REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 53 OF 2020

GABRIEL MAINA.....CLAIMANT

VERSUS

SOS CHILDREN'S VILLAGES KENYA.....RESPONDENT

RULING

1. The motion before this Court is the Respondent's Application dated 21st July 2021 filed under a certificate of Urgency seeking orders that;

a. *Spent*

b. *Spent*

c. The Honourable Court be pleased to set aside the *ex-parte* Judgment delivered on the 7th July 2021 and all consequential orders thereto.

d. The Respondent/Applicant be granted leave to defend the claim and to file its Statement of Response out of time *ex debito justitiae*

e. The Court do grant unconditional leave to the Respondent to defend the suit and the draft defence annexed be deemed as properly filed.

2. The Application is supported by ground set out in the Affidavit sworn by Ms. Rebecca Kiganane and Mr. George Mabeya Masese Advocate sworn on the 21st July 2021 to the effect that failure to enter appearance and file pleadings was occasioned by lack of valid service to the Applicant and the advocate. It was further averred that non-attendance was due to technical mishap leading to the Respondent's call being dropped on the 16th July 2021.

3. The matter was disposed of by way of submissions and the Respondent/Applicant submitted that the law governing an application to set aside an interlocutory judgement is contained in Order 10 Rule 11 that states as follows;

11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

4. The Respondent submits that the Court is therefore clothed with a wide discretion to set aside any judgement entered in default of appearance. In this regard it is the Applicant's submission that without prejudice to the reasonable explanation given by the Applicant, the Court has the absolute discretion to set aside a judgement in default unless the same has been delivered on its merits. The Respondent/Applicant relied on the case of **John Peter Kiria & Another *v* Pauline Kagwiria [2013] eKLR** where the Court cited with approval the Court of Appeal decision the case of **Philip Keipto Chemwolo and Mumias Sugar Co. Ltd *v* Augustine Kubende (1982) 1 KAR 1036**;

"*The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a* prima facie *defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for*

allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

5. The Respondent/Applicant submitted that it has availed to this Court an explanation in the Supporting Affidavit by Rebecca Kiganane and George Masese sworn on 21st July 2021 to the effect that the failure to enter appearance and file pleadings was occasioned by lack of valid service to the Applicant or the Applicant's Advocates. It further also went to the technical misshap when the Applicant's Advocate logged into the virtual court on the alleged hearing date court session on 16t July 2021, but the call was dropped. It is the Applicant's submission that the explanations availed in the Supporting Affidavit are enough to amount to a reasonable explanation of the events leading up to the failure to enter appearance and file pleadings and would therefore warrant the use of this Courts discretion in favour of the Applicant. 6. The Respondent/Applicant further places reliance in the case of **John Peter Kiria & Another *v* Pauline Kagwiria** *(supra)* where the Court quoted the Judgement of Apaloo JA.

"Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case determined on its merits."

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the respondent will not agree. I am unwilling to believe that in opposing the application for setting the judgment aside and allowing a hearing on the merits, the object of the respondent was to snap at the judgment in a case in which if the defendants were permitted a hearing, the quantum of the liability to pay damages may be much less.

6. It is the Applicant's submission that this Court must see the events leading up to the ex-parte hearing and the Judgement entered simply as unfortunate blunders that should not be used to deny justice. The Respondent submits that it is also clear from the Supporting Affidavit of the Applicant that there was no fraud or intention to overreach on the part of the Applicant and this Court should therefore allow the application as prayed. It is the Applicant's further submission that the ends of Justice would be best served by allowing the parties to ventilate the matter fully on its merits. It is the Applicants further submission that the ends of Justice would be best served by allowing the parties to ventilate the matter fully on its merits. The Respondent/Applicant submit that the Constitution of Kenya, 2010 places on this Court the overriding objective of facilitating the just resolution of disputes and further states that in the exercise of its powers the Court should seek to give effect to the overriding objectives. In this regard the Court is obliged to ensure that substantive justice is done without undue regard to technicalities. The Applicant herein asserts that it has further attached a draft Statement of Defence to the Claimant's Statement of Claim action in the Supporting Affidavit of Mabeya George Masese as "Exhibit MGM 4" which this Court should allow them to canvass in order to establish the rights of the parties. The Respondent/Applicant placed reliance on the case of **Equity Bank Limited *v* Kathreen Wamiti & 2 Others [2012] eKLR** the Court stated as follows;

The principles that the court should apply in exercising its discretion to set aside the default judgment are well-settled. In SHAH VS. MBOGO (1967) E.A 116 the court laid the following criteria:

"The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise) to obstruct or delay the cause of justice".

The Respondent submitted that the above position was expounded further in the case of **Morris & Company Limited *v* Victoria Minerals & Chemicals Limited & Another [2007] eKLR** where Waweru J. held as follows:

"The main concern of the court is to do justice to the parties before it. Its discretion will be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error..... Each case will depend on its own facts and circumstances. The court will look at the nature of the case, the conduct of the parties prior to, during and after judgment sought to be set aside. It will also consider if the Defendant has an arguable

defence to the claim."

As regards an arguable defence the Court went on to state;

With regard to the test of whether or not the Applicants have arguable defences, in the context of the present application, I am not required to evaluate whether or not the points of defence raised will upon subjecting the matter to trial succeed. I am only required to establish that the points are ex facie reasonable points of defence to the claim. This approach was laid down in the case of TREE SHADE MOTORS LIMITED V. D.T. DOBIE & ANOTHER (1995-1998) EA317 (CAK) Where the Court of Appeal held as follows:

"Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex parte judgment aside".

7. The Respondent/Applicant asserts that in the draft Statement of Defence attached to the Supporting Affidavit has raised the following issues *inter alia* that: There was a valid reason why it considered and contemplated taking severe disciplinary action against the Claimant. Prior to such severe disciplinary action, it subjected the Claimant to a fair process as contemplated in section 41 of the Employment Act. That the issues that led to dismissal of the Claimant from the Respondent's service were matters that the Respondent's service were matters

that the Respondent genuinely believed to be true. It is the Applicant's submission that these issues constitute triable issues that the Court should allow parties to ventilate in order at least to apportion liability in a just and fair manner. The Applicant submits that it has fulfilled the principles and/or factors the Court should consider when determining an application for setting aside an ex-parte Judgement or order. The Respondent cited the Court of Appeal decision in **Pithon Waweru Maina *v* Thuku Mugiria [1983] eKLR** as demonstrated below:

> *(a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.*

8. The Applicant submitted that it has demonstrated that his absence and non-participation in the hearing was occasioned by lack of proper service as required by the law. Under this limb, the Applicant submits that having demonstrated that non-appearance in court was not his doing and/or intentional, the Applicant prays that the court exercises its discretion to set aside the judgment entered and set the matter for proper hearing.

9. The Application is opposed by the Claimant whose counsel on record Mr. Kofuna Lawi Advocate swore an affidavit dated 3rd August 2021 disputing each and every claim by the Respondent.

10. The parties were to dispose of the application by way of submissions and the Claimant/Respondent isolated the following issues for determination:-

i. Whether the respondent was served with pleadings

ii. Whether the judgment was regular

iii. Whether the applicant should be granted leave and opportunity to present their case.

As to whether the Respondent/Applicant was served with the pleadings herein, the Claimant submitted that the Replying Affidavit at Paragraph 5 states that the Respondent/Applicant was served with said pleadings. Indeed, the Applicant has not sought to cross-examine the Process Server who served it with summons to enter appearance. The Claimant submits that in essence, the Process Server's Affidavit is unchallenged and therefore proof that the Respondent/Applicant was duly served but chose to ignore the Court process. As to whether the judgment was regular, the Claimant submitted that as a matter of when the matter came up before the Court on 2nd February 2021, the Court ordered that fresh service be effected upon the Respondent and the Respondent was subsequently served as can be evidenced by the notices marked in the affidavit in reply as annexures **KOL-3**, **KOL-4** and **KOL-5**. The Claimant submitted that this Court should take judicial notice that all the said notices were acknowledged by the Respondent and at each mention and the hearing date; the Court satisfied itself that proper service had been effected. The Claimant submitted that both the Affidavits filed on behalf of the Respondent, it was acknowledged that the notices were indeed received. The Claimant submit that such admission is a clear indication that the process leading to the judgment was regular and the Respondent was given adequate notice to present its case but ignored to do so. The Claimant submitted that the averment at Paragraph 10 by Mabeya Masese, advocate that on the 16th June 2021 he logged on to the Court portal on the date of the formal proof and that the Judge indicated that the matter would be called later is utterly false and an attempt to drag the Court into his misdoings. It was submitted that no explanation has been given for failure to enter appearance, attend the mentions, attend the hearings and even the judgment date. The Respondent's averment that the advocate was unable to log in is a desperate attempt to further delay the matter. The Claimant submitted that from the foregoing, it is evident that the judgment was procured regularly following all the stipulated procedures in law. The Respondent's allegation that judgment was procured irregularly is absolute falsehood which holds no water. The Claimant submitted that he requested the Court to have the matter proceed as undefended cause after according the Respondent sufficient time to defend the suit and it is upon failure by the Respondent to defend the cause within the reasonable time that the Court approved the Claimant's request for the matter to proceed to hearing since the applicant had slept on its rights to defend. As to whether the applicant should be granted leave and opportunity to present their case the Claimant submitted that by examining indispensable canons that should guide the courts in conducting proceedings from the date of instituting of a suit to the date of delivery of judgment/ruling the Claimant urged that we remind ourselves of the widely embraced doctrine, **'litigation must come to an end'**. The Claimant asserted that this doctrine undeniably rubberstamps the requirement that cases should be dispensed with as quickly as possible and this cannot be achieved without considering the "overriding objective" under Sections 3 of the Employment and Labour Relations Court Act, 2011 and the provisions of Article 159(2)(b) of the Constitution of Kenya 2010. The Claimant argued that the purpose of the overriding objective is for the dispute resolution process to be fair, fast and inexpensive. The Claimant asserted that the courts' duty in performing such mandate under Section **3** of the Employment and Labour Relations Court Act, 2011 requires the just determination of the proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. The Claimant submitted that this is fortified by the provisions of Article 159(2)(b) of the Kenya Constitution 2010 which propounds that in exercising judicial authority, the courts and tribunals shall not delay justice. The Claimant urged the Court to bear in mind is whether by allowing this application and by extension granting prayer 3, 4 and 5 of the application, it will be advancing the overriding objective principle and the spirit and letter of Article 159(2)(b) of the Constitution. The Claimant submitted the Applicant is engaging the Court and the Claimant in games aimed at defeating the whole process of justice. The Claimant submitted that judicial process has never been at the whim of the litigants and their corporation to ensure that matters is dispensed with expeditiously is not only a requirement but an obligation. The Claimant submitted that Courts thus should never shy away from taking steps to ensure that justice is served and served expeditiously. The Claimant submits that whereas the applicant has the right to be heard, the same must be weighed against the interest of justice as the Court cannot force a party to appear before it in their case. Further, in the present circumstances the applicant was accorded all the necessary opportunity to be head. The waiver of the same as displayed by the applicant cannot be to the detriment of the Respondent. The Claimant relied on the decision of the Court in **R *v* Aga Khan Education Services *ex parte* Ali Sele *&* 20 Others [2010] eKLR** where the Court while considering the applicability of the rules of natural justice held *inter alia:*

> *"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the Court and there cannot be a general requirement for hearing in all situations. There will be for example situations when the*

need for expedition in decision making far outweighs the need to hear the other side and in such situations, the Court has to strike a balance." (Emphasis supplied).

The Claimant further relied on the case of **Egal Mohamed Osman *v* Inspector General of Police & 3 Others [2015] eKLR** where Court held:-

Thus far, it is clear that the right to be heard is not absolute and is not necessarily always strictly applied. It is a right that can be limited under the provisions of Article 25 of the Constitution and to the extent set out under Article 24 of the Constitution.

11. The Claimant submitted that there was a limitation in the provision of Article 24 in the following terms:

"24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

12. The Claimant submits that that limiting the applicant's right to be heard after they on many occasions slept on their rights is well within the precincts of justifiability. The Claimant/Respondent having set the matter down for hearing and notified the applicant, it was judicious for them to be available to ensure that their side of the story was heard. The only inference that the court could draw from the conduct of the applicant was a party who had waived his right to be heard if not to drag the proceedings. The Claimant submitted that the need for the limitation of the right in these circumstances outweighs the individual's right to enjoy the right or freedom in question. There was no other remedy known in law that the court could invoke at that point in time. The Claimant submitted that in the present case, the matter proceeded and the court weighed the averments by the Claimant against the evidence provided and proceeded to enter judgment. It will be noted that in employment cases, there is no automatic outcome that judgment will be entered in favour of the Claimant. There are innumerable instances where causes have been dismissed for failure by the Claimant to meet the evidential burden. In the present case, the Court was duly satisfied that the Claimant had proven his case. The Claimant submitted that the applicant has not met the condition precedents set on the prayers sought and thus urged the dismissal of the motion as the same are aimed at delaying the judicial process and by extension sabotaging justice. The Claimant urged the Court to be guided by the wise words of Kiage JA in **Nicholas Kiptoo Arap Korir Salat *v* Independent Electoral Boundaries Commission & 6 Others [2013] eKLR** when he observed***;***

This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

13. The foregoing is sufficient to allow the Court to dismiss the Applicant's Notice of Motion dated 21st July 2021 with costs to the Claimant as I hereby do.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE