



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1418 OF 2015**

(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> October, 2020)

FRANCIS MWANGI CHEGE.....CLAIMANT

VERSUS

THE SHEPHERD CATERING LIMITED.....RESPONDENT/APPLICANT

**RULING**

1. Pending for determination before this Court is the Respondent's Notice of Motion Application filed in Court on 14<sup>th</sup> February, 2020. The same is filed under certificate of urgency and is brought under Order 10 Rule 11, Order 51 Rules 1 and 13 (2) of the Civil Procedure Rules, 2010, Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law including the Judicature Act seeking orders that:-

1. This application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance (Spent);
2. The default Judgment entered herein on the 15<sup>th</sup> January, 2020 against the Respondent/Applicant and decree herein together with all consequential orders arising therefrom be reviewed and set aside and the Respondent/Applicant be allowed to defend the suit unconditionally.
3. This Honourable Court do order a stay of execution of the Judgment in default herein and Decree thereof and all consequential orders emanating therefrom be lifted pending hearing and determination of the Respondent's Application herein.
4. The Applicant be granted leave to appear and defend the suit herein.
5. The Costs of this Application be in the cause.

2. The Application is premised on the grounds **THAT**:

- a. The default Judgment obtained ex-parte herein on 15<sup>th</sup> January, 2020, was obtained without intentional or neglect default on the part of the Respondent/Applicant, in view of the fact that the Respondent/Applicant's Advocates inadvertently failed to capture the hearing date in their diary and did not appear in Court when the matter was coming up for hearing nor did they inform the Respondent of the hearing date, despite having entered appearance on behalf of the Respondent/Applicant and filing a Defence and hence the current course of events.
- b. On the date of hearing the suit, an adjournment was sought because the advocate who was handling this suit was indisposed but it was declined and so the defence counsel did not get an opportunity to cross-examine the Plaintiff.
- c. The Counsel one Mr. Samuel Mugambi who was in personal conduct of the suit left the firm without informing the managing partner one Dismas Ndege of the position of the Suit, he only realized there was Judgment after being served with a decree on the 7<sup>th</sup> February, 2020.
- d. The Applicant maintains that the mistakes of an Advocate should not be visited upon an innocent litigant who was not at fault.

**e. He further argues that unless the Orders sought in the instant Application are granted the Claimant shall proceed with execution and that the Applicant stands to suffer irreparable and irredeemable loss as a result thereof.**

**f. He further maintains that the Applicant has a good, solid and meritorious Defence disclosing triable issues and should be heard and the matter be decided on merit.**

**g. The Application has been made without any unreasonable delay.**

**h. This Application will not occasion any prejudice to the Claimant/Respondent for the reason that if granted the suit shall proceed to full hearing and a determination arrived at on merit.**

3. The Application further supported by the Affidavit of **SALOME LENANA**, the Managing Director of the Respondent/Applicant sworn on 13<sup>th</sup> February, 2020, in which she reiterate the averments made on the face of the Application.

4. In response to the Application, the Claimant filed a Replying Affidavit on 28<sup>th</sup> February, 2020 in which he avers that the Application as filed is an afterthought, unmerited, misconceived, bad in law and purely meant to delay him from enjoying the fruits of the Judgment entered in his favour.

5. The Affiant further avers that failure by the Applicant to attend the hearing of this matter on 15<sup>th</sup> October, 2019 was deliberate as it was properly served with the hearing notice on 10<sup>th</sup> June, 2019, about 4 months to the said date and an Affidavit of service filed to that effect.

6. He further averred that the assertion by the Applicant that an adjournment was sought on the hearing date are false and that the same is only meant to mislead this Court as the Court record in this matter clearly indicate what transpired in Court on 15<sup>th</sup> October, 2019.

7. He further contends that the mistakes of the Respondent/Applicant are inexcusable as they were duly served with a Judgment Notice dated 7<sup>th</sup> November, 2019 on 11<sup>th</sup> November, 2019 prior to this Court delivering its Judgment on 15<sup>th</sup> January, 2020.

8. He posits that the reasons advanced by the Applicant for not attending the hearing of this matter to prosecute its case are unconvincing, whimsical and betrays little regards which the Applicant holds for this Court and argued that this Honourable Court ought to disregard the same.

9. The Claimant maintains that the Statement of Response as filed by the Respondent does not raise any triable issues to warrant the discretion of this Court to set aside its Judgment as the same consists of mere denials.

10. In conclusion, the Claimant urged this Court to dismiss the Application as filed with costs.

11. In its brief rejoinder, the Applicant filed a Supplementary Affidavit deponed by **SALOME LENANA** on 24<sup>th</sup> August, 2020 in which she contended that the Replying Affidavit is frivolous & vexatious and urged the Court to disregard the same and instead allow the Application as prayed.

