REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1993 OF 2017

MABEL KIBORE.....CLAIMANT

VERSUS

NATIONAL OIL CORPORATION LIMITED.....RESPONDENT

RULING

1. The Respondent's Application dated 21st December 2020 sees to stay all the proceedings in this matter and more specifically the *ex-parte* Order issued by the Honourable Court on 9th December 2020. It further seeks for the Court to discharge and/or set aside the said orders of 9th December 2020 and to grant the Respondent leave to file and serve its Replying Affidavit to the Claimant's Application dated 30th November 2020. The Respondent in its submissions asserts that it was not served and cites the case of **Abu Chiaba Mohamed *v* Mohamed Bwana Bakari & 2 Others [2005] eKLR** where the Court of Appeal held

> *The decision clearly recognized that if personal service which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to. Otherwise why would the Court have expected to be given reason or reasons why personal service was not effected? Why would the High Court and this Court have expected that some attempt at personal service be tried on the President and be shown to have been repelled? Lady Justice Khaminwa clearly recognized this aspect of the decision for she stated in her judgment at page 135 of the record of appeal:-*
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> *"In the Kibaki – Moi case the Respondent stated on oath that he was not personally served with the Notice of Petition either within 28 days after the date of publication of the result of the petitions (sic) as required by section 20 (1) (a) of the Act at all. However it was shown that the petition was served through the Gazette Notice as provided under Rule 14 (2). The facts are different in that case (sic) made no effort to personally serve the Respondent. In this case alternative methods were made to bring the notice to (sic) of the petition (sic) of the respondent knowledge but personal service proved impossible."*

2. The Respondent argued that in light of the foregoing a party must make effort to serve any process through personal service and that where personal service cannot be made then a party must seek the leave of Court to effect service by an alternative mode. The Respondent went on to assert that orders were granted by Justice Nzioka wa Makau while no such Judge serves the people of Kenya. It was submitted that neither the Employment & Labour Relations Court Act 2011 nor the Employment & Labour Relations Court (Procedure) Rules 2016 which govern the conduct of proceedings before this court envisage the service by way of electronic mail. It was submitted that the issue of service by electronic mail only recently developed especially in the wake of the Covid-19 pandemic and the same is currently provided for under Order 5 Rule 22B of the Civil Procedure Rules 2010. The Respondent submits that the same can be considered to be in order despite not being provided for under the Employment & Labour Relations Court (Procedure) Rules 2016. It submits that a party effecting service of process by way of electronic means has the duty to ensure that they attach a full and complete document or pleadings that they have filed and where there are directions of the Court, the same have to be served effectively. The Respondent submits that the documents should be in a readable format and not a format only known to the person effecting service. The Respondent further submitted that where the person effecting service has not served the directions of the Court, the Affidavit of proof of service cannot be relied upon unless the same is proved upon cross-examination. The Respondent submitted that there was therefore no proper service. It was argued that the orders issued by the Court were highly prejudicial to the Applicant and they were issued without affording the Applicant the opportunity to be heard. The Respondent cited the cases of **Pithon Waweru Maina *v* Thuku Mugiria [1983] eKLR** and **Elosy Murugi Nyaga *v* Tharaka Nithi County Government & Another [2020] eKLR** where it was held that the principles governing the exercise of the judicial discretion to set aside *ex parte* orders or judgment to be thus:-

> *a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.*
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> *b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to*

obstruct or delay the course of justice.

c. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically

The Respondent submitted that the case of **Shah *v* Mbogo *&* Another [1967] EA 116** was instructive on the issue of judicial discretion. The Respondent submitted that the Court should apply its discretion in favour of the Respondent. The Respondent asserts that the Claimant has not responded to the central issue raised in this Application and has instead diverted to addressing the issues that would otherwise be addressed while canvassing their application dated 30th November 2020.

