Wahome v Lupra Manpower & Human Resource Services Limited & another (Cause 924 of 2017) [2024] KEELRC 1851 (KLR) (16 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1851 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 924 OF 2017

JK GAKERI, J

JULY 16, 2024

BETWEEN

HENRY WACHIRA WAHOME ..... CLAIMANT

AND

LUPRA MANPOWER & HUMAN RESOURCE SERVICES LIMITED ..... 1ST RESPONDENT

BASCO PRODUCTS (K) LIMITED ..... 2ND RESPONDENT

RULING

1. Before the court for determination is the 2nd Respondent's Notice of Motion dated 21st March, 2024 filed under Certificate of Urgency seeking ORDERS THAT:-

    1. Spent.

    2. Spent.

    3. Spent.

    4. The judgment and ensuing Decree with all the consequential orders against the 2nd Respondent be varied, reviewed and/or set aside.

    5. Upon grant of prayer 4 above, the 2nd Respondent be granted leave to file its response to the claim and attendant documents within a specified period and the annexed draft response to the claim hereto be deemed as duly filed upon payment of the requisite court fees.

    6. The costs of this Application be in the cause.

2. The Notice of Motion is expressed under Order 10, 12, 22 and 51 of the Civil Procedure Rules, 2010, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the provisions

of *Civil Procedure Act* and is based on the grounds set out on its face and the Supporting Affidavit of Bipin Shah sworn on 21st March, 2024.

3. The affiant deposes that following the judgment delivered on 30th November, 2023 against the 2nd Respondent, Icon Auctioneers issued a Proclamation of Attachment against the 2nd Respondent which was unware of the proceedings against it.

4. The affiant further states that the judgment was obtained through misrepresentation by the Claimant as it only referred him to a medical facility on humanitarian grounds and the amount paid was refundable.

5. That it learnt of the proceedings on 18th March, 2024 when the Proclamation of Attachment was made.

6. That the Claimant was an employee of the 1st Respondent as an independent contractor contracted to supply specific services at the 2nd Respondent which was evident from the Claimant's payslip.

7. According to the affiant, the Claimant was not an employee of the 2nd Respondent when the accident occurred and the Respondent is not liable.

8. That service of summons and mention notice was irregular in that it was not brought to the attention of the 2nd Respondent's officer(s) and thus it could not participate in the proceedings.

9. That the secretary on whom service was effected was unnamed and was not an authorised person or officer of the Respondent.

10. That the judgment and decree should be set aside, reviewed or varied as there is no employer-employee relationship between the Claimant and the 2nd Respondent and the judgment and decree against it is an error.

11. The affiant further deposes that the 2nd Respondent has a valid defence against the claim as the Claimant was not its employee and he has no valid claim against the 2nd Respondent.

12. That the 2nd Respondent stands to suffer irreparably and condemned to bear liability that is not its own.

13. That the 2nd Respondent's failure to participate in the proceedings was a misapprehension that the 1st Respondent had resolved the matter of the accident as it was insured against such eventualities and the application has been lodged expeditiously and the 2nd Respondent is willing to abide by any conditions set by the court for the grant of stay of execution.

14. That it is in the interest of justice that the Proclamation of Attachment and all consequential orders herein be set aside and the 2nd Respondent accorded a chance to advance its defence to the claim.

15. That it is necessary in the circumstances that the Proclamation Decree be stayed and judgment reviewed, varied and/or set aside.

Response

16. In his Replying Affidavit sworn on 5th April, 2024, the Claimant deposes that he filed the instant suit on 17th May, 2017 clearly stating that he was an employee of the 2nd Respondent and both Respondents were served on 25th May, 2017 and both accepted service but only the 1st Respondent entered appearance and filed a Defence on 14th July, 2017 and the matter proceeded as undefended against the 2nd Respondent for failure to enter appearance.

17. That the letter dated 11th August, 2016 referred to the affiant as an employee of the 2nd Respondent and the invoice of Kshs.70,532.00 was sent to the 2nd Respondent and it paid the bill as its Supporting Affidavit shows.

