



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)**

**CIVIL APPEAL NO. 78 OF 2014**

**BETWEEN**

**MEK SACCO LTD ..... APPELLANT**

**VERSUS**

**KENYA UNION OF COMMERCIAL**

**FOOD & ALLIED WORKERS .....RESPONDENT**

***(An appeal from a Ruling of the High Court of Kenya, Industrial Court at Kisumu, (Wasilwa, J.) dated 3<sup>rd</sup> December, 2014***

**in**

**INDUSTRIAL CASE NO. 156 OF 2014)**

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**JUDGMENT OF THE COURT**

1. This is an appeal from the ruling and orders of the Industrial Court at Kisumu (H. Wasilwa, J.) in Cause No. 156 of 2014 given on 3<sup>rd</sup> December 2014 dismissing the appellant's application dated 11<sup>th</sup> August 2014 seeking to set aside earlier orders of the court given on 30<sup>th</sup> July 2014.

**Background**

2. On 1<sup>st</sup> July 2014, the respondent trade union on behalf of eight employees of the appellant (the grievants) presented a memorandum of claim before the Industrial Court at Kisumu, seeking a declaration that the action taken by the appellant to send the grievants on compulsory leave was done unprocedurally, was unfair and illegal; that the grievants be paid arrears of salary amounting to Kshs. 490,992.00; that the grievants be reinstated unconditionally; that the appellant be restrained from employing new employees in place of the grievants; and for a restraining order to stop the appellant from intimidating the respondent's shop stewards and members from participating in trade union activities.

3. Alongside the memorandum of claim, the respondent presented, under certificate of urgency, a notice

of motion dated 19<sup>th</sup> June 2014 seeking orders, pending determination of the dispute, to restrain the appellant from: intimidating, harassing or victimizing the grievants; disciplining, terminating, dismissing or declaring the grievants redundant; payment of arrears of salaries; reinstatement of the grievants to employment.

4. The notice of motion, as indicated, was made under certificate of urgency and was placed before the Judge of the Industrial Court on 3<sup>rd</sup> July 2014. On that day, the Judge certified the application as urgent. The Judge also issued a conservatory order against the appellant “*on the grievants positions*” and an order restraining the appellant from intimidating, harassing and/or victimizing the grievants pending determination of the application. The court then directed that “*the respondents be served and application be heard inter partes on 24<sup>th</sup>.7.2014.*”

5. On 24<sup>th</sup> July 2014 the court heard the application in the absence of the appellant having been satisfied that the appellant “*had been served with the application*” and “*failed to appear*”. The court then reserved its ruling on the application to 30<sup>th</sup> July 2014. On that date, the learned Judge delivered her ruling in which she concluded:

*“I find their case has merit and I find for them and grant them orders as prayed as follows:*

*1. The respondents are restrained from intimidating, harassing and/or victimizing the grievants pending the determination of this dispute.*

*2. The respondents are restrained from disciplining, terminating, dismissing and/or declaring the grievants redundant pending determination of this dispute.*

*3. The respondents are ordered to pay the grievants their salary arrears amounting to Kshs.490,992 pending determination of this dispute.*

*4. The respondents are ordered to reinstate the grievants back to employment without loss of benefits pending determination of this cause.*

*5. The respondents shall pay costs of this application.”*

6. That precipitated the appellant’s application dated 11<sup>th</sup> August 2014 presented to the Industrial Court on 14<sup>th</sup> August 2014, in which the appellant applied for stay of proceedings and of the orders given on 30<sup>th</sup> July 2014. In the same application, the appellant sought an order to set aside the orders given on 30<sup>th</sup> July 2014.

7. That application was based on the grounds that the court had been misled to grant those orders; that the failure by the advocate to attend court on 24<sup>th</sup> July 2014 was excusable; that appellant was only served with the court order given on 3<sup>rd</sup> July 2014 but was not served with the application dated 19<sup>th</sup> June 2014; and that in the interests of justice the orders granted on 30<sup>th</sup> July 2014 without hearing the appellant should be set aside.

8. In an affidavit in support of that application sworn on 11<sup>th</sup> August 2014 by Margaret Awour Odhiambo who described herself as the secretary to the Central Management Committee of the appellant, she deposed that an order with nothing else had been served on 10<sup>th</sup> July 2014 on one Dorcas Nuna Mwangi, a student on attachment with the appellant; that the order was inadvertently placed in the student’s locker and she did not discover it until 14<sup>th</sup> July 2014 when she then instructed the appellant’s advocates on the matter.

9. In an affidavit sworn on 11<sup>th</sup> August 2014, Dorcas Nuna Mwangi deposed that she did, while on student attachment with the appellant, receive an order “*from some lady who did not disclose her names*”

which she then placed in her locker and forgot about it until it was discovered there on 14<sup>th</sup> July 2014 by Margaret Awour Odhiambo.

10. Although on 19<sup>th</sup> August 2014 the court ordered the respondent to file and serve a replying affidavit to that application within 7 days of service of the application, no affidavit in opposition to that application appears to have been filed. Counsel representing the respondent however argued before the Judge that there was evidence, based on an affidavit of service, that the appellant had been served and indeed entered appearance that there were no grounds for setting aside the ruling of the court given on 30<sup>th</sup> July 2014.