12. She further avers that the Applicant has a good defence with high chances of success and that it is therefore in the interest of justice that it be allowed to defend the suit and a determination be made on merits of the case.

13. The Parties agreed to dispose of the Application by way of written submissions.

#### **Submissions by the Parties**

14. The Respondent/Applicant submitted that it should not be punished for the mistake of its Advocates as an innocent litigant. The Applicant further urged this Honourable Court to give it another chance to defend itself for the reason that a lapse in communication between the Advocates on record is not reason enough to dispose of the entire suit. To buttress this argument the Applicant cited and relied on the case **John Ndungu Njoroge Vs George Waweru in Nairobi HCC Appeal No. 809 of 2005** as quoted in the case of **Benson Nkaulo Vs Samson Kaapei (2019) eKLR** where the Court held that the mistakes of an Advocate ought not be visited upon an innocent litigant.

15. The Applicant argued that the Claimant stands to suffer no prejudice if the default judgment is set aside as the suit will still be determined on merit.

16. The Applicant contends that the Claimant has not demonstrated how he stands to suffer damages that cannot be compensated by way of money in the event the Orders sought in the instant Application are allowed and the matter allowed to proceed to full trial.

17. The Applicant urged this Honourable Court to exercise its discretion in setting aside the default judgment entered in this matter on the ground that it raises a good defence with triable issues. For emphasis the Applicant urged this Court to be guided by the decision in the case of **Sammy Maina Vs Stephen Muriuki (1984) eKLR** where the Court while quoting the decision in **Patel Vs EA Cargo Handling Services Limited (1974) EA 75** held that a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication.

18. In conclusion the Applicant urged this Honourable Court to find its Application with merit and allow it in terms of the reliefs sought therein.

## **Claimant's Submissions**

19. The Claimant on the other hand maintains that the Application and reasons given by the Applicant for failing to attend court for hearing lack merit and therefore urged this Honourable Court to dismiss it with costs. For emphasis the Claimant cited and relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010.

20. The Claimant further submitted that the Applicant has failed to provide sufficient reasons to warrant this Court to exercise its discretion in setting aside its judgment. He further contends that the Application as filed is devoid of merit as proper service of all the requisite notices was done as required under law and therefore the Applicant's failure is inexcusable and unfounded. To buttress this argument the Claimant cited and relied in the cases of **Wachira Karani Vs Bildad Wachira (2016) eKLR** and **Esther Wamaita Njihia & 2 Others Vs Safaricom Ltd (2014) eKLR** where the Courts held that the Court's discretion to set aside Judgments must be exercised sparingly to avoid injustice or hardship resulting therefrom.

21. The Claimant contended that no evidence has been led by the Applicant herein to show that they were present in Court when the matter was scheduled for hearing as pleaded. He further argues that the Applicant's contention that its failure to attend Court was due to a mistake of its Advocates on record does not hold water and urged this Court to be guided by the Court of Appeal decision in the case of **Tana and Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR** and accordingly dismiss the same.

22. He further argued that setting aside the Judgment will greatly prejudice him as he did as required by law serve all the necessary notices upon the Respondent herein who chose to ignore the same.

23. In conclusion the Claimant urged this Honourable Court to dismiss the instant Application with costs to the Claimant.

24. I have examined the averments of the Parties herein. I note from the Court record that this suit was filed on 14/8/2015.

25. The Respondents were served and on 11/9/2015, the firm of Ogwoka Ndege & Company Advocates entered appearance for the Respondents. On 2/10/2015 they filed a defence. After all preliminaries, this suit was scheduled to be heard on 15/10/2019 and the Respondent's counsels were served with a hearing notice on 10/6/2019 which they received and stamped as received.

26. On the day for hearing on 15/10/2019, the Respondent did not attend Court. The Respondent avers that he failed to attend Court was because counsel in conduct of this case did not inform the law firm of the scheduled hearing date.

27. Whereas this could be true, this Court notes that this is a Court of both equity and justice. Equity aids the diligent. There is no explanation as to why the Managing Partner of the law firm representing the Respondent did not take due diligent to update the firms' diary after the alleged counsel left the firm.

28. This is an old matter which has been in Court since 2015 and litigation must come to an end. In my view reopening this case will lead to a miscarriage of justice and prejudice the Claimant who though unrepresented has been diligent to pursue his case. I therefore find this application has no merit and dismiss it accordingly.

29. Costs in the cause.

**Dated and delivered in Chambers via zoom this 1<sup>st</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Msafiri for Applicant – Present

No

appearance

for

Respondent