



**Koech & another v Jalaram Limited (Shiv Krupa (Cause 205 of 2017)
[2022] KEELRC 12685 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12685 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 205 OF 2017
NJ ABUODHA, J
SEPTEMBER 23, 2022**

BETWEEN

JOSEPH KIPROP KOECH 1ST CLAIMANT

JAMES MAIYO 2ND CLAIMANT

AND

JALARAM LIMITED (SHIV KRUPA RESPONDENT

RULING

1. By a Motion dated 10th November, 2021 the respondent/ applicant sought orders among others that:
 - a. That this honourable court be pleased to stay of execution of judgment in Eldoret ELRC No. 205 of 2017 herein pending the hearing and determination of this application.
 - b. That the ex-parte hearing and resultant judgment be set aside and the matter be heard in merit.
 - c. That there be direction that the hearing of the main suit be heard afresh and applicant be allowed to defend suit accordingly.
 - d. That the applicant be granted leave to enter appearance to file a response to the statement of claim and all necessary documents.
2. The application was supported by the affidavit of one Amin Natial Kirithbai who deponed among others that:
 - a. That I am the director of the Applicant herein hence duly competent and qualified to swear this affidavit.
 - b. That the applicant got wind of this matter on 11/10/21 after being served with the taxation notice and party to party bill of costs.



- c. That the claimants are strangers to the applicant as they have never at any time worked as their employees.
 - d. That the applicant uses an agent to hire their employees and that both claimants were not it's employees.
 - e. That on 15/10/21 the applicant went ahead and did a search at Kenya union of Commercial Food & Allied Workers claimants based in Eldoret where it found out the claimants are not registered Members of the union.
 - f. That the Kenya Union of Commercial Food & Allied Workers membership card presented by the Claimant's is a forgery and the same on 28/10/2021 was made aware to the Directorate of Criminal Investigations vide O.B. No. 3.
 - g. That upon perusal of the court records in this matter, it came to our knowledge that it is alleged that summons and all other documents were served upon the applicant which is false.
 - h. That upon further perusal of the court records that this matter proceeded ex-parte and substantially judgment was entered on 1/10/21 on behalf of the claimants herein at Ksh. 431,377.28.
 - i. That the applicant has never received/nor served with summons to enter appearance or any other documents in regards to this matter physically by any person.
 - j. That the applicant has never received/nor served with summons to enter appearance or any other documents in regards to this matter via our postal address 215-30100 Eldoret or by personal service and shall request for cross-examination of the persons alleged to have affected the services.
3. The 1st claimant filed Replying Affidavits on his behalf and that of the 2nd claimant in which he stated inter alia that:
- a. That it is within my personal knowledge that summons to enter appearance and statement of claim was served upon the respondent/applicant on 14th March, 2017. The respondent through the manager refused to sign on the summons to enter appearance as demonstrated by the return of service sworn and filed in court.
 - b. That I have no doubt in my mind that the Respondent/applicant was personally served throughout prior to the matter proceeding exparte for hearing and the respondent choose not to receive mention and hearing notices, affidavit of service on record can confirm this.
 - c. That on 5th May, 2021, the matter proceeded in presence of my advocates on record, despite the applicant being served with the notice for hearing choose not to appear in court to defend the matter.
 - d. The respondent has never bothered to check on the progress of the matter from the date they received summons and the statement of claim in the year 2017 but choose to instruct an advocate at the time of taxation of costs realizing that their property would be attached.
 - e. That it is clear that the respondent/applicant has all the time been declining to receive documents served upon them as is indicated in affidavit of service sworn on 12th October, 2021.



- f. That the applicant cannot claim not to have been notified with the hearing of the matter whilst it's clear that the Respondent has been declining to sign notices notifying the respondent to appear in court either for mention or hearing since the year 2017.
 - g. I am informed by my advocates on record, which advice I strongly believe as true that no defence or response to Memorandum of Claim has been filed. The annexed and unsigned response to Memorandum of claim attached to the application does not raise triable issues as such the application ought not be allowed.
4. From the record, this matter came up before the court for mention several times and in nearly all the occasions; the respondent had been absent. The matter subsequently proceeded as an undefended cause when the court became satisfied that the respondent was duly served but failed and or ignored to enter appearance and file a response to the claim.
 5. In the present application the respondent/applicant has raised two plausible issues which the Court ought to consider seriously in deciding whether to allow the present application or not. First that the person whom the process server alleged was the manager was not a manager and that the process server never disclosed who introduced him to the process sever as a manager. Second. The respondent/applicant has stated that the claimants were neither its employees nor members of the Union alleged. This was confirmed by a letter from the Union stating that the claimants were not its members.
 6. Ordinarily, the Court would be reluctant to set aside a judgment properly entered because to do otherwise occasions to the Court double work. However, where it is clear to the Court that the ex-parte judgement could have been entered either through misrepresentation of facts or mistake, the same may be set aside in the interest of justice. As observed earlier, the applicant contended that the process server did not disclose the person who introduced to him the alleged manager who refused to sign for the summons. Further the respondent/applicants has alleged that the claimants were never its employees and further demonstrated that they made enquiries from the Union the claimants alleged they were members of and the union denied. In the circumstances it would not be in the interest of justice to proceed with execution as it might turn out to be true that the claimants were never the respondent's employees.
 7. In the circumstances the court will allow the application and set aside the ex-parte judgment delivered on 1st October, 2021 and hereby orders that this matter proceeds for hearing afresh.
 8. The respondent is further granted leave to file and serve a response to the claim herein together with supporting documents and witness statements within 21 days of this Judgment and that this matter be mentioned on the 17th day of October, 2022 for directions on hearing and disposal
 9. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