3. The Claimant on her part submits that the Orders given by the Court in favour of the Claimant/Respondent on 8th November 2017 were served personally on the Respondent's Company Secretary with an endorsed Penal Notice and which service has never been denied. She further submits that however the order has never been complied with and the Applicant declined to reinstate her to her position and has been without a salary to date. She invites the Honourable Court to look at the annexures in her Replying Affidavit in support of her case to determine whether she deserves the Court's discretion in her favour as the Applicant has demonstrated open contempt and impunity for the orders issued by this Court and the Court of Appeal. She submits that the Applicant has always been aware of the Orders of the Court. The Claimant further submitted that this Honourable Court also posted online its directions given on the 3rd December 2020 to the parties' Advocates and wherefrom Counsel for the Claimant got a copy of the said directions. That these directions are still available online and evidence thereof is available and that the Applicant should be made to explain how it intends to respect the outcome of its Application if it had not bothered to honour the orders of this Court given on 6th August 2019, almost two years ago. She further submits that the Applicant has quoted out of context the authority of **Abu Chiaba Mohamed *v* Mohamed Bwana Bakari *&* 2 others [2005] eKLR** because the Claimant's application was served personally on the Applicant's Chief Executive Officer and the Applicant has not denied that the email address of its Counsel provided does not belong to its Advocates. That it is also pertinent that there is no officer from the Applicant who has sworn an affidavit to deny being served with the Application and the mention notice. The Claimant submits that the Applicant has cited out of context the provisions of Rule 16 of the Employment and Labour Relations Court Act, 2011 which is on Notice to Show Cause why a suit should not be dismissed and that the same has no relevance to the Application before Court. That in any event, there would be no point to pursue conclusion of the full suit when the interlocutory orders have not been complied with. She further submits that the provisions of Order 42 (6) of the Civil Procedure Rules do not apply in in this case because there is no appeal filed against the decision of the court and now subject of the discourse hereto and that Order 43(3) of the Civil Procedure Rules is also cited out of context. That the Application herein thus displays and demonstrates that the Applicant and its Counsel are out of their depth and may lack grasp of the Orders of this Court made on 9th December 2020 and that the Court's jurisdiction has therefore not been invoked and the Application is not clothed or anchored in any law. The Claimant submits that Section 38 of the Civil Procedure Act, 2010 empowers this Court in the following terms:

38. Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—

b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree;

The Claimant submits that Order 22 Rule 6 of the Civil Procedure Rules, 2010 also provides for the making of an application to the court which passed the decree with the proviso to Order 22 Rules 6 contemplating service of 10 days' Notice on a Judgment Debtor where judgement was entered in default of Appearance. She submits that Order 22 Rule 13 provides the procedure to be followed by the Court upon receiving an application for execution and that the Court is only required to satisfy itself that the Decree Holder has satisfied the provision of Order 22 Rules 7 and 9. Further, that Rule 32(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that an order or decree shall be enforceable in accordance with the Civil Procedure Rules and which route the Claimant followed. That this matter being at the execution stage, the Applicant's Advocates is in the circumstances unnecessary and was only served for purposes of information and nothing more. The Claimant submits that Application before Court is an attempt to circumvent the orders of this court and that even if the alleged "great sin" of failure to serve the Claimant's application to the Respondent's Advocates had been committed, (and it has been demonstrated that service was effected), the greater sin and original sin was committed by the Applicant in failing to honour the orders of this Court. The Claimant submits that he who comes to equity must do equity and come to court with clean hands and that she in the circumstances urges the Court to weigh carefully whether any justice shall have been served by allowing the Applicant to dance around the court orders of 8th November 2017.

4. The Respondent correctly points out that the principles governing the exercise of the judicial discretion to set aside *ex parte* orders or judgment are enunciated to be thus:-

a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

c. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically

5. All said and done, the discretion is exercised when inadvertence, accident, excusable mistake or error occur. It is not exercised arbitrarily or idiosyncratically. The motion by the Respondent is misguided in as far as it attacks service by electronic mail. Service by electronic mail as has been correctly pointed out is now permitted in the new normal brought about by the global pandemic that is Covid-19. This Court is not immune from the progressive amendment to the Civil Procedure Rules per Rule 22B. Granted that service was effected on the Respondent by electronic means, and granted the Respondent admits receipt of the documents though it complains these were in a different format, the Respondent being aware of the same ought to have made arrangements to either obtain clearer copies from the Claimant if the ones it received were not clear, or seek these copies from the Court or the online portal. As these were not done the Respondent cannot now claim to be prejudiced. Diligence is not only reposed in the party moving the Court. It behoves every party before the Court to be diligent. Finally, there is no Judge known as Nzioka wa Makau and as such since the Court the Respondent seeks to reverse does not exist there is nothing for the Court to do but dismiss the Respondent's notice of motion application with costs to the Claimant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2021

Nzioki wa Makau

JUDGE