



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE 485 OF 2017**

**EVANS OOKO NYAMOTA.....CLAIMANT/ RESPONDENT**

**VERSUS**

**BEEMTHO SERVICE LTD.....RESPONDENT/APPLICANT**

**RULING**

1. Before this Court is the Respondent/Applicant's Application dated 19<sup>th</sup> January, 2021 filed through the firm of Ondieki Mogambi and associates Advocates seeking the following orders: –

**1) Spent.**

**2) THAT pending the inter-party hearing of the Application herein, the Honourable Court be pleased to grant an interim Order of Stay of Execution of the ex-Parte Court Proceedings including the final judgement and decree hitherto entered against the respondent/Applicant herein together with the taxation of the Party and Party Bill of Costs scheduled on 19/1/2021.**

**3) THAT the Honourable Court be pleased to set aside, annul and/or vary the Judgement and Decree dated 27<sup>th</sup> August, 2020 entered against the Respondent/Applicant together with the consequential orders.**

**4) THAT Consequent to prayer (3) herein above being granted, the Honourable court be pleased to grant the Respondent/Applicant leave to file its Memorandum of Defence to the Claim and the annexed Memorandum of Defence be deemed as duly filed and served upon the payment of the requisite court fees.**

**5) THAT the costs of this application be borne by the Claimant/Respondent.**

**6) THAT the costs of this Application be in the cause.**

2. The Application is supported by the grounds set out therein and in the undated Supporting Affidavit of Thomas Machuma Nyamota, the director and authorized representative of the Respondent/ Applicant. The Application has been opposed vide the Claimant/Respondent's Replying Affidavit sworn by Evans Ooko Nyamota, the Claimant herein, on 9<sup>th</sup> February, 2021.

**The Applicant/Respondent's Case**

3. The Applicant avers that it was never served with a copy of the Memorandum of Claim and Summons to Enter Appearance as alleged in the affidavit of 15<sup>th</sup> March, 2019 sworn by **Bonface P. Owuoch**. Accordingly, the Defendant never had the opportunity to be heard on its' Defence by this Honourable Court.

4. The respondent's affiant contends that, he has never seen the above mentioned process server who allegedly served him with the pleadings dated 30<sup>th</sup> November, 2017. Therefore, he stated that, the affidavit of service is fictitious, defective and contravenes the law.

5. Accordingly, it was stated that, it is unconscionable and unequitable for the Claimant/Respondent to obtain such substantial and final orders as were obtained in the said ex parte Judgement without the Respondent/ Applicant being heard in the matter.

6. It is alleged that the affidavit of service culminating into the entry of final Judgment herein, is riddled with falsehoods, incompetent,

deficient and not capable of sustaining a Court process leading to entry of the judgement. There thus exists special Circumstances that necessitate the instant application being heard on priority basis.

7. That the conduct of the Claimant herein constitutes an abuse of the Court process. The same is fraudulent and the Court needs to correct the anomaly herein by setting aside the judgement.

8. The Respondent/Applicant avers that it has a strong and plausible Defence against the Claimant/Respondent's claim and the same ought to be allowed to enable it file its' Defence and the Case herein be heard on merit.

9. It is contended that, unless this application is granted, the Claimant/Respondent will proceed to institute execution proceedings to their detriment.

10. Accordingly, they aver that, it is only just and fair that the Respondent/Applicant be heard on its said Defence as this application has been made without any unreasonable delay. Further that, the application herein will not occasion any prejudice to the Claimant/Respondent for the reason that if the same is granted, the suit would proceed to a full hearing on its substantive merits.

### **The Claimants/Respondents' Case**

11. The Claimant/Respondent avers that the application is incompetent and in bad taste as it seeks to obstruct the cause of justice and allowing it would be repugnant to good practice and timely administration of justice.

12. He contends that, the memorandum of claim was duly served upon the respondent as evidenced by the affidavit of service sworn by Bonface P. Owuoché on 15<sup>th</sup> March, 2019 and that the respondent is not being honest.

