



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1333 OF 2016

RICHARD MWENDWA MUTHAMA.....CLAIMANT

VERSUS

LADDER CONSULTING COMPANY LIMITED.....1ST RESPONDENT

MARTIN NGUNGA.....2ND RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 2nd August 2021 by which the Respondents seek the following orders:
 - a) That the firm of GMLaw Advocates be granted leave to come on record for the Respondents;
 - b) That any Advocate or court process server who has sworn an affidavit on service of summons upon the Respondents be examined on oath to ascertain the contents of their affidavit(s) of service;
 - c) That there be a stay of execution of the *ex parte* judgment entered on 29th October 2020 and taxation ruling delivered on 7th May 2021, against the Respondents, pending the hearing and determination of the application;
 - d) That the *ex parte* judgment entered on 29th October 2020 and taxation ruling delivered on 7th May 2021, against the Respondents in default of appearance and defence, be set aside and the Respondents be given unconditional leave to defend the suit;
 - e) That the Claimant be ordered to supply the Respondents with the Statement of Claim and all pleadings and documents filed and relied upon in the suit;
 - f) That leave be granted to the Respondents to file a Statement of Defence out of time;
 - g) That the costs of this application be in the cause.
2. The application is supported by an affidavit sworn by the 2nd Respondent, Martin Ngunga and is based on the following grounds:
 - a) An *ex parte* judgment was entered on 29th October 2020, in favour of the Claimant and against the Respondents, whereupon the Respondents were ordered to pay the Claimant Kshs. 99,923.07 plus costs and interest;
 - b) Costs were later on taxed by the Court and vide a ruling delivered on 7th May 2021, the Respondents were ordered to pay the Claimant's Advocates Kshs. 82,161 as costs of the suit;
 - c) The said *ex parte* judgment and taxation ruling were obtained unfairly and unlawfully since the Respondents had never been served with the suit papers properly or at all;
 - d) The Claimant has commenced execution of the said judgment against the Respondents and has instructed auctioneers practising as Moran Auctioneers to proceed with recovery;
 - e) The said Moran Auctioneers served a proclamation notice on 30th July 2021 to the effect that they would seize the Respondents

assets for sale by way of public auction;

f) The Respondents never knew of the existence of the suit and/or the judgment, ruling and decree until they received the said proclamation notice from the Auctioneers;

g) The said judgment and ruling ought not be executed and should be set aside owing to the fact that the Respondents have never been accorded their chance to be heard before the decisions were arrived at;

h) The Respondents stand a good chance at trial once they are allowed access to the allegations against them in the Statement of Claim and are allowed to respond to the same;

i) Nothing short of the orders of the Court shall prevent the Claimant from proceeding with such execution in which event, the Respondents will suffer irreparable harm;

j) Unless the *ex parte* judgment is set aside, the Respondents will suffer undeserved loss. Further, the Respondents will be driven away from the seat of justice;

k) The Respondents have come to court within a reasonable period of time and there has been no undue delay in bringing the application;

l) The application will not occasion any prejudice to the Claimant and will only serve the ends of justice to all parties involved;

m) It is in the interest of justice that the application be granted as prayed.

3. In his affidavit in support of the application, the 2nd Respondent, Martin Ngunga depones that the 1st Respondent stopped operations and ceased to exist in 2015.

4. Ngunga further depones that the Claimant worked for the 1st Respondent as a driver for one and half months and was still on probation when he absconded and deserted duty.

5. The Claimant opposes the application by way of a replying affidavit sworn on 21st August 2021.

6. The Claimant depones that it is not true that the Respondents were never served with summons. He states that he personally accompanied a process server by the name Edward Kathanzu to serve the Respondents on 30th August 2016.

7. The Claimant adds that the Respondents had been variously served with court process on 23rd September 2018, 14th June 2019 and 31st March 2021.

8. In a further affidavit sworn on 30th August 2021, the Claimant depones that he had recorded an audio file of what had transpired on 30th September 2016.

9. The 2nd Respondent swore a supplementary affidavit on 18th October 2021 in which he states that the affidavits of service annexed to the Claimant's replying affidavit are false and inconsistent.

10. The 2nd Respondent states that he had no reason to decline to accept court process as stated in the affidavits of service. He further denies knowing any employee of the 1st Respondent known as Michael Kamau, who is said to have accepted some court process on behalf of the Respondents.

11. Regarding the audio recording, the 2nd Respondent states that there was no proof that he was part of the recorded conversation or that he admitted any facts. He further states that the recording is not clear and there is no proof of the date of its recording and the participants in the conversation. Additionally, the 2nd Respondent avers that the recording was not accompanied by the certificate required under the Evidence Act and is therefore inadmissible.

12. The question before the Court is whether the Respondents were served with the suit papers as required by law. The 1st Respondent challenges the veracity of the affidavits of service sworn by the process server, Edward Kathanzu. In light of this, the Claimant ought to have availed the process server for examination.

13. Further, the audio recording presented by the Claimant was of no probative value; because first, it was unclear and second, it was not accompanied by the necessary certificate.

14. On the whole, I find and hold that the Claimant failed to prove service on the Respondents. The *ex parte* judgment is therefore set aside. The Respondents are directed to file and serve their Response, supporting documents and witness statements within the next 21 days from the date of this ruling.

15. The costs of this application will be in the cause.

16. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF MARCH 2022

LINNET NDOLO

JUDGE

Appearance:

MR. OGUNDE FOR THE CLAIMANT

MR. MUREITHI FOR THE RESPONDENT