18. The affiant states that the 2nd Respondent is misleading the court as to who his employer was.

19. That the contract produced by the Respondent had no cover page on who the contracting parties are.

20. The affiant deposes that the 2nd Respondent was responsible for taking out Employers Liability and Workers Compensation Insurance in respect of personnel of the 1st Respondent and pay all direct costs of wages, salaries, overtime and disbursement to workers account.

21. That the 1st Respondent was contracted for management services at Kshs.300/= per worker per month.

22. That the 2nd Respondent was responsible for hiring workers to be shared between two service providers and the 1st Respondent issued contracts to employees and would be paid by the 2nd Respondent after completion of the term of the contract.

23. That payments made by the 1st Respondent were refunded by the 2nd Respondent.

24. The affiant depones that the 2nd Respondent has not denied service of summons and mention notice dated 18th October, 2017 and a Secretary of a Corporation can accept service.

25. That the 2nd Respondent had not disclosed the type of contract it had with the 1st Respondent as the alleged specific services were undisclosed and was intended to circumvent the law.

26. That the 2nd Respondent could not take the affiant or confirm that he was an employee or pay the bill if he was not an employee and ought to settle the decree and claim from the 1st Respondent as it purports to have done on the hospital bill.

27. That the 2nd Respondent's hands are tainted with lies, half-truths and non-disclosure for equity to be done to it and it could not deny knowledge of the suit as it blatantly ignored it.

28. That the orders sought, if granted, be conditional and the decretal sum and auctioneer charges (if any) be deposited in an interest earning account jointly held by the advocates for the parties.

29. The affiant deposes that the 2nd Respondent has not offered any justification why the judgment ought to be stayed, varied and/or set aside and the Notice of Motion should be dismissed with costs.

30. The 2nd Respondent's Supplementary Affidavit sworn on 17th April, 2024 reiterates the averment that the Claimant was an employee of the 1st Respondent in addition to other matters highlighted in the Supporting Affidavit and the submissions on record.

Grounds of opposition

31. The 1st Respondent opposes the 2nd Respondent's Notice of Motion on the grounds that the judgment by the court was regular and the 2nd Respondent was the employer of the Claimant and thus responsible for the judgment sum and quantum is not an issue.

32. That the affidavit by Ezekiel Luchera is improperly on record and ought to be struck out.

33. That the applicant's remedy lies against the 1st Respondent.

Applicant's submissions

34. As to who is liable to settle the Claimant's claim under the *Work Injury Benefits Act*, 2007 (herein after WIBA), counsel for the applicant relies on the provisions of Sections 4(1), 5, 7 and 10 of WIBA to urge that the Claimant was not its employee and the 1st Respondent has sworn an Affidavit that the Claimant was its employee and it had taken out insurance policy in accordance with Section 7 of WIBA.

35. Counsel submits that the judgment was procured by concealment of material facts and misrepresentation by the Claimant who misled the court that he was an employee of the 2nd Respondent and the 2nd Respondent is not liable under WIBA.

36. On service of summons on the 2nd Respondent, counsel cites Order 5 Rule 3 of the Civil Procedure Rules on service on corporation.

37. Counsel urges that the Officer who accepted service was undisclosed by name and was not an authorised person or officer of the 2nd Respondent for purposes of service and cites the sentiments of the court in *Frigonken Ltd V Value Park Food Ltd HCCC No. 424 of 2010* as well as Kenya Commercial Bank Ltd V Nyataige & another (1990) KLR to reinforce the submission.

38. On the reliefs sought, counsel reiterates that there was no employer employee relationship between the Claimant and the 2nd Respondent.

39. That because service of notice of summons and mention is questionable, the 2nd Respondent was deprived of the right or opportunity to participate in the proceedings.

1st Respondent's submissions

40. Counsel urges that the 2nd Respondent was not challenging the award but submits that the 1st Respondent ought to pay as the injuries were sustained in the course of his duties.

41. Counsel further submits that under the contract between the 1st and 2nd Respondent, the 1st Respondent was to take up all employee disputes on behalf of the 2nd Respondent and urges that the 2nd Respondent ought to pay and the Respondents to settle as between themselves.

