



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. E067 OF 2020

JOKALI HANDLING SERVICES LIMITED.....1ST RESPONDENT

VERSUS

JAPHETH OMONDO OKWIRI.....RESPONDENT

RULING

1. The Applicant in the Notice of Motion Application dated 10/6/2020 prays for stay of execution of the judgment and decree entered against the Appellant on 10/7/2020 and all subsequent orders thereof.
2. That the judgment be set aside and the Appellant be granted leave to defend the suit.
3. The application is premised on grounds set out on the face of the Notice of Motion numbered (a) to (g) the nub of which is that: -
 - (a) The appellant was never served with the Statement of Claim and summons in the matter.
 - (b) That the Appellant was not the employer of the defendant during the alleged employment period.
 - (c) That the Appellant only came to know about the suit when it was served with a decree on 16/7/2020.
 - (d) That the Appellant has a good defence in the matter as evidenced by the draft defence attached to the appeal.
 - (e) That it is in the interest of justice that the application be granted.
4. The application is buttressed by a supporting affidavit of one Charles Lukoye the Head of Human Resource of the Appellant company who deposes: -
 - (a) That on 14/7/2020 Messrs Vintage Auctioneers served upon the company a decree issued by the Court on 10/7/2020.
 - (b) That at the time the company was not aware of the suit or any related proceedings having not been served with summons to enter appearance or the Statement of Claim.
 - (c) That he has not seen the affidavit of service filed in the suit. That failure to attend Court was not deliberate.
 - (d) That the Appellant stands to suffer great injustice if the application is not granted.
 - (e) That the affidavit is made in support of the attached appeal and against the judgment and ruling marked "JHSL4."
5. A draft statement of defence to the claim is attached.
6. The Claimant/Respondent opposes the application and states in a replying affidavit of Joseph Mungai Advocates that the contents of the current application are in *pari materia* with the application by the Appellant in the lower Court dated 20/7/2020 the Ruling of which is the subject of the current Application and Appeal.
7. That the main basis of the application is that the Applicant was never served with the process of the Lower Court being summons to enter

appearance and memorandum of claim.

8. The deponent of the replying affidavit states that the suit was filed on 12/6/2019 and summons to enter appearance taken out on 18/6/2019. That attempts were made on 24/6/2019 to effect service on the Applicant at its last known address but the same was fruitless as the Applicant's offices were always closed. Again on 26/6/2019 further attempts were made at the Applicant's same offices but the same were locked whereby the process server slid a copy of the summons and Statement of Claim under the door.

9. On 30/6/2020, the Applicant was served through its last known postal address being P.O. Box 3126-100100 Nairobi with the summons to enter appearance which address appears on all the Applicant's official documents and which address the Applicant has disowned.

10. That despite the aforesaid service, the Applicant never entered appearance and neither did it file its response.

11. That the Appellant's application dated 20/7/2020 was heard and determined on merit and same was dismissed with costs in a Ruling dated 14/10/2020 attached to this application.

12. That an Appeal has been filed against the said Ruling of 14/10/2020.

13. That Mr. Charles Lukoye, the Applicant's Head of Human Resource who has deposed to the supporting affidavit only alleges that summons had never been served upon the Applicant but notably failed to state whether the indicated postal address which was used to serve the entire process and which appears on all the Applicant's official documents is the Applicant's postal address or not. The deponent has also not commented at all on the applicant's offices which were said to be always closed but the summons and statement of claim were slipped through the door.

14. That the Court is left to make its own finding pursuant to the evidence provided by the Claimant/Respondent which only goes to show that the Applicant was properly served.

15. That the Court record has affidavits of service of every Court process that was served on them. Furthermore, the applicant has gone ahead to draft a statement of defence despite denial of knowledge of the Statement of Claim which action is indicative of the fact that the applicant was at all material times aware of the summons and Statement of Claim and other Court processes served on them.

16. That the application be dismissed with costs.

Determination.

17. The Applicant did not file a supplementary affidavit to deny and/or join issue with the facts regarding service of Court process set out in the replying affidavit of Joseph Njoroge Mungai. These facts set out in the replying affidavit therefore stand uncontroverted.

18. Order 5, Rule 3 of the Civil Procedure Rules on service of a corporation provides: -

“Service on a Corporation [Order 5, rule 3.1]

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 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;***

(iii) ***if there is no registered office or physical address of the corporation, by leaving it at the place where the corporation carries out businesses; or***

(iv) ***By sending it by registered post to the last known postal address of the corporation. (emphasis mine)***

19. As is disclosed in the affidavits of service of the summons and mention notices, and also set out in the replying affidavit of the respondent whose contents have not been controverted by the applicant, the Court finds as was ably found by the trial magistrate that the applicant was lawfully and properly served with summons to enter appearance and Statement of Claim including other Court processes on diverse dates but failed to enter appearance nor file a defence to the suit.

20. In **Frigoken Limited –vs- Value Pak Food Limited (Nairobi Commercial Tax Division HCCC No. 424 of 2010)** the Court stated: -

“.....Presumption as to service - there is a presumption as stated in the process server's report, and the burden lies on the party questioning it, to show that the return of service is incorrect. But an affidavit of the process server is admissible evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and

opportunity of cross-examination given to those who deny the service.”

21. The Applicant did not seek to have the process serve cross-examined before the trial Court during the hearing of the application to set aside before the magistrate nor has the applicant sought to have the process server to be cross-examined before this Court.
22. Just like the trial magistrate was satisfied that proper service had been effected on the applicant, this Court is equally satisfied that summons to enter appearance, the statement of claim and several other notices were lawfully duly served on the applicant.
23. That the applicant has not demonstrated any justifiable cause to have the present application granted by the Court pending the hearing and determination of the appeal filed against the ruling of the Senior Principal Magistrate, Ruiru, Hon. C.K. Kisiangani delivered on 14/10/2020.
31. Accordingly, the application is dismissed with costs.

Dated and delivered at Nairobi this 17th day of June, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

J.N. Muema & Co. Advocates for the Applicant

Muse Boez and Thomas Advocates for the Claimant/Respondent

Ekale – Court clerk