



Mirithu v County Government of Kiambu & another (Employment and Labour Relations Cause E162 of 2023) [2025] KEELRC 15 (KLR) (14 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 15 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E162 OF 2023**

**JW KELI, J
JANUARY 14, 2025**

BETWEEN

NAOMI WANJIKU MIRITHU CLAIMANT

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

KIAMBU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. The Applicant vide Notice of Motion Application dated 25th November 2024 brought under the provisions of Article 50 of *the Constitution*, 2010, Sections 1A, 1B, 3A and Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 5, Order 45 and Order 51 of the Civil Procedure Rules, sought following orders:-
 - a. spent
 - b. That the ex parte hearing, judgment delivered on 27th July 2023 and the amended Decree issued on the 28th December 2023 be set aside.
 - c. That the court be pleased to issue an order to review the judgment delivered on the 28th December 2023 and hear the matter afresh on merits.
 - d. That the applicant herein be granted leave to file a response out of time to the claim dated 23rd March 2022
 - e. That the draft replying affidavit marked WW2 in response to the claim dated 23rd March 2022 be deemed properly filed and served.
 - f. That costs be provided for.



Grounds of the application

2. The Application was premised on the grounds on the face of the application and the supporting affidavit of Waithira Waiyaki, the applicant's County Attorney. The deponent averred that the matter proceeded Exparte for non-attendance of the applicant and judgment was delivered on the 27th of July 2023(WW1a was the judgment). That the non-attendance to the hearing was not their fault as the counsel handling, one Lucy Wanjeri on record on behalf of the County Attorney, did not attend court due to a long illness. That they have since appointed another counsel and prepared a draft replying affidavit in response to the claim (WW2 was a copy of the response). That the applicant and the general public would suffer grave financial implications in the event the default judgment and proceedings are not set aside. That they had filed an application dated 26th January 2024 still awaiting ruling.

Response

3. The Respondent was the Decree Holder. He opposed the application vide statement of grounds of opposition dated 4th December 2024 namely; the application is subjudice because the matters in issue in this application are also directly and substantially in issue in the Respondent's application dated 26th January 2024 which has been heard already and is pending fixing of ruling date. That the application is frivolous, vexatious and an abuse of the process of the court and the same should be dismissed with costs to the claimant.

Decision

4. The court directed that the application be canvassed by way of written submissions. The parties did not comply. The Court on perusal of the application and response discerned that the issues for determination in the application were:-
 - a. Whether the application was subjudice
 - b. Whether the application was merited.

Whether the application was subjudice

5. The Respondent in statement of grounds of opposition dated 4th December 2024 stated that the application is subjudice because the matters in issue in this application are also directly and substantially in issue in the Respondent's application dated 26th January 2024 which had been heard and was pending fixing of ruling date. The court perused the said application, which is on the record, and found that it related to stay of execution and lifting of the warrants of attachment on the basis of non-compliance with the provisions of the *Government Proceedings Act*. The Court finds that the instant application related to a different issue of setting aside the default judgment. The court holds that the instant application is not subjudice.

Whether the application was merited

6. The court on perusal of the record finds that there was evidence of service of the hearing notice of the hearing date of 28th February 2023. This was thus a regular default judgment. The applicant stated that the reason for on-attendance was a long illness that befell the counsel on record. There was no response on this issue and the court finds the reason uncontroverted. The court was disturbed as to why the office of the County Attorney representing the applicant, having received the hearing notice did not send a legal representative to inform the trial court of the alleged illness. Nevertheless, the applicant is a public entity and public resources are at risk in undefended suits. There is a draft response annexed



to the application. The court on perusal of the draft response by way of replying affidavit of Waithira Waiyaki finds that there exists arguable defence and the annexed documents which were not before the trial court, related to the employment of the respondent. The Court holds that it is in public interest for the said defence to be considered in the dispute.

7. Before the court is a regular default judgment sought to be set aside. In the Court of Appeal in [*CA No. 6 of 2015 James Kanyita Nderitu V Maries Philotas Ghika & Another*](#) [2016]eKLR it was held as follows as regards setting aside a regular default judgment :- “We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).”
8. Applying the foregoing decision, having held the draft defence by way of replying affidavit raised triable issues, and further there was uncontroverted reason given for the non-attendance. The Court was not satisfied with the reason as the County Attorney could have appointed a counsel to hold brief. The delay in making the application of over one year was not explained. The court considered that with an arguable defence have been demonstrated, it was in public interest to exercise the Court’s unfettered discretion and allow the application by setting aside the default judgment. The court took judicial notice that the applicant is financed by the public exchequer and hence it would not be in public interest to allow the default judgment to stand in view of the triable issues raised in the draft defence.
9. In the upshot the application dated 26th January 2024 is allowed as follows:-
 - a. An Order is issued to the effect that the exparte hearing, default judgment delivered on 27th July 2023 and the amended Decree issued on the 28th December 2023 and all consequential orders be and are hereby set aside.
 - b. An Order is issued granting the Applicant leave to file response out of time to the claim dated 23rd March 2022 within 21 days of this Order and comply with filing of documents and witness statements if any.
 - c. The Respondent/ claimant is at liberty to file reply within 7 days of service.
 - d. Costs of the application to the Respondent.
10. Mention on the 17th February 2025 for pretrial.
11. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF JANUARY, 2025.

JEMIMAH KELI,



JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant : - Ongato

Applicant / Respondent: absent