42. Counsel further submits that as the suit was filed in May 2017 and judgment delivered in November 2023, more than 5 years later, the Claimant should not be kept away from the fruits of his judgment on the basis of who among the Respondents should pay the sum of Kshs.750,000/=.

43. Reliance is made on the sentiments of the court in Kenya Shell Ltd V Kibiru & another (1986) eKLR on substantial loss as well as those in James Wangalwa & another V Agnes Naliaka Cheseto (2012) eKLR on the nature of execution.

44. As regards the judgment delivered on 30th November, 2023, counsel submits that the application lacked merit as the judgment was regular.

45. Reliance was made on the sentiments of the court in Yooshin Engineering Corporation V AIA Architects Ltd (2023) (KECA) 872 KLR and Jericho Furniture Ltd V Apostle of Jesus Registered Trustees HCCC No. 82 of 2018.

46. On the 2nd Respondent's defense, counsel submits that it raises no triable issues as contributory negligence and non-joinder are not issues.

47. As regards the contract between the Respondents, counsel urges that the 2nd Respondent should seek indemnity from the 1st Respondent if the Claimant was its employee.

48. Finally, on the Affidavit of Ezekiel Luchera, counsel submits that the Supplementary Affidavit of Bipin Shah sworn on 17th April, 2024 attempts to sneak in the proceedings an annexture "BPS" affidavit of Ezekiel Luchera and the same cannot be an annexture for admission as evidence and it ought to have been filed by counsel for the 1st Respondent.

49. Reliance was made on the decision in Ngenda Location Ranching Co. Ltd V Hari Gakinya & 7 and another (2022) eKLR.

50. Counsel urges that service of notice was properly effected but the applicant was under a mistaken impression that the insurer would take up the claim and urges the court to reject the application.

Claimant's submissions

51. As to whether the judgment on record is regular, the Claimant's counsel submits that the contested service of summons and mention notice, was regular as the notice of summons bears a stamp, date of service and signature and relies on the sentiments of the court in Shadrack Arap Boiywo V Bodi Bach KSM CA Civil Appeal No. 122 of 1986 (1987) eKLR on service.

52. That the same process server served summons on the 1st Respondent.

53. Reliance is made on the decision in K-Rep Bank Ltd V Segment Distributors Ltd (2017) eKLR to urge that the judgment was regular.

54. Counsel further submits that the decision to set the judgment aside is discretional and only to avoid hardship and injustice from accident, inadvertence or excusable mistake or error as held in Shah V Mbogo & another (1967) EA 116.

55. On arguability of the response or defense, counsel submits that the 2nd Respondent was the Claimant's employer under supervision of the 1st Respondent which was to carry out management services including preparation of contracts, payroll and payment which were refunded by the 2nd Respondent.

56. According to counsel, the arrangement between the Respondents was intended to create a lacuna as to who the employer of the Claimant was and the 1st Respondent defended its obligations as an employer at the hearing.

57. Counsel urges that the 1st Respondent was carrying out management services of employee matters on behalf of the 2nd Respondent and as there is no contest on the quantum, it is fair that the 2nd Respondent pays the Claimant and claim from the 1st Respondent.

58. Reliance is made on the sentiments of the court in Raghbir Singh Chatte V Miwani Sugar Company (1939) (2001) eKLR to urge the court to dismiss the application with costs.

59. The only issue for determination is whether the 2nd Respondent's Notice of Motion is merited.

60. When the matter was placed before the duty judge on 25th March, 2024, the Honourable judge granted temporary stay of execution which the court extended on 8th April, 2024 and on 9th May, 2024.

61. The only outstanding prayers for determination are whether the 2nd Respondent has made a sustainable case for the variation, review and/or setting aside of the judgment delivered on 30th November, 2023 and whether leave ought to be granted for the 2nd Respondent to file its response to the claim and attendant documents.

62. The pith and substance of the 2nd Respondent's application is that it was not the Claimant's employer and as such there was no employer/employee relation between itself and the Claimant.

63. That the Claimant misrepresented facts and failed to disclose the nature of his employment with the 1st Respondent. Thus, the court made an error or mistake.