11. In the impugned ruling delivered on 3<sup>rd</sup> December 2014, while rejecting the appellant's application, the learned Judge alluded to an affidavit of service sworn by one Yournitter O. Pacho, a process server, who deposed having served the secretary to the appellant with the court order on 10<sup>th</sup> July 2014; that the court order was acknowledged as evidenced by the stamp of the appellant thereon and that *"the stamped copy was on the court file and behind were listed the documents served."* On that basis the Judge concluded that:

*"The issue of service upon the applicants [appellant] is clear-that they were served and they have not denied that their office received the stamped copy of the order and documents. I therefore find that the application to set aside the ruling on account of not being served is not truthful. It lacks merit and the application is rejected."*

### **The appeal and submission**

12. Referring us to the memorandum of appeal, learned counsel for the appellant, Mr. C. Nyawiri, submitted that the Judge erred in concluding that the appellant had been served with summons to enter appearance and the application when in fact all that had been served was the order of the court fixing the matter for interpartes hearing; that the affidavit of service on which the court relied was of no assistance and was inadequate as it merely referred to service of *"bundle of documents and order"* without indication what was in fact served and on whom service was effected; that the purported service on the appellant, a corporate body, did not accord with the Civil Procedure Rules on service; that in light of the matters deposed to in the affidavits in support of the application, the Judge ought to have exercised her discretion in favour of the appellant by setting aside the orders given ex parte on 30<sup>th</sup> July 2014; that in the totality of circumstances the Judge was wrong to find that service was proper.

13. Opposing the appeal, Mr. D. Atela, representing the respondent, relied on written submissions filed on 15<sup>th</sup> July 2015. He urged that the documents served on appellant were listed on the reverse side of the order given on 3<sup>rd</sup> July 2014 and included the certificate of urgency, the notice of motion and supporting affidavit and the memorandum of claim, among other documents; that service was duly effected and acknowledgement signified by a stamp of the appellant.

### **Determination**

14. We have considered the appeal and submissions made on behalf of the parties. The grant or refusal to set aside an ex parte judgment involves the exercise of discretion. [See **CMC Holdings Limited vs. Nzioki [2004] 1KLR173**].

15. In **Mbogo and Another vs. Shah [1968] EA 93** this Court stated:

*"...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

16. The only question for our determination is whether the impugned decision is clearly wrong on account of misdirection by the learned Judge that the appellant was duly served.

17. The material that was before the Judge in that regard was an affidavit of service in a pre-printed standard form that was filled out by hand, sworn by one Yournitter O. Opondo, a process server, who deposed that she received a “*bundle of documents and order*” in Industrial Cause No. 156 of 2014 “*to be served upon Mek Sacco Society Limited*”. The process server went on to say that he served the same upon “*the secretary of Mek Sacco on 10<sup>th</sup> July 2014 who acknowledged receipt by stamping and refused as the manager is the only authorized to sign*”

18. For the appellant, there was, as we have already mentioned, two affidavits. One was by Margaret Awour Odhiambo, the secretary to the Central Management Committee of the appellant, who explained that service of an order, without more, was effected on a student on attachment. The other affidavit was by that student, one Dorcas Nuna Mwangi, who explained how she handled the order when the same was served on 10<sup>th</sup> July 2014.

19. In the impugned ruling, the learned Judge made absolutely no reference to the uncontested facts deposed to in those two affidavits to which there was no reply by the respondent. Had the Judge taken the contents of those affidavits into account, we doubt that she would have reached the conclusion that she did that the appellant did not deny having been served with a copy of the order “*and documents.*” The fact is that whilst the appellant conceded that an order was served on a person who should not have been served, the appellant contended that nothing beyond that order was in fact served.

20. We are therefore persuaded, in the words of the Court in ***Mbogo vs. Shah*** (supra), that the learned Judge “***failed to take into consideration matters which [he] should have taken into consideration and in doing so arrived at a wrong conclusion.***”

21. Furthermore, the Judge does not appear to have taken into account that the appellant is a limited liability company, and the affidavit of service did not disclose that the mode of service prescribed by the rules for a corporation was complied with.

22. In addition the respondent sought the prayers in that notice of motion “*pending determination of the dispute*”, those prayers were the same prayers the respondent was seeking in the memorandum of claim. In effect, allowing the prayers as couched in the application would substantively dispose of the respondent’s claims without having to canvass the memorandum of claim.

23. For those reasons, we are compelled to interfere with the Judge’s exercise of discretion. We do so by allowing the appeal and setting aside the ruling and orders of the court given on 3<sup>rd</sup> December 2014. We substitute therewith an order setting aside the ruling and orders of the court given on 30<sup>th</sup> July 2014. Each party shall bear its own costs of the application dated 11<sup>th</sup> August 2014 in the lower court and of this appeal.

Orders accordingly.

**Dated at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

I certify that this is a true  
copy of the original.

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**DEPUTY REGISTRAR**