13. He avers that service was effected at several stages as follows:

**a) Hearing notice dated 20<sup>th</sup> march, 2019.**

**b) Mention notice dated 30<sup>th</sup> October, 2019.**

**c) Notice of taxation dated 21<sup>st</sup> December, 2020 and served on 23/12/2020.**

**d) Taxation notice dated 21<sup>st</sup> January, 2021 and served on 25/1/2021.**

14. That, it is only after service of the taxation notice that this application was served upon him when the applicant has been aware of the existence of this matter but neglected to defend it, hence this application is only an afterthought.

15. He alleges that, the applicant has not offered sufficient explanation for failing to attend court or inquiring on the court document served upon him, this only shows indolence on their part.

16. He avers that the applicant seeks to question the integrity of the return of service filed on 15<sup>th</sup> March, 2019 but does not wish to cross examine the process server on the same. He thus states that, this application is only meant to inconvenience and delay him from enforcing the decree of this court and enjoying the fruits of his judgment and should be dismissed with costs.

17. The respondent/ Applicant with leave of court granted on 9<sup>th</sup> February, 2021, filed a supplementary affidavit sworn on 3<sup>rd</sup> March, 2021, alleging that the application is merited as the ex-parte judgement was obtained dishonestly and in violation of due process so as to deny the Respondent/Applicant the right to fair hearing.

18. It is averred that the Memorandum of Claim was never served upon the director or any other authorized officer of the Company, and state that on the day service is purported to have been effected on 28<sup>th</sup> March, 2018, the affiant herein had travelled to Nairobi to attend to a family matter as evidenced in the travel receipt attached.

19. He contends that, the respondent only became aware of the existence of this suit when they were served with a Notice of Taxation dated 21<sup>st</sup> December, 2020 and urged this court to allow the said application in the interest of justice.

### **Applicant's Submissions.**

20. The Applicant's Counsel opened his submissions by submitting that the affidavit of service dated 15<sup>th</sup> March, 2019 sworn by Bonface P. Owuoché, is fatally defective for failing to conform to the mandatory provision of Order 5 Rule 3 of the civil procedure Rules.

21. It was submitted that, the affidavit of service, did not indicate the time when the service was effected further that the affiant alleged to have served the pleading upon 'Thomas' but failed to indicate whether the said Thomas was pointed out to him or was well known to him prior to the service of the pleadings. Additionally, he took issue with the indication that the pleadings were served at Pluto building 1<sup>st</sup> Floor but no room is mentioned by the said process server.

22. The applicant submitted that the Respondent alleges to have served further document inter alia hearing notice, upon the respondent, but failed to attach an affidavit of service of the said documents therefore rendering the said documents invalid. It is submitted that service of all court pleadings including a hearing Notice and a mention notice must conform with the rules of serving pleadings as stipulated under Order 5 of the civil procedure Rules and cited the case of **Constance M. Mwakitwa -v- Reshma Aftab Khan [2003] eKLR**.

23. Accordingly, the applicant submitted that since the said documents were not properly served or served at all upon it in accordance with the rules, it therefore follows that the service ought to be declared invalid and cited **H CCC No. 241 of 1998 Fidelity Bank Limited – versus- owen amos Ndungu & another**. Where Justice Njagi held that;

**“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right”**

24. On the issue of whether the memorandum of Defence raise any triable issue to warrant grant of leave to defend this claim, the Applicant submitted that the draft Defence attached to this application raise three important and triable issues; whether the claimant was terminated by the respondent, whether the claimant is entitled to damages sought and whether the respondent owes the damages sought. he reinforced this by citing the case of **Job Kiloch –Versus- Nation Media Group, Salaba Agencies 7 Michael Riorio[ 2015] eKLR** where the court held that;

**“What then is a Defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial.”**

25. Additionally, the said triable issue need not be that which the defendant would ultimately succeed on, but that it just needs to be bonafide as seen in the case of **Olympic Escort International Co. ltd –versus- Par Minder Singh Sandhu & Another [2009] eKLR**.

