



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1093 OF 2015

EZEKIEL KEBONDO MUHINDI.....CLAIMANT

VERSUS

LEGATO CITY AND COUNTRY GETAWAYS.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 11th December 2020 seeking to be heard for orders that the final judgment entered against the Respondent on 12th May 2017 be set aside and for leave to file an Answer to Claim out of time and defend. It also seeks for costs of this application to be provided for. The Application is premised on the grounds that final judgment was entered following an ex- parte hearing and that the Respondent was not served with Summons to enter appearance. The motion also seeks that the Respondent who has now been proclaimed for attachment to satisfy the decree herein has a plausible answer to the claim and prays for an opportunity to be heard on merit. The Application is supported by the Affidavits individually sworn on 14th December 2020 by the owner of the Respondent, Rhoda Odeng Wilhelmsen and a former manager of the Respondent, Eva Oduor. Ms. Wilhelmsen avers that her personal goods were proclaimed on 3rd December 2020 and could be attached any time. The Applicant asserts that the suit is a non-starter as the Respondent is not properly described and sued and that the entity sued is not the one she owns and that she will have been condemned unheard if execution proceeds and her goods are attached. She believes the Court always gives parties a chance to ventilate their case and avers that the Claimant will not suffer any loss and damage that cannot be compensated by way of costs if the orders sought in the Application are given. Ms. Oduor denies being served with Summons to Enter Appearance as deponed by the process server. She avers that she has never been the Managing Director of the Respondent which business cannot have a managing director because it is not a limited liability company but is a business registered under the Registration of Business Names Act.

2. The Claimant filed his Replying Affidavit sworn on 24th December 2020 wherein he depones that the suit cannot be defeated for indicating to be as against a business name, Legato City and Country Gateways. He asserts that the suit is properly filed since Rhoda Odeng Wilhelmsen trades as Legato City and Country Gateways and that the description of the Respondent does not matter as long as it is associated with the Respondent herein. He further avers the Summons to Enter Appearance was duly served as per the affidavit of service sworn on 4th May 2016 by Mr. Francis M. Maina and that the Respondent was duly served on at least two occasions but chose to ignore the court's proceedings. He notes that the Respondent has not sought to cross-examine the process server who effected service. The Claimant further asserts that the Respondent has come to court late in the day considering that service of the pleadings and summons to enter appearance was done more than four years ago. He avers that the draft Answer to the Claim raises no triable issues and allowing the subject application would only lead to waste of judicial time and resources and that the Respondent merely wants to prevent him from enjoying the fruits of his judgment.

3. In response, Ms. Rhoda Odeng Wilhelmsen filed a Supplementary Affidavit sworn on 20th January 2021. She avers that there does not exist a limited liability company by the name Legato City and Country Gateways and that the Court should thus find and hold that there does not exist a suit against her t/a Legato City and Country Gateways. That a limited liability company is a separate entity from its owners or directors and is different from a business and which is why the description of the Respondent matters and goes into the core of the suit. That this is a key triable issue which ought to set aside the final judgment and prays to be allowed to defend the suit.

4. The parties filed their respective submissions to dispose of the application. The Respondent/Applicant submitted that where summons are not served, judgment ought to be set aside as a matter of right because it is an irregular judgment, as was stated in the case of **Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR)**. The Respondent further submitted that the Court has the discretion to still set aside a regular judgment as long as sufficient reason why the defendant did not enter appearance or file a defence is given. In support of this the Respondent cited the cases of **Shah v Mbogo** and **Patel v E.A. Cargo Handling Services Ltd** as well as the case of **Esther Wamaita Njihia & 2 Others v Safaricom Limited [2014] eKLR**, on the discretion of court to be exercised to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error. The Applicant submits that the Claimant ought to have made personal service of the Summons to Ms. Rhoda Odeng Wilhelmsen as the owner of Legato City and Country Gateways and that serving summons on Eva Oduor was irregular and cannot hold water. The Applicant submitted that it is like filing suit against KMAU of NYER1 and serving summons upon ONYANGO of HOMA BAY and she asserts that Eva Oduor was a stranger to the proceedings. The

Applicant urged this Court to read the supporting affidavit and find and hold that the Respondent has established her case for setting aside judgment. The Respondent/Applicant further submitted that the interest of the Court is to do justice to the parties who come before it and which is the reason why the Court has unlimited discretion. The Applicant urges the Court to grant the orders sought and submits that the grounds to consider for an application to set aside *Ex-parte* judgment were summed up in the case of **Stephen Ndichu v Monty's Wines and Spirits Ltd [2006] eKLR** where the court stated as follows:

*"...The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See **Sebei District Administration v Gasyali [1968] E.A. 300**). It also goes without saying that the reason for failure to attend should be considered."*

The Applicant thus urged the grant of the prayers sought.

