



Kudheiha Workers v BOM Dr Babla Diani Girls Secondary School (Cause E090 of 2024) [2025] KEELRC 2355 (KLR) (8 August 2025) (Ruling)

Neutral citation: [2025] KEELRC 2355 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E090 OF 2024
M MBARŪ, J
AUGUST 8, 2025

BETWEEN

KUDHEIHA WORKERS CLAIMANT

AND

BOM DR BABLA DIANI GIRLS SECONDARY SCHOOL RESPONDENT

RULING

1. The respondent, BOM Dr. Babla Diani Girls Secondary School, filed an application dated 25 April 2025 under the provisions of Order 10 rule 11, Order 12 rule 7 of the Civil Procedure Rules, seeking orders.
 - a. The court be pleased to review, vary and set aside the judgment entered on 23 January 2025 and decree, the proceedings thereto and all consequential orders.
 - b. The court be pleased to grant the applicant leave to file a response to the claimant out of time within 14 days hereof and have the matter heard afresh with all parties' participation.
 - c. Costs be provided for.
2. The application is supported by Munira Mbarak Abeid, principal of the respondent school, because the court delivered judgment herein on 23 January 2025 without the respondent having the opportunity for a hearing. The respondent is represented by the office of the Attorney General, which office was not served with summons under sections 26, 27, 28 and 29 of the Employment and Labour Relations Court (Procedure) Rules (Court Rules). The office of the Attorney General was never served with mention notices, hearing notices or judgment notices. The respondent only learnt of the matter when it was served with the judgment.
3. Abeid avers in the affidavit that the respondent is a public institution and will suffer loss and damage if the judgment herein is executed without having a fair chance to argue its case. The application is filed



in good faith, and the court is invited to exercise its discretion and set aside the judgment and allow the respondent to file a response.

4. The claimant filed this suit and deliberately failed to serve the office of the Attorney General.
5. The respondent is already engaged with the Ministry of Education and seeking guidance on how to file a response. The Ministry's position is that the respondent cannot sign a CBA and be compelled to do so without having the ability to meet the ends of justice. The Bard does not pay nonteaching staff, and only the Ministry of Education disburses money, which can take responsibility. As a public school, the respondent is not allowed to sign the CBA with the claimant.
6. In reply, the claimant filed the Replying Affidavit of Francis Omondi, Kwale Branch Secretary, who avers that judgment herein was delivered on 23 January 2025, after the due process, the respondent was served with summons and failed to enter an appearance or attend at the hearing. There are Affidavits of Service to confirm that the summons was issued and served on 26 September 2024. The respondent was further served with amended pleadings and returns filed.
7. The respondent neglected to enter an appearance, hence waived the right to participate in these proceedings. The judgment is regular and lawful.
8. The assertion that the office of the Attorney General was not served is misleading since this does not absolve the respondent as an institution from entering an appearance or ensuring the officer of the Attorney General has done so on its behalf.
9. Omondi avers that while the Attorney General has the authority to appear in court on behalf of government institutions, service can be effected directly on the public institution under Rules 26 to 29 of the Court Rules. There is no absolute requirement that the service must be through the Attorney General.
10. The respondent, through the principal and the Board of Management, was aware of these proceedings as evidenced in a letter dated 9 April 2025 referencing the receipt of a summons to appear in court. In violation of Rule 74 of the Court Rules, the present application is filed three months after judgment without sufficient cause and is meant to frustrate the lawful execution of the judgment.

Parties were directed to file written submissions.

Only the claimant complied.

11. The respondent filed the instant application and took no further action.
12. Indeed, the court is allowed to review its orders where there is a mistake, error or for a good cause. The applicant must demonstrate the discovery of new matter, any error in the face of the record, or sufficient reason to warrant such a review.
13. Save to urge the court that there was no service through the office of the Attorney General, who has the authority to attend to public institutions, there is no matter that arises to justify an order of review in the instant application. Rule 74 of the Court Rules, upon which the instant application is premised, is not addressed at all.
14. The court is also allowed to set aside its orders for good cause and to meet the ends of justice. However, such an order must be premised on the principles set in the case of *Remco Ltd v Mistry Javda Parbat & Co. Ltd & 2 others* that the applicant;

First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito*



Justitiae (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of judicial process itself. Secondly, if the default judgement is a regular one, the court has unfettered discretion to set aside such Judgment and any consequential decree order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the court is to do justice between the parties

15. In this case, the respondent does not deny service of the summons, except that the office of the Attorney General was not served. Upon the service of the summons on the respondent, there was a duty and responsibility to attend and ensure the office of the Attorney General attended on its behalf. This cannot be placed on the claimant to serve the office of the Attorney General, as the respondent is the primary party to attend court and defend itself.
16. The Affidavits of Service filed herein by the claimant have not been challenged as not being correct. There was proper service.
17. The respondent is also seeking leave to file its response out of time. There is no draft response attached to the Affidavit of Abeid. There is nothing to suggest there is a plausible response to the claim herein. What then is the purpose of the application?
18. The respondent was served, took a back seat and watched as matters progressed, and did nothing. Upon service of the judgment, to stall execution, the instant application was filed. This can be the only explanation for the respondent's conduct. This is an abuse of the court process.
19. On the claim costs, having deliberately failed to attend court or offer any response, the claim for costs is not justified.
20. Accordingly, the application dated 25 April 2025 is without merit and is an abuse of the court process. The same is dismissed with costs to the claimant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 8 DAY OF AUGUST 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

