

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 185 OF 2017

VICTOR AMOS NANDI OTIPA.....CLAIMANT

VERSUS

MALPLAST INDUSTRIES LIMITED.....RESPONDENT

RULING

1. The application before me is the notice of motion application dated 14th March 2018 seeking to set aside the judgment of the court issued on 12th March 2018 and for hearing *de novo*. The motion seeks the setting aside as the Respondent's advocate did not attend the taking of a hearing date on 30th November 2017 as directed by the court. The Respondent asserts that it has a defence to the claim. The matter proceeded in the absence of the Respondent or their counsel.

2. The Claimant filed submissions in which it asserted that the Respondent's motion would be time consuming exercise with no success as the Respondent was duly served and had participated in the hearing date being obtained.

3. The criteria for setting aside judgment is well set out in decisions of the Court of Appeal. On my part, I think it is reasonably plain that in order to obtain a setting aside of an *ex parte* judgment certain criteria must be met. An *ex parte* judgment is a judgment that is obtained in the absence of a party or in default of the party appearing and defending the cause. It is not similar to a regular judgment that is obtained on the merits after hearing both parties. 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.

4. In this motion, even after considering the arguments advanced by the Respondent/Applicant, I do not discern a basis to allow the motion to reopen the suit. The Respondent's defence and statements were considered and there is no merit in allowing a party that was indolent in its conduct to delay the end of litigation. I dismiss the application by the Respondent but make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 20th day of November 2018

Nzioki wa Makau

JUDGE