64. Under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016;

> 1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred is from which no appeal is allowed, may within reasonable time, apply for a review of the judgement or ruling –
>
> a. . . .
>
> b. on account of some mistake or error apparent on the face of the record;
>
> c. if the judgment or ruling requires clarification; or
>
> d. for any other sufficient reason.

65. As to whether the application was made within a reasonable time, the court is satisfied that based on the reasons given by the applicant, the slightly more than 3 months delay is not inordinate or unreasonable.

66. According to the applicant, the court made an error or mistake by finding that the Claimant was an employee of the 2nd Respondent.

67. In arriving at the finding, the court considered the totality of the evidence on record, specifically, the fact that the Claimant was working at the 2nd Respondent's premises when the accident occurred, the Respondent referred him to the Nairobi West Hospital indicating that the Claimant was working for it and had fallen from the first to the ground floor while on duty and that bills be sent to the applicant and it was subsequently sent to the applicant.

68. The hospital accorded the Claimant two weeks sick-off from 16th August, 2016.

69. The only thing that appeared to connect the Claimant and the 1st Respondent were copies of the payslip on record which the court considered but dismissed for want of the relationship between the two companies and in any event a payslip is not a contractual document. See Grain Pro Inc Ltd V Andrew Waithaka Kiragu (2019) eKLR.

70. It is trite law that for a mistake or error on the face of the record to be sustained, it must be self-evident and requires no elaborate arguments to be demonstrated.

71. See Nyamongo & Nyamongo V Kogo (2001) EA 174, Muyodi V Industrial and Commercial Development Corporation & another (2006) 1 EA 243, Paul Mwaniki V National Health Insurance Fund Board of Management (2020) eKLR for a lucid exposition of the concept of mistake or error on the face of the record.

72. The 2nd Respondent has failed to demonstrate the paragraph(s) wherein the judgment dated 30th November, 2023 addresses the mistake or error.

73. Flowing from the foregoing, the court is not persuaded that the 2nd Respondent has made a sustainable case for a review of the impugned judgment under the provisions of Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

74. The 2nd Respondent, additionally argues that the service of summons by the Claimant was improper and cites Order 5 Rule 3 of the Civil Procedure Rules, 2010 whose provisions on service on a body

corporate are replicated under Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as follows;

1. Service on a corporate body may be effected –

    a. On the secretary, director or any other principal officer of the corporate body.

    b. Where the Process Server is unable to find any of the officers of the corporate body mentioned in subparagraph (a) by –

        i. leaving the pleadings at a conspicuous place at the registered office of the corporate body;

        ii. . . .

        iii. leaving the pleadings at a conspicuous place where the body corporate carries out business; or

        iv. . . .

75. Was the service upon the 2nd Respondent defective or improper?

76. Documents on record show that on 25th May, 2017, Mr. Francis M. Njoroge of Gatarwa Express Services of P.O. Box 7399-00300 Nairobi proceeded to the premises of 2nd Respondent situated on Airport North Road, Embakasi Nairobi, where he found a Secretary, who after introduction accepted service of the Notice of Summons, stamped, signed and indicated the time of service on the copy which the Claimant filed on 22nd June, 2017.

77. The 2nd Respondent faults the service on the premise that the Secretary's name is not indicated nor her description and she was not authorised to accept service.

78. The 2nd Respondent has not denied that it has or had a secretary at the time or that she had instructions not to accept service.

79. Similarly, it has not contested the stamp or signature on the Claimant's copy of the Notice of Summons filed in court or that it did not receive the Notice of Summons.

80. The principles that govern service of summons and the setting aside of default judgments are well settled. Principally, if the court comes to the conclusion that there was no service or that it was improper, the default judgment is set aside ex debito justiciae.

81. However, as submitted by the 1st Respondent, the burden of proof is borne by the party questioning the service and where the fact of service is denied, the process server should be cross-examined on it. (See Shadrack Arap Baiywo V Bodi Bach (Supra) where the Court of Appeal cited Chitaley and Annaji Rao; The Code of Civil Procedure Vol. 2 P 1670.

82. As observed by Majaja J. in Agigreen Consulting Corp Ltd V National Irrigation Board (2020) eKLR;

> " An affidavit of service must prima facie disclose proper and actual service for it is on the basis of this service that judgment is entered . . ."