26. The Applicant thus urged this court to allow the application as prayed.

#### **Claimants/ Respondent’s Submissions.**

27. In a bid to demonstrate why the Application herein should be dismissed counsel for the respondent maintained that the pleadings in this suit was effectively served upon the respondent as demonstrated in the affidavit of service sworn on 15<sup>th</sup> March, 2019 by Bonface P. Owuoche, a Court process server. Accordingly, he argued that the service conformed to the mandatory provisions of section 20 of the civil procedure Act and reinforced this by citing the supreme court decision in **Moses Mwicigi & 14 Others –Versus- Independent Electoral and Boundaries Commission and 5 Others [ 2016] eKLR**. Where the apex Court held that;

**“This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”**

28. The Respondent, submitted that there is presumption of service as stated in the affidavit of service, and therefore the burden of disproving the same lies with the party questioning the said service. In addition, he submitted that anybody questioning personal service should issue a notice to cross examine the process server and failure to cross examine the process server leaves the affidavit of service unchallenged and therefore the affidavit of service becomes sufficient proof of service.

29. The respondent, submitted that the application herein is an abuse of court process, as the applicant had been granted all the indulgence but was indolent and failed to comply but now seeks to defend the suit. Nonetheless, he submitted that if the court is inclined to allow the application then the respondent to be ordered to deposit security of cost for due performance and cited the case of **Mwaura Karuga T/A Limited Enterprises –Versus- Kenya Bus Services Limited & 4 Others [2015] eKLR** where the court held that;

**“the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”**

30. He submitted that, the application herein ought to be dismissed in that the Applicant has not offered an explanation about the delay of about four months in seeking the stay orders after judgment herein was delivered, he relied on the case of **Jaber Mohsin Ali & Another Versus- Pricillah Boit & Another 2014]eKLR** where the court held that;

**“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir Eldoret E&L 919 of 2012* the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of**

**the period given to vacate the land.”**

31. Finally, he urged this court to dismiss the application with costs to him.

32. I have examined the averments of the parties herein. The applicant’s contention is that he was never served with summons to enter appearance nor the memorandum of claim and therefore the attendance, Judgment and taxation is irregular and should thus be set aside.

33. The applicant contends that the affidavit of service as sworn is also deficient for failure to state who pointed out the Thomas and Josphat who were served and how the process server came to know of them and which office document was served.

34. The applicants contend that this offends the Civil Procedure Act Order 5 Rule 3. Order 5 Rule 3 provides as follows;-

**Subject to any other written law, where the suit is against a corporation the summons may be served-**

**a) On the secretary, director or other principal officer of the corporation; or**

**b) If the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)-**

**i. by leaving it at the registered office of the corporation;**

**ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or**

**iii. if there is no registered office and no registered office or physical address of the corporation, by leaving it at the place where the corporation carries on business; or**

**iv. by sending it by registered post to the last known postal address of the corporation.**

35. The order only provides who may be served on a corporation whether Secretary, director or principal officer. The order does not indicate that the person serving must state how he knew the direction or the person served.

36. In the instant case the process server explained that the person served was one Thomas and another Josphat who introduced himself as the supervisor.

37. This in my view would suffice as being adequate to explain how the process server knew the person served who in this case was a principal officer of the corporation.

38. There is also sufficient evidence that there was also service upon the respondents subsequently including service of the hearing notice on 20/3/2019, mention notice dated 30/10/2019 and taxation notices dated 21/12/2020, 23/12/2020, 21/1/21 and 25/1/2021.

39. In my view the respondents were well aware of the existence of this suit and chose to stay in a cocoon and now resurfacing at the 11<sup>th</sup> hour trying to turn the tables around. This is indeed an abuse of the court process which this court cannot condone.

40. I find no reason to reopen this case and cause further delay in justice.

41. I therefore find this application unmerited. I reject it and allow execution to proceed.

**RULING DELIVERED VIRTUALLY THIS 22ND DAY OF APRIL, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nyamweya for respondents – present

Applicants – absent

Court Assistant - Fred