



**REPUBLIC OF KENYA**

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

**CAUSE NO. 229 OF 2014**

**JACOB JOSEPH ONYANGO.....CLAIMANT**

**v**

**JOHN NDUNGU MUREITHI**

**NDUMU HOUSE (ONE IN ONE LODGING).....RESPONDENT**

**RULING**

1. The Court delivered judgment on 10 July 2015 in which it found and held that the dismissal of the Claimant was unfair and he was awarded a total of Kshs 2,645,374/75.
2. The Cause had proceeded *ex parte* after the Court found that the Respondent had been duly served with Notice of Summons and hearing notices twice but failed to file a Response or attend the hearing.
3. On 2 September 2015, the Respondent moved the Court seeking
  1. .... (spent)
  2. .... (spent)
  3. THAT the *ex parte* decree issued by the Court in default of appearance and defense be set aside by the court *ex debito justitiae* or upon the court's exercise of discretion and on such terms as may be just.
  4. THAT the respondent be granted an unconditional leave to defense (sic) this claim.
  5. THAT cost of this application be borne by the claimant.
4. The Claimant filed a replying affidavit opposing the motion on 17 September 2015, and the motion was taken on 22 October 2015.
5. The Respondent raises mainly three grounds in support of his application. These are that he was not served with Notice of Summons because the building mentioned in the affidavit of service, *Ndungu House* is nonexistent; that he has a meritorious defence, a draft of which was annexed to the application and it is to the effect that the Claimant was never his employee ( the named Claimant and documents produced refer to different persons) and, that some portions of the cause of action advanced by the Claimant are statute barred.
6. The Claimant in opposing the application contended that the reference to *Ndungu House* was a typing

error and that service was effected at *Ndumu House* and that Joseph Jacob Onyango and Jacob Onyango Onguawe are the same person.

7. The legal principles applicable to applications such as the instant one are legion and the Court need not turn back/reinvent the wheels.

8. The Court of Appeal discussed the principles in *Pithon Waweru Maina v Thuku Mugiria* (1983) eKLR and made extensive reference to earlier case law in cases such as *Patel v E A Cargo Handling Services Ltd* (1974) EA 75 and *Kanji Naran v Velji Ramji* (1954) 21 EACA 20.

9. From case law, the legal principles are that *there are no limits to the judges discretion except that setting aside should be on just terms, the discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, the Court has no discretion where there was no proper service, the nature of the case should be considered, denying a subject a hearing should be a last resort of a Court and the discretionary power should be exercised judicially and in a discriminatory manner.*

10. The facts as to service of Notice of Summons, and the correct and genuine Claimant/employee as presented by both sides, in the view of the Court, cannot be resolved on the basis of the varying versions given in the papers without in depth analysis. None of the parties saw it necessary to call the deponents of the rival affidavits for cross examination.

11. Further, the Respondent has also raised the issue of time bar. Time bar goes to jurisdiction and is not merely a procedural question.

12. After considering the submissions by the parties and applying the legal principles to the facts as presented, the Court has come to the conclusion that this is a fit case to exercise its discretion in favour of the Respondent but on terms.

13. The Court would therefore grant prayer 3 of the motion in an amended form

- i. that the *ex parte* judgment and decree ensuing therefrom in default of appearance and defense be set aside on conditions
  - a. that half of the decretal sum being Kshs 1,403,261/- be deposited into an interest earning account in the names of the respective parties advocates with a commercial bank to be agreed upon by the parties before 4 February 2016, or in default of agreement on the bank, into Court within the same period.
  - b. That the Respondent files and serves his Response, documents to be relied on and witness statements before 4 February 2016.
  - c. That on failure to comply with order (a) and (b) above, the execution which had commenced do proceed.
  - d. That the Respondent pays the Claimant's thrown away costs of the main Cause and costs of the instant motion.

14. This Cause to be mentioned on 5 February 2016 to confirm compliance/for further directions.

**Delivered, dated and signed in Nakuru on this 22<sup>nd</sup> day of January 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant

Mrs. Ndeda instructed by Ndeda & Associates

For Respondent

Mr. Githui instructed by Githui & Co. Advocates

Court Assistant

Kosgei