



REPUBLIC OF KENYA



KENYA LAW
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**Nyaoke v Kenya Post Office Savings Bank (Cause 268 of 2020)
[2022] KEELRC 13235 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 268 OF 2020
CN BAARI, J
NOVEMBER 17, 2022**

BETWEEN

KIPTUM NYAOKE CLAIMANT

AND

KENYA POST OFFICE SAVINGS BANK RESPONDENT

RULING

1. Before court is the respondent's application dated 21st June, 2022, brought pursuant to articles 22, 23, 25, 50, 159 and 165 of *the Constitution* and section 3 (c) of the *Judicature Act*. The applicant seeks orders that: -
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to set aside the Judgment delivered on 17/3/2022 at Kisumu.
 - iv. That the Honourable Court be pleased to grant leave to the respondent/applicant to file their attached response to the Statement of Claim out of time and the same be deemed duly filed.
 - v. The costs of the application be provided for.
2. The application is supported by grounds on the face and the affidavit of Grace Maina sworn on 21st June, 2022. The Applicant avers that she received notice of summons in the suit herein on 7th September, 2021, and a hearing notice on 27th November, 2021, and that she forwarded the same to the Office of the Attorney General to enter appearance and represent them in the matter.
3. It is the applicant's assertion that there was a mix-up at the Attorney General's Registry that led to them not actioning the applicant's instructions with the result that the matter proceeded undefended.



4. The applicant avers that they only got to know of the turn of events when the judgment was served upon them. It is their contention that this was purely a mistake on the part of their Counsel, and which mistake should not be visited upon them.
5. The applicant further avers that they have furnished the Hon. Attorney General's Nairobi Office with instructions, including documents to be relied on in response to the allegations made out in the claimant's Memorandum of claim.
6. The applicant avers that it is in the interest of justice and the dignity of this Honourable court that the application is allowed so that the applicant/respondent may be heard and the matter determined on merit.
7. It is the applicant's position that they prosecuted Cause No. 39 of 2020 filed in Eldoret to its logical conclusion and which case was dismissed.
8. The claimant opposed the application through a replying affidavit he swore on 30th June, 2022. The claimant avers that he served the respondent/Applicant on all occasions, but that the respondent failed to attend court for the hearing. The claimant avers that one of such occasions was on the 26th November, 2021, when he served a hearing notice upon the respondent, and which is evidenced by a return of service.
9. It is the claimant's further assertion that the respondent/applicant had no interest in prosecuting their matter because if they were, they would have made follow-ups with their Advocates.
10. It is the claimant contention that a mix-up at the Attorney General's Office, is not sufficient reason for the respondent's non-attendance since the matter was filed. The claimant further avers that the respondent's is a case of indolence and not a genuine mistake.
11. The claimant prays that the application is dismissed with costs.
12. Parties canvassed the application vide written submissions, and which have been duly considered.

Determination

13. I have carefully considered the application by the respondent, together with the grounds and affidavit in support, the claimant's opposition captured in his replying affidavit, and the submissions by both parties. The issue that fall for determination is whether the respondent/applicant is deserving of the orders sought.
14. The applicant/respondent contends that by virtue of articles 159 (2) (d) and 50 of *the Constitution*, the court is obliged to hear and determine each case on its merits and that no litigant should be driven from the seat of justice.
15. There is no doubt that the court has discretionary power to set aside an ex parte decision such as the one before this court. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR, it was held:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”
16. In the case *Mohamed E. Another -v- Shoka* (1990) KLR 463 the Court set out the factors that would guide in setting aside an interlocutory judgment to include:



- i. Whether there is a regular judgment;
 - ii. Whether there is a defence on merit;
 - iii. Whether there is a reasonable explanation for any delay;
 - iv. Whether there would be any prejudice.
17. It is not disputed that the claimant served notices upon the respondent/applicant on every instance when the matter was to come before court. It is therefore true that the judgment subject of the instant application was regularly entered. In *Mwala -v- Kenya Bureau of Standards EA LR (2001) 1 EA 148*, the court stated;
- “To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”
18. The reasons for non-attendance and the failure to defend the suit is attributed to a mix-up at the Attorney General’s Office registry. This has not been substantiated, and does not in my view, amount to a reasonable explanation for the respondent/applicant’s failure to attend court and defend the suit.
19. Further, the applicant/respondent has through the annexures to the instant application demonstrated that it is only after judgment was pronounced in the matter that they furnished the Attorney General’s office with their instructions on the matter. It is indeed evident that the judgment seem to have awoken the applicant from their two years of slumber.
20. In *Shah v. Mbogo & Another (1967) EA 116*, the Court of Appeal of East Africa stated:
- “This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
21. The court notes that the hearing notices were served upon the Respondent/Applicant and not the Attorney General’s Office, obviously owing to the fact no appearance was entered on their behalf by the Office of the Attorney General.
22. The various instances when service was effected upon the Respondent should in my view, have alerted the Applicant that the Attorney General had not entered appearance on their behalf. This to me, does not look like a mistake of counsel. This is a party that simply did not take their case seriously and does not deserve the court’s exercise of its discretionary power.
23. I conclude by holding that the application lacks merit and is dismissed with costs.
24. It is so ordered.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH
DAY OF NOVEMBER, 2022.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Chepkwony Present for the Claimant