83. See also the sentiments of the Court of Appeal in James Kanyiita Nderitu & another V Marios Philotas Ghikas & another (2016) eKLR on the setting aside of a default judgment.

84. In the instant Notice of Motion, the 2nd Respondent is not contesting the fact of service but its properness or regularity.

85. It has not faulted the Affidavit of Service dated 22nd June, 2017 or sought leave to cross-examine the Process Server.

86. Evidently, service was effected on 25th May, 2017 and the 2nd Respondent was aware of the suit against it.

87. On 20th November, 2017, the trial judge recorded as follows;

> "The 2nd Respondent having been duly served but failed to enter appearance and or file a response to the claim, the matter shall proceed as undefended cause as against the 2nd Respondent but as a defended cause against the 1st Respondent on a date to be fixed at the Registry".

88. In the court's view, service on the 2nd Respondent had been effected almost 6 months earlier and no steps had been taken to defend the claim.

89. The court made a similar finding at paragraph 34 of its judgment since the discretion of the court to set aside the judgment on the ground of improper service is intended to obviate injustice and hardship occasioned by an accident, inadvertence or excusable mistake or error and in this case, the 2nd Respondent has not demonstrated that the judgment dated 30th November, 2023 was irregular on account of improper service. The court is not satisfied that this is a proper case to exercise the discretion favourably on the part of the applicant.

90. As adverted to elsewhere in this ruling, the 2nd Respondent did not deny service of summons. It was aware of the case and did not engage an advocate or do any follow-up. It could not explain how the unknown secretary affixed its official stamp of the copy of the notice of summons.

91. On the arguability of the draft defence, the gravamen of the 2nd Respondent's case is that the Claimant was an employee of the 1st Respondent and the reference to the Nairobi West Hospital and undertaking to pay the accruing bill was done on humanitarian grounds and the same was recoverable from the 1st Respondent.

92. That all was done at the request of the 1st Respondent but the 2nd Respondent tendered no evidence of the request or refund of the amount spent.

93. In the suit, the 1st Respondent did not deny that the Claimant was an employee of the 2nd Respondent and urges in its submission that the 2nd Respondent should pay the amount due to the Claimant and claim from the 1st Respondent.

94. Similarly, in its Grounds of Opposition dated 7th May, 2024, the 1st Respondent was emphatic that the 2nd Respondent was the employer of the Claimant.

95. The basis of the applicant contention that it was not the Claimant's employer is a copy of an agreement signed on 29th January, 2016 by Mr. Ezekiel Luchera on behalf of the service provider and one Mr. Geoffrey E. Bukachi for the client.

96. As correctly submitted by the Claimant's counsel and for unexplained reasons, the cover page of the contract is omitted and it is impossible to discern who the parties to the agreement are.

97. A cursory glance at the agreement shows that it was not meant to be an outsourcing contract and the 1st Respondent adduced no evidence to that effect.

98. In its Supporting Affidavit, the 2nd Respondent is silent on whether the employees were aware of the arrangement between the two companies.

99. During the hearing, the Claimant testified that he joined the 2nd Respondent in 2009 and the 1st Respondent came in in 2014, but he maintained that he was still an employee of the 2nd Respondent as he had not been instructed otherwise.

100. The court is in agreement with the Claimant's counsel that the Respondents appear to have entered into an arrangement which left the 2nd Respondent's employees suspended in between the two Respondents. For instance, Clause 1.23.1 of the agreement states that the Contractor was responsible for insurance of motor vehicle, workers compensation as by law required.

101. It is unclear who the Contractor was. According to the 1st Respondent, the agreement between the Respondents provided for dispute resolution and remedies and opposed the setting aside of the judgment.

102. That the Claimant's claim be settled and the Respondents settle as between each other, an argument analogous to the adage that when elephants fight, it is the grass that suffers, which is unfair to the Claimant.

103. For the foregoing reasons, the court is not persuaded that the 2nd Respondent has made a sustainable case for the setting aside of the judgment delivered on 30th November, 2023.

104. In the upshot, the 2nd Respondent's Notice of Motion dated 21st March, 2024 is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF JULY 2024.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE