



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 140 OF 2018

MERRY MUKIRIA.....CLAIMANT

VERSUS

METHODIST CHURCH IN KENYA

TRUSTEES REGISTERED & ANOTHER.....RESPONDENTS

RULING

1. What falls for determination is the Respondents' notice of motion application dated 15<sup>th</sup> November 2018. In the motion, the Respondents seek to set aside the decision of this court made on 9<sup>th</sup> October 2018. The Respondents assert that they were not served with the suit papers and only got to learn of the matter at execution stage. It was argued that the Respondents had a viable/ *prima facie* defence to the suit and thus sought leave to defend. The Respondent argued the motion had been filed without inordinate delay. The Claimant was of course not of the same view and filed her replying affidavit in opposition to the motion. The Claimant asserts that the Respondents were properly served and had been unwilling to cooperate when served and the application was therefore an attempt to delay justice. She averred that the same person who has always been served was served with the decree they now sought to set aside and he declined to sign in acknowledgment as usual. She opined that should the court be inclined to grant the prayers sought then the entire decretal sum should be deposited in an interest earning account in the joint names of the advocates.

2. The suit proceeded undefended and the Respondents upon being notified of the judgment sought to set aside the judgment through the motion before me. In the case of **Patel v E. A. Cargo Handling Services Ltd [1974] E.A. 75** Duffus P. held as follows:-

*The main concern of the court is to do justice to the parties and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where there is a regular judgment the as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean in my view, a defence that must succeed, it means as Sheridan J. put it 'a triable issue' that is an issue which raises a prima facie defence and should go to trial for adjudication. (underline mine)*

3. In this motion, even after considering the arguments advanced by the Respondents, there is a draft defence which upon analysis does not disclose any triable issue for my consideration. Further, from the account before me, the Respondents were served in the same fashion as before with the decree they seek to set aside. The Chairman who has been served repeatedly and declined to acknowledge receipt is the bane of the Respondents as they would suffer the consequences of execution as I decline to set aside. The Respondents are undeserving of the exercise of my discretion to set aside. Application is dismissed with costs to the Claimant. Execution may proceed.

It is so ordered.

**Dated and delivered at Nyeri this 19<sup>th</sup> day of February 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

Deputy Registrar