

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 445 OF 2017

PURITY WANJIKU MIGWI (suing as the legal Representative of the estate of

JULIUS KARIUKI NDICHU.....CLAIMANT

VERSUS

VALENTINE ATENYA MUTOKO.....RESPONDENT

RULING

1. The application before me is the one dated 8th October 2018 in which the Respondent seeks leave to defend the suit. The Respondent had failed to file a defence in time upon being served by the Claimant and the suit was slated to proceed as an undefended cause. The Claimant is naturally opposed to the grant of the orders sought in the application. The Respondent argues that there is a triable defence and is determined to defend the suit.

2. The factors to consider in an application for leave to defend are well set in precedent. In setting aside the default judgment entered against the Respondent, I am required to do so on terms that are just. As held in the case of **Patel v East Africa Cargo Services [1974] EA 75**

The main concern of the court is to do justice to the parties and the court will not fetter the wide discretion given to it by the rules... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied there is a defence on the merits.

3. In setting aside the order that the suit is to proceed undefended, the court has considered that the matter was yet to proceed for formal proof and the fact that there is a defence on the merits. The draft memorandum of reply raises triable issues such as whether the deceased was an employee of the Respondent or not. In the premises I will set aside the default judgment entered herein on terms. The Respondent must file the defence and witness statements within 7 days and pay the thrown away costs to the Claimant which I assess at Kshs. 10,000/- within the next 7 days in default of which the matter will proceed as an undefended cause.

It is so ordered.

Dated and delivered at Nyeri this 26th day of February 2019

Nzioki wa Makau

JUDGE