. The judgment in this matter was rendered by court (Wasilwa J) on October 7, 2021 wherein the claimant was awarded a sum of Kshs.577,397.35 plus costs and interest.
9. In Paragraph 7 of the said judgment the trial court found that the respondent/applicant had been duly served with summons to enter appearance but failed to defend the cause.
10. This cause was initiated by the claimant vide a memorandum of claim dated July 8, 2015 filed in court on July 21, 2015 that is almost seven (7) years ago.
11. There is an affidavit of service sworn by one Boniface P. Owuoche, a process server, on August 3, 2015 to the effect that the Respondent was served with the memorandum of claim and summons to enter appearance on August 3, 2015.
12. On March 13, 2017 the court (Radido J) ordered that summons to enter appearance be served afresh. On February 27, 2019 the court (Mbaru J) confirmed that service had been properly effected and ordered that the matter be fixed for hearing and subsequently the matter was set for formal proof on June 29, 2020.
13. After a period of dormancy the matter came up for mention on March 18, 2021 and the court (Wasilwa J) fixed the matter for formal proof on July 22, 2021.
14. On July 22, 2021 the matter proceeded for formal proof and the claimant (CW1) testified alone in support of this cause and the matter was reserved for judgment on October 7, 2021. It is the judgment delivered on October 7, 2021 that the Respondent/Applicant is seeking to set aside.
15. In paragraph 6 of the supporting affidavit John Njuguna, a director of the respondent, deposes that he visited the office of the claimant's Counsel on March 21, 2019 to discuss an out of court settlement of the cause. This visit is important for two reasons. One, it proves that the respondent had already been served with the court process in the matter and secondly, that the respondent knew and was aware of the cause pending in court.



16. The respondent does not explain why it failed to enter appearance and file defence at that point. Had the matter been compromised and settled as alleged by the respondent there ought to have been filed in court a formal consent to that effect. No such consent was executed and none was filed in court. Instead of taking action to defend the cause the respondent decided to unilaterally take matters into its own hands and impose a settlement by depositing a sum of Kshs.26,908/= into the bank account of the claimant.
17. The essence of service of court process is to inform the party on whom such service is effected of the existence of the cause, and secondly to alert such a party to take appropriate legal action by filing appropriate response(s).
18. Having been duly served and upon the respondent failing to enter appearance and file a response/ defence the matter proceeded for formal proof, as it should, culminating in the aforesaid judgment.
19. John Njuguna on behalf of respondent confirms that he attended court on various dates including April 23, 2019, July 9, 2019, and February 5, 2020. This was long after the direction of court of March 13, 2017 that fresh summons be served upon the respondent.
20. Now that the respondent was all along aware of the cause in court and even attended court as above, why did it not take action in defending the cause? The allegation by the respondent in paragraph 14 of the supporting affidavit that it was not aware of existence of the cause is absolutely and blatantly false. What other notice did the respondent need in order to defend the cause?
21. It is the view and holding of this court that the respondent was properly served with the court process and it all along knew and was aware of the subject matter of this cause but it deliberately decided not to take any action in defending the same.
22. On January 20, 2022 the respondent instructed his Counsel on record to act for it in this matter, ostensibly after appreciating the seriousness and consequences of the same. There is no explanation as to why the respondent had not approached the said Counsel or indeed any other Counsel to act for it since 2015 when it was served with the court process.
23. The two replying affidavits for and or on behalf of the claimant are clear on how service was effected upon the respondent not only in respect of the claim and summons to enter appearance, but also in various mention notices and even notice of entry of judgment. The respondent has not rebutted that evidence. The said notices and the affidavits of service have been exhibited by the claimant.
24. The claimant does not deny that a sum of Kshs.26,918/= was paid into his account but he categorically states that it was without his consent or approval.

IV. THE LAW

25. Order 10 Rule 11 of the *Civil Procedure Rules* grants this court wide and unfettered discretion in deciding whether or not to grant an order of setting aside a judgment. However, there are principles that have been established to avoid capricious or whimsical exercise of that discretion.
26. It is clear that after the respondent failed to enter appearance or file defence the matter proceeded to formal proof under order 10 rule 9 of the *Civil Procedure Rules*
27. In setting aside an ex-parte judgment, in the circumstances of this cause, this court has to consider several factors. One of the factors is service of summons to enter appearance and the pleadings. This court has already found that the respondent was properly served and was at all material times always aware of this cause but took the option of not defending the cause.



28. In *Anne Wanja Mwangi v Samson Muriithi Muriuki* (2019) eKLR, Ngaah J while relying on the decision of the Court of Appeal in *James Kanyita Nderitu & another v Morris Philotas Ghikas & another* (2016) eKLR quoted the following passage:-

The court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether in the whole it is in the interest of justice to set aside the default judgment, among others.”

29. Article 159(2) of the *Constitution* calls upon this court, and indeed all courts and tribunals, not to delay justice when exercising judicial authority. Section 3(1) of the Employment and Labour Relations Court Act calls upon this court to facilitate just, expeditious, efficient, and proportionate resolution of disputes that come before it.
30. The overriding objective is to facilitate the just, expeditious, proportionate, and affordable resolution in causes is again reiterated under sections 1A, 1B, 3, and 3A of the *Civil Procedure Act* (Cap 21).
31. In the entire application the respondent has not disclosed what defence it has to the claim. No draft defence has been attached to the application and hence this court enjoys no benefit of assessing if the respondent has any *prima facie* defence to the claim or at all.
32. This matter has been pending in court since 2015 and it would be highly prejudicial to the claimant if the judgment was set aside after he has been waiting for justice to be done for close to seven (7) years. Litigation must come to an end one way or another. It is the view of this court that this matter came to a fair, logical, and just end through the judgment delivered on October 7, 2021 and there are no sound legal reasons given or advanced by the Respondent as to why the said judgment may be set aside.
33. Equity does not aid the indolent but the vigilant. As demonstrated in an earlier part of this judgment the respondent took no action to defend the cause since 2015, notwithstanding that it all along knew of the cause pending in court and even attempted an out of court settlement with claimant’s Counsel which did not materialize.
34. It is the view of this court that the present application is an attempt by the respondent to further delay the conclusion of this matter. Justice cuts both ways and the claimant is equally entitled to enjoy fair, just, expeditious, proportionate, and efficient disposal of the matter. The claimant is entitled to the fruits of the judgment herein.
35. The respondent/applicant has not brought forth any excusable mistake or error on its part to explain the failure to enter appearance or file defence. It has also failed to demonstrate that it has a *prima facie* defence in case it was allowed to defend the cause.
36. In the circumstances, in respect of the main issue for determination, this court returns that the application by the respondent has not met the required threshold for setting aside the judgment, the decree, and proceedings herein.

V. COSTS

37. Costs follow event and hence the application by the respondent is dismissed with costs to the claimant.



VI. Issue of Kshs. 26,908/=

38. Both sides are in concurrence that the above sum was deposited by the respondent into the bank account of the claimant, albeit without the consent or approval of the claimant or his Counsel. However, this court orders that the said amount of money be taken into account in determining the actual amount due and payable to the claimant by the respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS.16TH DAY OF JUNE, 2022.

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DAVID NDERITU

JUDGE

