



**Buluma v Kenya Methodist University (Employment and Labour Relations  
Claim 284 of 2018) [2022] KEELRC 1562 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1562 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 284 OF 2018**

**HS WASILWA, J**

**JUNE 2, 2022**

**BETWEEN**

**FRED CEPHAS OBANDE BULUMA ..... CLAIMANT**

**AND**

**KENYA METHODIST UNIVERSITY ..... RESPONDENT**

**RULING**

1. Before me for determination is the Respondent/Applicants Notice of Motion dated 18<sup>th</sup> January, 2022 file under certificate of urgency on even date and brought pursuant to Order 10 Rule 11, Order 12 Rule 7, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of the *constitution* and all other enabling provisions of law. The Applicant is seeking the following Orders;-
  - a. Spent.
  - b. That pending hearing and determination of the this Application, an interim Order of stay be issued staying the execution of the Judgement of the Court and the decree arising therefrom directing the Applicant to pay the Respondent a sum of Kshs. 790,000 plus costs and interest.
  - c. That there be an Order of stay of execution.
  - d. That the judgement and decree arising therefrom be set aside and the matter be heard on its merit.
  - e. That costs of this application be in the cause.
2. The Application is supported by the grounds in the face of the application and the supporting Affidavit of Willium Lusweti, the Advocate ceased of the conduct of this matter deposed upon on the 18<sup>th</sup> January, 2022 and based on the following grounds; -



- a. That judgment in this cause was delivered by this Court in favour of the Claimant as against the Respondent for payment of Kshs.790,000.
  - b. It is averred that the Applicant herein was not served with the hearing notice in this case and were only served with judgement dated 16<sup>th</sup> December, 2021.
  - c. The Applicant contends that the hearing of this cause proceeded *ex parte* without their knowledge as no notice was served upon it.
  - d. It was then averred that the Applicant herein has been condemned unheard contrary to the provision of the constitution that guarantees a right to be heard under Article 50.
  - e. He argued that, it has good defence with overwhelming chances of success and therefore they ought to be given an opportunity to defend this Cause.
  - f. The Applicant then urged this Court in the interest of justice to allow its application and averred that the Claimant would not be prejudiced in any way as he will be granted an opportunity to participate in the hearing as well.
3. The Claimant/Respondent herein opposed the Application and filed a replying Affidavit deposed upon on the 28<sup>th</sup> February, 2022 on the basis that this suit was filed in the year 2018 and pleadings served upon the Respondent/ Applicant herein on 11<sup>th</sup> February, 2019.
  4. The Respondent did not enter appearance nor filed any defence in opposition of the claim and in September, 2019 the Claimant obtained a mention date for direction scheduled for 23<sup>rd</sup> September, 2019 which was served upon the Applicants herein on the 3<sup>rd</sup> September, 2019.
  5. Subsequently, the Respondent entered appearance on the 6<sup>th</sup> November, 2019 through the firm of Lusweti and Nabutola company Advocates and no Defence was filed. The matter was later mentioned on the 6<sup>th</sup> May, 2021 which date had been served upon the Applicant's Advocates on the 28<sup>th</sup> April, 2021. During this mention the Court certified the matter ready for hearing and a hearing scheduled for 11<sup>th</sup> November, 2021. A hearing notice was served upon the Applicant's Advocates on the 10<sup>th</sup> June, 2021. In their absence and having been served, the matter proceeded for hearing on the 11<sup>th</sup> November, 2021 and judgement delivered on the 16<sup>th</sup> December, 2021.
  6. It is therefore contended that the Respondent was served with the hearing Notice and their application is without any basis. It then urged this Court to dismiss the application and allow litigation to come to an end.
  7. In addition to the Replying affidavit, the Respondent filed grounds of opposition which came out as follows;
    - a. That the application is fatally defective, bad in law, a non-starter, incompetent, frivolous, vexatious and or otherwise an abuse of Court process.
    - b. That the application is self-defeating and the prayers therein untenable in the circumstances.
    - c. That the application as framed does not meet the minimum threshold for grant of the Orders sought.
    - d. That the Application has been brought prematurely in the circumstances.
    - e. That the application is on a fishing expedition.
    - f. That the application as brought is wanting in both form and content.



- g. That this Court is *functus officio* in this matter.
  - h. That the applicant has come to court with unclean hands concealing material facts to defeat the course of justice.
8. This Application was disposed of by way of written submissions with the Applicant filing their submission on the 6<sup>th</sup> April, 2022 and the Respondent on the 14<sup>th</sup> April, 2022.