5. The Claimant/Respondent submitted that there was proper service upon the Respondent which even is explained and described in the Affidavit of Service sworn on 4th May 2016 by Mr. Maina. The Claimant submitted that Rhoda Odeng Wilhelmseng has admitted in her affidavit sworn on 14th December 2020 that Ms. Eva Oduor, who received the summons to enter appearance as well as the pleadings, worked for the Respondent. The Claimant submitted that even though Ms. Eva Oduor denies being served, she does not explain where or what she was doing at the date and time of service of the summons. Further, the position of a Managing Director being non-existent does not take away the fact that Ms. Oduor was duly served with the summons to enter appearance and the pleadings. He refers this Court to *paragraph 8 of the draft Reply to the Memorandum of Claim* which he submits the same appears to be an admission that the Respondent received the said summons and pleadings but failed to act because the Claimant's claim is 'unjustified'. The Claimant submitted that the process server further talked of the supervisor named Benson and who called the said Ms. Oduor and that the Applicant has not denied it had an employee by the name Benson. That if the Respondent's position is that it was not served, it should not have delved into whether a court would set aside a judgment where proper service was effected. The Claimant further submits that the Respondent/Applicant is guilty of laches. That even if the Respondent/Applicant became aware of the subject suit on 3rd December 2020, it took more than ten days to file the subject application which is presumed to have been filed on 14th December 2020, the date of the Certificate of Urgency. That it is clear the Respondent/Applicant waited until judgment was delivered and decree extracted for it to exercise its so called right to be heard. He submits that he who comes to equity must come with clean hands and that the Respondent herein must realize that choices have consequences. The Claimant submitted that the Respondent/Applicant having not offered any plausible excuse or reason for not entering appearance as required by law, the principal objective of this Court as under Section 3(1) of the Employment and Labour Relations Court Act can only be met if the Respondent's Application is dismissed.

6. The Claimant/Respondent submitted that the suit shall take much longer should the Respondent's application be allowed and he will continue suffering as he shall be forced to continue struggling to eke out a living after losing employment with the Respondent. That this Honourable Court should determine whether the draft Reply to the Memorandum of Claim raises triable issues which he submits is just a mixture of mere denials and subtle admissions. That the Respondent/Applicant has also not presented any evidence in the affidavits supporting the Application, which would demonstrate the Claimant's involvement in any workplace malpractice and that having the matter proceed for trial *de novo* would be a waste of precious judicial time. He further submits that it would only be fair for the Respondent/Applicant to deposit the entire decretal amount in Court or in a joint interest earning account to be opened in the names of the Advocates for the Claimant and the Respondent. The Claimant/Respondent's submitted that Eva Oduor has admitted in her affidavit having been the Respondent's former manager and there is no better person to effect service upon than a manager of the Respondent who also qualifies to be an employer as per definition under Section 2 of the Employment Act, 2007 as hereunder:

"...any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company."

7. The Claimant submitted that the argument that the wrong person was served has no basis. He further submitted that the Respondent should not run away from its obligations merely because it is registered under the Business Registration Act and not the Companies Act and that what matters is the existence of an employment relationship and that Article 159(2)(d) of the Constitution of Kenya, 2010 provides that justice should be administered without undue regard to procedural technicalities. He relies on **ELRC Cause No. 559 of 2019 Bakery, Confectionery, Food Manufacturing & Allied Industries v Bafagih Bakeries [2020] eKLR** where the court stated that labour contracts are special contracts and that the respondent, whether registered under Registration of Business Names Act or later under the Companies Act, did not change its character as the Employer of the Unionisable Employees represented by the Claimant Union. The Court also discussed the term 'Employer' as defined under Section 2 of the Labour Relations Act, No. 14 of 2007.

8. The Court is required to consider factors brought to fore in the case of **CMC Holdings Limited v Nzioki [2004] 1 KLR 173** where the Court of Appeal considered the grant of discretionary orders to set aside. The learned Judges of Appeal, Tunoi, O'Kubasu JJA, Onyango Otieno Ag. JA (as they then were), held as follows:-

1. In an application before a court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.

2. On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.

3. In law, the discretion on whether or not to set aside an ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.

4. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.

5. *In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.*

6. *In an application for setting aside ex parte judgment, the Court must consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raised triable issues.* (emphasis mine)

9. The Claimant obtained a judgment against the Respondent and was in the throes of execution when the instant application was filed. The Applicant asserts there was no proper service and that the Respondent does not trade or operate as a limited liability entity. The Respondent is stated to be distinct from the Applicant whose goods have been proclaimed. The Applicant is waxing both hot and cold. The affidavit of Ms. Oduor suggests that service was effected on her when she was employed by the Applicant. It is the nit picking as to what registration regime the Respondent herein is registered that is offered as the reason why there was no entry of appearance or an attempt at defending the suit. That is not sufficient grounds to prompt the Court to exercise its discretion to set aside. Application by the Applicant is devoid of merit and is dismissed. Execution may proceed forthwith.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2021

NZIOKI WA MAKAU

JUDGE