



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1763 OF 2013**  
**BENARD ALUMASA MAKOLO.....CLAIMANT**  
**VS**  
**RADAR SECURITY LIMITED.....RESPONDENT**

**RULING**

1. The Respondent's application dated 21<sup>st</sup> July 2015 seeks orders to set aside the judgment entered on 13<sup>th</sup> March 2015 and any consequential decree made thereafter.
2. The application which is supported by an affidavit sworn by Wangai Wanjuhi, Advocate on 21<sup>st</sup> July 2015 is based on the following grounds:
  - a) That default judgment was entered against the Respondent for non-appearance and default of defence;
  - b) That failure to enter appearance and file defence was occasioned by the fact that the Respondent was unable to locate the file at the Registry;
  - c) That despite numerous attempts to enter appearance, the Respondent was unsuccessful;
  - d) That the Respondent was only able to locate the file on 14<sup>th</sup> July 2015;
  - e) That inability to enter appearance has denied the Respondent a chance to defend the claim;
  - f) That the Respondent has a good defence;
  - g) That the application has been filed without delay;
  - h) That the Claimant will not suffer any loss or prejudice that cannot be remedied by an award of damages;
  - i) That it is in the interest of justice that the application be allowed and for the Respondent to defend the suit.
3. In the supporting affidavit sworn by Wangai Wanjuhi, Advocate it is deponed that a hearing notice was served on the Respondent on 16<sup>th</sup> November 2014 upon which Counsel prepared a Memorandum of Appearance dated 10<sup>th</sup> November 2014. Attempts to file the Memorandum of Appearance were however frustrated as the file could not be traced.

4. On 18<sup>th</sup> November 2014, Counsel for the Respondent wrote to the Claimant's Advocates asking for copies of the Statement of Claim, Summons to Enter Appearance and any other documents filed in the matter. Counsel also sought to know the status of the matter and the number of times the file had been placed before the Court.
5. The Claimant's Advocates responded by letter dated 28<sup>th</sup> November 2014, advising the Respondent's Advocates to obtain the documents from their client.
6. On 6<sup>th</sup> July 2015, Counsel for the Respondent wrote to the Executive Officer of the Court complaining about the missing file upon which the file was found.
7. In his replying affidavit sworn on 28<sup>th</sup> September 2015, the Claimant depones that judgment on this matter was entered on 13<sup>th</sup> March 2015 and no leave was sought before the Respondent's current Advocates came on record.
8. The Claimant states that the Respondent ignored the timelines set out in the Procedure Rules of the Court. Moreover, no defence has been exhibited and the Respondent therefore only seeks to delay the cause of justice.
9. It is the Claimant's case that no sufficient reason has been advanced to warrant the setting aside of the judgment and that the Claimant would be highly prejudiced by such an order.
10. The issue for determination before the Court is whether the Respondent has established sufficient grounds for setting aside of the judgment of the Court delivered on 13<sup>th</sup> March 2015.
11. Order 12 Rule 7 of the Civil Procedure Rules allows the Court to set aside an *ex parte* judgment upon such terms as may be just. This power is discretionary and discretion must always be exercised judiciously.
12. In considering a similar application in ***Joseph Macharia Mbugua v M/S Young Club 7 & Restaurant [2014] eKLR*** the Court held that apart from considering the sufficiency of the cause of an applicant's failure to participate in proceedings, the Court ought to inquire into whether the applicant is guilty of obstructing justice. Additionally, the Court is expected to take into account any defence filed by the applicant.
13. A perusal of the court record reveals that the Claimant filed a Statement of Claim on 30<sup>th</sup> October 2013 and Notice of Summons was issued on the same day. Service on the Respondent was effected on 1<sup>st</sup> November 2013.
14. The Respondent was served and acknowledged receipt of hearing notices as follows:
  - a) Hearing notice dated 9<sup>th</sup> December 2013 received on 11<sup>th</sup> December 2013;
  - b) Hearing notice dated 4<sup>th</sup> November 2014 received on 5<sup>th</sup> November 2014.
15. It would appear that the Respondent did not take any action on these occasions and no explanation was offered for this failure.
16. Moreover, apart from a general statement by Counsel for the Respondent that the court file went missing at some stage, there was no demonstration of any real efforts made towards tracing it. In fact, there was no official complaint about the missing file until 6<sup>th</sup> July 2015 when Counsel for the Respondent wrote to the Executive Officer.
17. It seems to me that the Respondent sat on its right to defend the claim for far too long and in the

absence of any credible explanation for this inordinate delay, I decline to exercise discretion in the Respondent's favour.

18. The result is that the Respondent's application is dismissed with costs to the Claimant.

19. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Shijenje for the Claimant

Mr. Wangai for the Respondent