



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 840 OF 2018

BETWEEN

SIMON WACHIE WAKHUBUBI.....CLAIMANT

VERSUS

EDERMANN COMPANY [K] LIMITED.....RESPONDENT

RULING

1. *Ex-parte* Judgment was delivered in favour of the Claimant, for a sum of Kshs. 248,150, on 9th December 2019.
2. It was a finding of the Trial Court at page 3 of the Judgment, that “ *despite service of summons, statement of claim, the mention and hearing notices, the Claimant [read Respondent], failed to attend court, to enter appearance or to file response to the claim.*”
3. The Deputy- Registrar of the Court, on taxing the Party and Party Bill of Costs on 27th April 2020, similarly found that Taxation Notice had been served upon the Respondent, despite the Claim being undefended, and the Respondent did not attend taxation.
4. The Respondent has filed an Application dated 28th September 2020 disputing service, and asking the Court to set aside Judgment on record, and allow the Respondent, to respond to the Claim.
5. The Application is based on the Affidavit of Joseph Anditi an Officer at the Human Resource Department, acting on authority of the Respondent’s Board of Directors. The Affidavit was sworn on 27th September 2020.
6. Anditi states that the Respondent became aware of the Proceedings in Court and resultant Judgment on 17th September 2020, when one Joseph Mwangi from Bemac Auctioneers went to Respondent’s sister company at Mlolongo, and delivered execution documents.
7. It was only then, that the Respondent instructed its Advocates on record, who upon perusal of the Court file, realized there was an *ex-parte* Judgment against the Respondent.
8. The Respondent denies that it was ever served with summons from the Court, as alleged in the Affidavit of Service sworn by Process-Server, Peter Ng’eno.
9. The Respondent states that it has a good Statement of Response as disclosed in the draft filed with the Application.
10. It is submitted for the Respondent that the Respondent does not have its physical address at Finance House, 6th Floor in Nairobi, as alleged in the Affidavit of Ng’eno. Its physical address is at Mlolongo, Machakos County.
11. The Application is opposed through the Replying Affidavit of Patrick Mulaku, Advocate for the Claimant, sworn on 2nd December 2020.
12. The Advocate states that all documents, pre and post- Judgment required to be served upon the Respondent by the law, were served upon the Respondent at Finance House, 6th Floor, along Koinange Street in Nairobi.
13. There were several mentions before the trial. The Court gave orders that the Respondent is served, at every mention. The Respondent did not honour any of the Notices. Having satisfied itself, that the Respondent had failed to enter Appearance and file Response as required under

the E&LRC [Procedure] Rules, 2016, the Court, on 16th July 2020, certified the matter ready for hearing undefended. It was only when the Claimant moved to execute Judgment, that the Respondent instructed its Advocates to enter Appearance, seek setting aside of the Judgment, and seek to be heard.

14. Parties agreed on 10th June 2021, to have the Application considered on the strength of their Affidavits and Submissions. Ruling was scheduled for 21st October 2021, but is ready much earlier, and the Court has directed its Registry, that Parties are notified of its delivery on the date indicated below.

The Court Finds: -

15. The Respondent has not supplied the Court with any extract from the Register of Companies, showing that it does not have an office, at Finance House, 6th Floor, Koinange Street, in Nairobi's Central Business District, or showing that its registered office is at Mlolongo.

16. The Affidavit of Anditi in support of the Application, refers to Respondent's sister company located at Mlolongo. It is probable the Respondent has a presence at both Finance House and Mlolongo. This Affidavit does not say that the Respondent is not housed, at Finance House, 6th Floor, at Koinange Street. The disavowal of Finance House is first made in the Submissions of the Respondent.

17. An Application filed by the Auctioneer Joseph Mwangi, seeking the aid of the Police in executing warrants of sale and attachment, indicates the attached goods were in Respondent's premises, located in Central Business District, Nairobi. No objection proceedings, with respect to the proclaimed goods, have been filed by any Objector, in this file.

18. The Respondent complains about service carried out by Process-Server Ng'eno. But the record shows there were other Notices served at the same place, upon the same Respondent, by other Process-Servers with the same result- no attendance in Court by the Respondent.

19. There are Notices served by Process-Servers George Okwemba and Michael Cleophas O. Odongo. All were served at Finance House, 6th Floor. Like the ones served by Ngéno, they were received by Legal Officer Ms. Hinga.

20. It is unlikely that all the Process-Servers and the Auctioneer, were mistaken about the Respondent's physical address.

21. The Respondent has not denied that Ms. Hinga is its Legal Officer. She has not sworn an Affidavit denying service.

22. Instead, the Respondent relies on the Affidavit of Anditi, whose actual designation with the Respondent is not disclosed. He describes himself merely as an Officer, with the Respondent's Human Resource Department. The Respondent needed to clarify exactly what Anditi is, and how he interacted with the issues in dispute.

23. The authority allegedly given to him by the Directors, does not have the seal of the Respondent. The names of the Directors are not even disclosed. It is just the signatures of unknown Directors, on the authority document. At the bottom, service of the authority is to be made upon the Law Firm of Gichuki Kingára & Co. Who does this Law Firm represent in these proceedings? This is not an authority that can be relied upon by this Court.

24. The Court is satisfied that proper service was effected. The Trial Court, The Deputy Registrar, have all confirmed service, before hearing and taxation. The Trial Court certified the Claim ready for hearing undefended, upon satisfying itself on service. Different Process-Servers were involved. Receipt was by Legal Officer Ms. Hinga, who has not filed any Affidavit denying involvement. There is no document from the Register of Companies, discounting Respondent's presence at Finance House, or confirming that the Respondent's sole place of business is at Mlolongo. It is highly unlikely that all Process-Servers and the Auctioneer, made a mistake with respect to the Respondent's place of business.

IT IS ORDERED: -

a. The Application filed by the Respondent, dated 28th September 2020, is declined.

b. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10TH DAY OF SEPTEMBER 2021.

JAMES RIKA

JUDGE