### **Applicant's Submissions.**

9. The Applicant submitted that, it was not served with the hearing notice of this matter as alleged by the Claimant. It was argued that this Court in accordance with Order 5 rule 16 of the [Civil procedure Rules](#) ought to have called for the examination of the process server when they raised the issue of service. It maintained that service was not done and the judgement was thus irregular. To support their case, the Respondent cited the case of [Aritibi Selasio Murungi V Bright Wanja Julius](#) [2020] eklr where the Court held that;

“The trial court should have interrogated the question of service fully by even summoning on its own motion the process server in order to satisfy itself that the appellant was duly served before condemning him. Courts in my view should exercise some measure of reluctance at closing windows of opportunity for litigants to access to justice unless there is a clear demonstration by a party to derail, obstruct or delay justice. Setting aside an interlocutory judgment being a discretionary matter should lean more to allowing parties access to justice rather impeding them on account of inadvertent mistake like in this instance”

10. Accordingly, it was submitted that since the Judgement was irregular, this court ought to exercise to discretion and allow the application to set aside the Orders of the Court. In this they relied on the case of [James Kanyिता Nderitu and another V Marios Philotas Ghikas and another](#) [2016] eklr, where the Court held that;-

“From the outset, it cannot be gain-said that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others....”

11. The applicant then urged this Court in the interest of justice and guided by Article 159 of the [Constitution](#) to allow its application and reopen, allow the Respondent file their defence for the matter to be heard on merit.

### **Respondent's Submissions.**

12. The Respondent on the other had submitted that the judgment delivered by this Court was a regular one as per Rule 22 (1) of the [Employment and Labour Relation procedure rules](#) 2016. It was argued



- that the Applicant has failed to satisfy the conditions pre-requisite of grant of setting aside Order as was held in the case of *CMC Holding Limited v James Mumo Nzioki* [2004] eklr.
13. The Respondent further submitted that the application herein is fatally defective, bad in law and an abuse of Court process since the Applicant has not to date filed a response to the claim, neither have they annexed a draft copy that this court would scrutinize to ascertain if the Applicant has raised any triable issue in the defence. To support his argument the Respondent relied on the case of *Harun Rashid Khator Suing as the representative of Rashid Khator (Deceased) v Sudi Hamisi & 11 others* [2014] eklr.
  14. It was further argued that the Applicant has not given any reason for failing to file any defense during trial and also for failing to annex a draft in this Application. He then cited the case of *SMR Limited V Michael Ezra Mulwooya* [2019] eklr . Additionally, that the Applicant has not sought in this Application for leave to file a defence out of time but merely mentioned it at Submissions stage.
  15. The Respondent also submitted that the Applicant's Supporting affidavit is defective and should be expunge from record for the reason that; the affidavit was sworn in Nairobi and commissioned in Nakuru contrary to the provisions of section 5 of the *Oaths and statutory Declarations Act*. He then supporting his argument by relying on the case of *Regina Munyiva Nthenge v Kenya Commercial Bank Limited* [2005] eklr which decision was echoed in *CMC Motors Group Limited V Bangeria Arap Koris Trading as Marben School and another* [2013] eklr.
  16. On whether the Hearing Notice was served upon the Applicant herein, it was submitted that the said Hearing Notice was served upon the Applicant on 10<sup>th</sup> June, 2021 and it was received by June Aresa an advocate who worked in the said Firm who even held the Applicant's brief on the 16<sup>th</sup> March, 2022. It was further argued that if service was indeed disputed the Applicant ought to have sought leave to cross examine the process server who effected services as was held in *Shadrack Arap Boiywo v Bodi Bah* [1987] eklr.
  17. The Respondent then submitted that the Applicant has not indicated that it would suffer any prejudice if the Application is not allowed. In any case that the agreement by the Applicant that it would be condemned unheard is without any basis in light of the fact that they did not exhibit even a draft defence herein.
  18. The Respondent then urged this Court to disallow the Application with costs.
  19. I have examined the averments and submissions of the parties. The applicants contention is that they were not served with the hearing notice of this case and were thus condemned unheard.
  20. The Respondents insist that the Respondents were well aware of this case and chose to ignore defending the claim.
  21. The claim was filed on 20<sup>th</sup> December 2018. The Respondents were served with summons on 14/1/2019 and entered appearance on 6<sup>th</sup> November 2019. The Respondents never filed any defence.
  22. On 20<sup>th</sup> April 2021, the Claimant Respondents served the Respondents counsel with a mention notice for 6/5/2021. On this day, the Respondents didn't attend and this court gave direction for hearing on 11/11/21.
  23. On 10<sup>th</sup> June 2021, the Respondents were again served with a hearing notice for hearing of this case on 11<sup>th</sup> November, 2021. The received the hearing notice was stamped by the Respondent Applicants firm on 10<sup>th</sup> June 2021.



24. On 11/11/21, the date set for hearing, the Respondents failed to attend court and the matter proceeded ex parte.
25. The contention by the Respondent Applicants that they were never served with a hearing notice is not true.
26. The Respondents have never been serious in defending this claim and have not even filed any defence despite service.
27. It is my finding that the application is not merited and I dismiss it accordingly with costs to the Claimants.

**RULING DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF JUNE, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:-

Ndichu for Claimant Respondent – present

Aresa for Applicant – present

Court Assistant - Fred

