



**Ngare v Peasbets Limited (Employment and Labour Relations Cause E369 of 2022) [2024] KEELRC 410 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 410 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E369 OF 2022  
BOM MANANI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**MICHAEL MAINA NGARE ..... CLAIMANT**

**AND**

**PEASBETS LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. This matter proceeded ex-parte where-after judgment was entered in favour of the Claimant on 20<sup>th</sup> April 2023. The Respondent has filed the instant application seeking to set aside the said judgment. The Respondent's request is premised on the grounds that it was not served with summons to enter appearance and that it has a valid defense to the cause.
2. The Respondent contends that it only learned of the cause when it (the Respondent) was served with the Bill of Costs. It denies that summons to enter appearance were served on it as required by law or at all.
3. The application is opposed. The Claimant has sworn an affidavit in which he contends that the summons to enter appearance were served on the Respondent through email in terms of order 5 rule 22 of the *Civil Procedure Rules*. He states that the pleadings were delivered to the Respondent through the same email that was used to serve the Bill of Costs. According to the Claimant, the fact that the Respondent admits receipt of the Bill of Costs denotes that it also received the summons to enter appearance since the two court processes were served using the same email address.

**Analysis**

4. The law on setting aside of ex-parte orders is now well settled. Where a court process was not properly served, the resultant order will be set aside as a matter of right to the aggrieved party. Conversely, where



there is evidence of proper service of the court process, the aggrieved party is not entitled to have the resultant orders set aside as a matter of right. However, the court retains the discretion to set aside the resultant orders if it is satisfied that the applicant has a defense on the merits which ought to go to trial (*Yoosbin Engineering Corporation v Aia Architects Limited* (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023)).

5. In the instant case, the Respondent contends that it was not served with summons to enter appearance. However, the Claimant has filed an affidavit of service dated 30<sup>th</sup> August 2022 showing that the pleadings were served on the Respondent vide email on 15<sup>th</sup> June 2022.
6. The court process server has set out the email address to which the pleadings were sent. The Respondent has not denied that the email address belongs to it.
7. It is noteworthy that the Respondent did not cross examine the court process server on the affidavit of service that is on record. Instead, it (the Respondent) has tried to poke holes in the affidavit through its director's affidavit.
8. Unless the affidavit of service is challenged through cross examination of the deponent, its contents remain uncontroverted. The court cannot cast aspersions on it based on the assertions by the Respondent.
9. On the basis of the affidavit of service dated 30<sup>th</sup> August 2022, I am convinced that the Respondent was properly served. Thus, I reach the conclusion that service of summons to enter appearance was regular.
10. That said, I have taken note of the Respondent's contention that the instant dispute ought to have been submitted to arbitration in the first instance. I have looked at the contract of service between the parties and note that it contains an arbitration clause (clause 14). The Claimant does not deny the Respondent's assertion that they had an agreement that disputes arising from their employment relation should be resolved through arbitration.
11. Having regard to the foregoing, I find that the Respondent is entitled to raise the issue of arbitration to resist the court's jurisdiction to entertain the current action. As a result, I arrive at the conclusion that the Respondent has a prima facie defense to the action on the merits which it (the Respondent) should be given an opportunity to pursue.

### **Determination**

12. Having regard to the foregoing and in order not to occasion undue hardship to the Respondent, I exercise my discretion to set aside the ex-parte judgment subject to the Respondent paying the Claimant throw away costs of Ksh. 15,000.00 within 7 days of this order.

**DATED, SIGNED AND DELIVERED ON THE 29<sup>TH</sup> DAY OF FEBRUARY, 2024**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

.....for the Claimant

.....for the Respondent

**Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived



compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

