



**REPUBLIC OF KENYA**

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

**CAUSE NO. 477 OF 2014**

**THOMAS ABUGA ETHAMBO.....CLAIMANT**

**v**

**SOPHIA KHALID RATTOS.....RESPONDENT**

**RULING**

1. The Court delivered judgment in favour of the Claimant on 19 February 2016 in which the termination of the Claimant's employment was found unfair and he was awarded Kshs 197,966/60 comprising of compensation, pay in lieu of notice and pay in lieu of accrued leave.

2. The Cause had proceeded as an undefended Cause.

3. On 20 June 2016, the Respondent moved Court seeking

1. ....

2. THAT pending the inter partes hearing and determination of this Application, this Honourable court be pleased to stay the execution process pursuant to judgment obtained herein together with all other orders. 3. THAT the judgment entered against the Respondent herein be set aside together with all consequential orders thereto pending the hearing and determination of this application.

4. THAT upon granting of prayer 3 above, the defendant be granted leave to file a defence and defend this suit.

5. THAT the Honourable court be pleased to order that the matter be re-opened and heard de-novo inter parties. 6. ....

4. The Claimant filed grounds of opposition to the application and the Court took oral submissions on 19 July 2016.

5. The Court has considered the application, grounds of opposition and oral submissions.

6. In the Court's view, the utility of the orders sought will fall or be merited upon a positive outcome on the prayer for setting aside the judgment.

7. The grounds advanced by the Respondent for seeking the orders are that the judgment was delivered without her knowledge and she only learnt of the judgment after service of taxation notice; she was not personally served; that a person who was allegedly served Salim Didi was not her Farm Manager; she was not given a chance to participate in the proceedings/hearing notice was not served; she stands to suffer

substantial loss; she has a good defence to the Cause and that the Court has been moved without undue delay.

8. The legal principles applicable to an application for setting aside an *ex parte* judgment are now legion (see for instance *Kanji Naran v Velji Ramji* (1954) 21 EACA 20); *Pithon Waweru Maina v Thuka Mugiria* (1983) eKLR and *Patel v EA Cargo Handling Services Ltd* [1974] EA 75).

9. The principles are that there are no limits to the judge's discretion to set aside an *ex parte* judgment except that the order should be granted on terms; the Court has no discretion where there has been no proper service; the main concern is to do justice to the parties in order to avoid injustice caused by inadvertence, accident or excusable mistake but not to assist an applicant who has obstructed the course of justice; nature of defence if brought to the court's attention; fact that denial of a hearing ought to be a final resort and whether costs can compensate the Claimant.

10. The Court went to great lengths to set out the history of service of process in the judgment under challenge.

11. The Court has also evaluated the facts as brought forth by the Respondent in the present application and is of the view that order 3 as set out in the motion under consideration should be granted on terms.

12. The Court in effect grants order 3 of the motion on conditions

(a) that the decretal sum of Kshs 197,966/60 and security for costs in the sum of Kshs 45,000/- be deposited into Court on or before 30 September 2016.

(b) that the Respondent to file and serve a Response, witness statement and documents (including employment records if available) to be relied on before 30 September 2016.

13. On failure to comply with any of the conditions, the orders granted herein will automatically lapse and the Claimant will be at liberty to proceed with execution.

14. Claimant to have thrown away costs.

**Delivered, dated and signed in Nakuru on this 23<sup>rd</sup> day of September 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant            Mr. Bichanga instructed by Chepkwony & Co. Advocates

For Respondent        Mr. Opar instructed by Muthanwa & Co. Advocates

Court Assistant        Nixon