



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 30 OF 2013**

**SEASONS RESTAURANT HOTEL.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**KENYA POWER AND LIGHTING CO. LTD.....DEFENDANT/APPLICANT**

**RULING**

1. The chamber summons application by the applicant dated **7<sup>th</sup> September 2020** prays for orders that leave be granted to the applicant to file a reference out of time in respect to the taxation ruling dated 28<sup>th</sup> May 2020 by Hon. M Kyalo the Deputy Registrar and the taxing master for this purpose.
2. The applicant prays also that the said decision be set aside and the same be taxed afresh. They also pray for the costs of the application.
3. The application is supported by the grounds thereof and the affidavit of **Caroline W Warui** sworn on the even date. The deponent who is the legal officer of the applicant deponed that the applicant was not made aware of the ruling and because of the Covid 19 pandemic they were not able to respond to the said decision early enough by seeking to file this reference.
4. She said that the ruling is full of misdirection in respect to the several items which they need to challenge by way of reference. She said that failure to file the reference was beyond their ability due to the Covid issues.
5. The respondent has opposed the application by way of a replying affidavit of one **Philip Chuma Mburu** dated **26<sup>th</sup> April 2021**. He said that this application is a total abuse of the court process and there is no good reason advanced by the applicant.
6. He said the same has been brought inordinately late three months after the delivery of the ruling. The ruling in any case was delivered by way of email and the applicant neglected to act within time.
7. The court has perused the application as well as the courts record. The court has also perused the submissions by the applicant as well as the attendant cited authorities. The respondent did not file its submissions as at the time of writing this ruling.
8. The application shall be allowed by this court only on one ground namely failure by the respondent to serve the applicant. The affidavit of service on record sworn on **3<sup>rd</sup> February 2020** by one **Fintan Odhiambo advocate** indicates that the applicant was served by way of registered post on **20<sup>th</sup> January 2020**. He attached a copy of the invoice from the courier company. He went on to state that the same was not returned unclaimed.
9. This in my view was unprocedural. Service by post should be as it were a second option and after getting leave of the court. The best and sure service is personal. There was no evidence that the applicant or its representative were not available. Their last physical address was known. Nothing prevented the respondent from effecting personal service as provided under **Order 5 rule 8 of the Civil Procedure Rules**. In my view, this was a lazy service.
10. The applicant has no better reason on its part to argue that it was unable to respond. The issue of Covid 19 was too general and vague. Were it not for the element of service this court would have dismissed the application.
11. The reasons raised and submitted to by the parties in their supporting affidavits and submissions touches on the bill itself and the court for the reasons below shall not delve into them. They should raise them at an appropriate forum otherwise this court may prejudice the outcome of the bill.

12. In the premises, the ruling dated **28<sup>th</sup> May 2020** is hereby set aside. The bill is remitted back to the same taxing master if she is available or any other taxing master to be taxed afresh.

13. The respondent shall have the costs of this application.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 22ND DAY OF JULY 2021.**

**H K CHEMITEI**

**JUDGE**