



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 400 OF 2018

COLLINS TEMBO MWANGOMBE.....CLAIMANT

- VERSUS -

AWANAD ENTERPRISES LIMITED.....1ST RESPONDENT

HABO GROUP OF COMPANIES.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

RULING

The Court (Ndolo J) delivered the judgment in the suit on 20.05.2021. Judgment was entered for the claimant against the 1st and 2nd respondents jointly and severally as follows:

- a) 6 months' salary in compensation Kshs. 150, 000.00.
- b) 1 month's salary in lieu of notice Kshs. 25, 000.00.
- c) Salary for 19 days in May 2017 Kshs.15, 833.00.
- d) Leave pay for 5 years (25, 000.00/ 30x 21 x 5 Kshs.87, 500.00.
- e) The amount to attract interest at court rates from the date of judgment until payment in full.
- f) The claimant is also entitled to a certificate of service plus costs of the case.
- g) Orders accordingly.

The respondent in the suit has filed an application by the notice of motion dated 24.08.2021 and through Wameyo Onyango & Company Advocates. The application is under rule 3 (2) of the High Court (Practice and Procedure) Rules and other enabling provisions of law. The applicant prays for setting aside of interlocutory judgment entered against the respondents herein; and costs of the application be provided for.

The application is based on the annexed supporting affidavit of Bibiana Awiti and upon the following grounds:

- a) The service of the notice of summons was never effected on the 1st respondent.
- b) The 1st respondent became aware of the suit on 18.08.2021 when the auctioneers effected service of a notice of proclamation of attachment.
- c) The 2nd respondent has been struck off the register of companies per Gazette Notice No. 666 of 29.01.2021 and no longer exists, neither Ms. Fatuma nor the Human Resource Manager who was allegedly served was a principal officer of the 2nd respondent.
- d) The claimant is in the process of executing the judgment against the 1st respondent who was never served with a notice of summons and if the orders sought herein are not granted at the first instance the application will be rendered nugatory.

e) Ms. Fatuma mentioned in the affidavit of service of summons was an employee of the 2nd respondent and not the 1st respondent and the affidavit of service does not make reference to service of summons upon the 1st respondent.

f) The 1st respondent has a defence raising triable issues and a draft 1st respondent's response to claim.

The claimant opposed the application by filing his replying affidavit on 24.09.2021 through C.K Mwero Advocates. The replying affidavit urges as follows:

a) The suit was filed on 14.06.2018 and Patrick Mwendwa, a licenced process server served the applicants with the notice of summons and pleadings on 16.07.2018 and the affidavit of service is exhibited.

b) Prior to hearing of the suit the Court was satisfied that effective service had been effected.

c) While the claimant worked for the respondents Ma. Fatuma was acting for both Applicants when receiving summons as the applicant is a subsidiary of the 2nd respondent in the suit.

d) The claimant has exhibited the letter dated 30.05.2017 confirming that he was an employee of Habo Group of Companies working under the applicant from 1st July 2012 to May of 2017 as an electrician and that he was an honest employee.

e) The applicant and the 2nd respondent in the suit were served all court processes but failed to enter appearance, to file a response to the claim, to attend mentions and to attend at the hearing. Some service was by registered mail per leave of Court and the applicant cannot be heard to say that it was not aware of the suit.

f) The delay to defend the suit is inordinate and inexcusable because the applicant was at all material time aware of the pending suit. Inaction to defend the suit does not amount to excusable mistake or technicality and 4 years have lapsed since the suit was filed.

g) The case was heard on merits at full hearing and there was no interlocutory judgment.

h) The Court should invoke Article 159 and 160 (1) of the Constitution of Kenya and dismiss the application with costs.

Parties filed their respective submissions. The Court has considered the application, the respective affidavits and exhibits and submissions and make findings as follows.

First, the claimant's replying affidavit has shown that by the letter dated 30.05.2017 he indeed worked for the applicant which was a subsidiary of the 2nd respondent in the suit. His evidence that Ms. Fatuma always received court summons for both applicant and the 2nd respondent even at the time he worked for the 1st respondent has not been rebutted at all. The Court finds that there is no reason to doubt that the applicant was duly served and was aware of the filing of the suit as set out in the affidavit of service of the notice of summons and memorandum of claim. Subsequently, mention notices and hearing notice were served per the affidavits of service on record and in urging its case the applicant has made no submission about that subsequent service. The Court finds that there is no reason to doubt that the notice of summons and the memorandum of claim were served and that all through the pendency of the suit the applicant was informed about the steps in the suit but decided not to attend. The Court upholds the findings in the judgment thus, **"The respondents were duly served with the claim but they did not file any response. The matter therefore proceeded by way of formal proof."**

Second, as submitted for the claimant, the applicant was misconceived in praying for thus, **"2. THAT this Honourable Court be pleased to set aside the interlocutory judgment entered against the respondents herein."** The Court finds that there was no interlocutory judgment on record and there was no prayer seeking to set aside the judgment delivered herein on 20.05.2021 and the decree or processes flowing from that judgment. Thus the application will fail as misconceived and incompetent.

Third, in urging the application, the applicant failed to invoke the Court's rules of procedure and without invoking the inapplicable Order 10 rule 11 of the Civil Procedure Rules, purported to rely on the same Order 10 rule 11 of the Civil Procedure Rules in the submissions. The Court has already found that there was no interlocutory judgment on record and relying on the inapplicable rules did not aid the applicant's case but acts as an impetus to dismissal of the application. The submission for the claimant that the Employment and Labour Relations Court (Procedure) Rules 2016 applied and did not provide for interlocutory judgment is upheld.

In conclusion the application dated 24.08.2021 and filed 25.08.2021 for the 1st respondent in the suit is hereby dismissed with costs for the claimant.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE