



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**CAUSE NO. 103 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**ANDREW SIKUKU.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT KIBISI FYM PRIMARY SCHOOL.....RESPONDENT**

**RULING**

1. Applicant prays the court to set aside the *ex parte* judgment delivered on 27<sup>th</sup> July 2018 in favour of the respondent.
2. The application was filed on 25<sup>th</sup> April 2019, about one year and three months from the date of judgment.
3. The application is premised on grounds set out on the face of the notice of motion to wit:
  - (i) Summons to enter appearance were not served on the applicant.
  - (ii) The alleged service of summons is suspicious and incapable of belief.
  - (iii) The applicant has a good defence with triable issues.
  - (iv) It is in the interest of justice that the judgment be set aside.

These grounds are advanced further in the supporting affidavit of Mr. Cedrick Chimakile Musa, the head teacher of the respondent school.

4. The application is opposed vide a replying affidavit of the claimant sworn on 12<sup>th</sup> September 2019 in which the claimant reiterates assertion made in court at the time of hearing that the respondent was served with the statement of claim and summons to enter appearance on 16<sup>th</sup> November 2017.
5. Affidavit of service was filed by one Emmanuel Wanyonyi, an authorized court process server who deposed that on 16<sup>th</sup> November 2017, he received the statement of claim and summons to enter appearance from Masika and Koross advocates for the claimant.
6. That on the same day he proceeded to the physical address of the respondent school at Natiri and arrived at 1.20 p.m and he met the security personnel at the gate to whom he identified himself and the purpose of the visit and the security personnel advised that he had instructions to receive documents on behalf of the respondent.
7. The process server proceeded to serve the security officer and he received, signed and wrote his telephone number. The signed notice was filed in court together with the Affidavit of service.
8. The respondent deposes that after lapse of 21 days matter was fixed for directions which notice was served on the respondent and the affidavit of service was duly filed before court.
9. That the respondent did not enter appearance nor file a defence and did not attend the mention date for directions. Matter was set for formal proof on 29<sup>th</sup> May 2018 and it proceeded *ex parte* and judgment was delivered on 27<sup>th</sup> July 2018.

**Determination**

10. The court does not doubt the veracity of the Affidavit of Service filed by the process server. It is not enough for the applicant more than a year from the date of judgment to say, that the alleged service of summons is suspicious without laying out any basis for the alleged suspicion.

11. The delay in filing the application to set aside is grossly inordinate. The applicant did not apply to cross examine the process server. The applicant has not put forth any justifiable reason to have the judgment in favour of the claimant be set aside after three years and three months from date of delivery.

12. The grant of this application would grossly prejudice the claimant who has waited to enjoy the fruits of his judgment for a long time. The application is an aberration on the principle of timely delivery of justice.

13. The court has looked at the statement of defence which is a mere general denial of the claim by the respondent. The principle in **Tree Shade Motors Limited vs DT Dobie and another (1995-1998) IEA 324** is not suited for this case.

14. The court instead relies on the decision in **Felister Nduku Nzaku vs Joyce Wairimu Gitau (2017) eKLR** and declines to exercise its discretion in favour of the indolent applicant upon being satisfied that service was proved and was proper. Failure to attend court is inexcusable in the circumstances of the case.

15. The application is dismissed with costs.

**Ruling Dated, Signed and delivered at Nairobi this 13<sup>th</sup> day of May, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Ocharo for Respondent/Applicant

Mr. Were for Claimant/Respondent

Chrispo – Court Clerk