



Musungu v Human Capital Proactive Consultants Ltd (Employment and Labour Relations Cause 1604 of 2016) [2024] KEELRC 1895 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1895 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1604 OF 2016**

**MN NDUMA, J
JULY 18, 2024**

BETWEEN

MOSES SALANO MUSUNGU CLAIMANT

AND

HUMAN CAPITAL PROACTIVE CONSULTANTS LTD RESPONDENT

RULING

1. The notice of motion application dated 25/4/2024 by the respondent/applicant seeks for an order in the following terms:
 1. Spent
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 3. That the honourable court be pleased to set aside the exparte judgment issued in this matter
 4. That the honourable court be pleased to grant the respondent herein leave to file his response to memorandum of claim out of time.
 5. Cost of the application be provided for
2. The application is premised on grounds (a) to (e) set out on the face of the notice of motion and buttressed in the supporting affidavit of Catherine Kinuthia, a partner in the respondent's company. The affidavit was sworn to on 25th April 2024.
2. The nub of the application is that the respondent/applicant was never served with the statement of claim and summons to enter appearance and only learnt of this matter when the respondent was served with the proclamation of attachment on 22/4/2024.
3. That respondent/applicant has a good defence in that the employment of the claimant was never terminated but the claimant deserted employment and absconded work for five months without leave



and without any reason given. That the last day he reported to work in Kajiado, he was very intoxicated and very rude to customers, his employer and colleagues.

4. That the respondent will not suffer prejudice if the application is granted.

Replying affidavit

6. The claimant/respondent filed a replying affidavit sworn to by the claimant on 29/5/2024. The claimant deposes that the respondent/applicant was duly served with the summons to enter appearance and statement of claim on 22/8/2016. That the summons was duly stamped by the office while acknowledging receipt.
7. A copy of notice of summons dated 12/8/2016 is attached to the replying affidavit bearing a stamp of the respondent dated 22/8/2016 and indicating that service was effected at 12:49 p.m.
8. The claimant has also attached an affidavit of service sworn to by one Richard Wachira, a duly authorized process server of the court. He deposes that on 22/8/2016, he proceeded to the office of the respondent at Phikogoh House 4th floor, Mbagathi Road near Kenyatta Market. He then served notice of summons dated 12/8/2016, memorandum of claim, verifying affidavit, witness statement by Moses Salano Musungu, the claimant and documents attached to the statement of claim dated 11/8/2017. That the documents were given to him by Waiganjo Wachira and company advocates.
9. That the said process server was introduced to the legal officer of the respondent to whom he explained the purpose of the visit and served the court documents to him.
10. That the application is founded on falsehood. That there is no reason disclosed for the failure by the respondent/applicant to defend the suit. That the matter has taken eight years to conclude and the claimant would suffer great prejudice if the court entertains this baseless application. That the court ought not exercise its discretion in terms of Order 10, rule 11 to set aside the judgment. The application be dismissed with costs.

Determination

11. In the judgment of the court delivered on 26/5/2022, the court specifically found that summons to enter appearance and statement of claim had been served on the respondent/applicant who failed to enter appearance nor file a statement of claim.
12. This fact of service has been demonstrated again by the claimant/ respondent vide the replying affidavit.
13. The application by the claimant is based on unsubstantiated allegation that no service of notice of summons and statement of claim was served on the respondent. This allegation by the respondent/applicant is manifestly false. The respondent/applicant did not apply to cross-examine the process server to impeach the evidence of service adduced before court under oath.
14. Clearly, the respondent applicant has not disclosed any justifiable reason why it did not enter appearance or file a statement of defence.
15. This application was only brought when reality of attachment downed on the respondent. The respondent has brought this application about two years after the date of judgment which constitute inordinate delay. No security for costs and decretal sum has been tendered by the respondent/applicant nor has a draft statement of defence been attached to the application to demonstrate that the respondent/applicant has an arguable defence.



16. In the whole, the application is frivolous, lacks any merit and the same is dismissed with costs.

DATED AT NAIROBI THIS 18TH DAY OF JULY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Kinyanjui for respondent/applicant

Mr. Waiganjo for claimant/respondent

Mr. Kemboi Court Assistant

