



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 280 OF 2018

KENYA PETROLEUM AND OIL WORKERS UNION.....CLAIMANT/RESPONDENT

VERSUS

DESNOL INVESTMENT LIMITED.....1ST RESPONDENT/APPLICANT

CLIVE NATOME.....2ND RESPONDENT/APPLICANT

RULING

1. This ruling relates to a Notice of Motion application dated 24th July, 2021, The Applicant seeks orders:

i. Spent.

ii. spent

iii. That the judgment of this court made against the Respondent on 16th April, 2020 be set aside and the Respondent be granted leave to appear and defend this claim.

iv. That upon grant of prayer 3 above, the draft response to the claim annexed to this application be deemed duly filed and served subject only to payment of the requisite court fees

v. The costs of this application be provided for.

2. The application is premised on the grounds set out on the face of the application, the crux of which is that judgment was entered against the Respondents and in favour of the Claimants on 16th April, 2020 in default of filing a Memorandum of Appearance and a Response to the claim.

3. The Applicant avers that they only came to learn of the judgment when the premises of the 1st Respondent's premises were proclaimed on 19th June, 2020.

4. The respondents assert that the entry of the judgment was irregular for reason that service of summons on either of the Respondents was not effected. They further aver that they were not served the pleadings in the case and that the Affidavits of service filed before court were meant to mislead the court on the service of process in the matter.

5. The Claimant/Respondent filed a replying affidavit in response to the application. He avers that all court processes in the matter were duly served by a licensed process server, one Mr. Elvis Ochieng.

6. It is the Claimant/Respondent's position that the Memorandum of Claim together with the Verifying Affidavit, Notice of Motion under Certificate of Urgency and a hearing notice, were duly served on the 1st and 2nd Respondents/Applicants on 26th September, 2018 by the process sever named herein. The Respondent/Claimant adds that notices to take hearing dates were all served upon the Applicants/Respondent and that the return of service as proof of the said service, are attached in the Replying Affidavit.

7. The Respondent/Claimant avers that all mention notices were equally served on the Applicants/Respondents and that the court was satisfied that the Applicants/Respondent were aware of the pendency of the case and certified the same to proceed to hearing as undefended.

8. The Respondent/Claimant avers that the case proceeded to hearing and judgment was delivered on 16th April, 2020, which it extracted and once again, served it on the Applicant/Respondents on 7th May, 2020.

9. The Claimant states that although the Applicant/Respondent deny instructing the Firm of Adiso & Co. Advocates to act for them, the Respondent/Applicant has since not bothered to seek clarification on why they received process on their behalf without instructions.

10. The Claimant further deposes that the Applicant/Respondent has not sought to controvert the Affidavit of Service in the court record.

11. The Respondent/Claimant asserts that the issue of service herein is an issue of fact which can only be addressed or challenged on appeal. The Respondent avers that the truth of the matter is that the Respondent/Applicants simply elected not to participate in the proceedings and that it is not by reason of lack of service.

12. The Claimant/Respondent deposes that nothing contained in the Applicants/Respondents' application warrants the intervention or disturbance of the judgment of the court and that the application should suffer the inevitable fate of dismissal with costs.

13. Parties canvassed the application through written submissions.

The Respondents'/Applicants Submissions

14. It is submitted for the Applicants/Respondents that they have a legitimate right to defend themselves in the proceedings and have a determination of the dispute on merit.

15. The Respondents/Applicants submitted that the affidavits of service filed by the Claimant/Respondent were only meant to mislead the court to enter judgment in favour of the Claimant. They submit that the fact that most of the affidavits of service were said to have been served upon them at 11:00a.m, only goes to show that they were drawn to hoodwink the court to believe that service was effected.

16. The Respondent submits that the Claimant failed to issue the mandatory 10 days' notice of judgment. They sought to rely on the case of **NAIROBI HCCA NO.220 OF 2017- NAIROBI BOTTLERS LTD V BENJAMIN DEON MASAU** to support this position.

17. The Respondent submitted that Order 10 Rule 11 of the Civil Procedure Rules empowers a court to set aside an ex parte judgment. They sought to rely on the case of **Pithon Waweru Maina V Thuka Mugiria (1983) Eklr**

The Claimant's Submissions

18. It is submitted for the Claimant that the court record is proof that the Respondent/Applicants were served with all the documents in relation to the judgment subject of this application. It is further submitted that in the impugned judgment, the judge referred to the issue of service, clearly demonstrating that the Respondents/Applicant chose not to participate in the suit.

19. The Claimant submitted that the Respondent admitted receiving warrants of attachment which were served in the same way the other documents in the suit were. It is their further submission that the Respondents are dishonest in not acknowledging receipt of service of process in the suit, as the same were served upon them at every step.

20. It is submitted that the orders sought herein can only be allowed, where the court determines that the applicant was condemned unheard. In this matter, it is submitted that the Applicants/Respondents had knowledge of the suit and chose not to participate resulting in the orders now in force. They sought to rely on the holding in the case of **Koinange Investment & Development Ltd V Robert Nelson Ngethe (2014) eKLR**.

21. It is submitted that the Claimant filled return of service of all service effected on the Respondents and with the all the necessary details thereof per Rule 15 of Order 5 of the Civil Procedure Rules.

22. The Claimant submitted that the judgment in the matter is valid and regular and that the court only sets aside a judgement if the same is irregular. (**Ecobank Kenya Limited v Minolta Limited & 2 others (2018) eKLR**).

23. The Claimant further submits that the Respondents' draft response does not raise triable issues, is a sham and full of mere denials and general statements, which do not warrant disturbing of the judgment of the court.

Determination

24. The Applicant/Respondents claim to have learnt of the judgment subject of this application on the 19th June, 2020. The instant application was filed on 24th July, 2021, a year after having learnt of the existence of the same.

25. The Applicant/Respondents being the burden bearers, have failed to prove that they were not summoned to enter appearance in this matter or that they were not aware of the pendency of the suit all together, before court. There are a Affidavits of Service on record showing that the Applicants/Respondents were notified of every step in the case. They simply did not take the case seriously and will now not be allowed to deny the Claimant/Respondent to enjoy the fruits of their judgment.

26. The court that rendered the judgment subject of this application, made mention of the issue of service, and was satisfied that every effort

was made in accordance with the law, to notify the Respondents of the pendency of the suit and the progress thereon. The Respondents made no effort on their part to defend or otherwise participate in the suit.

27. The court concludes that the application is unmerited, frivolous and an abuse of the process of this court and is hereby dismissed with costs to the Claimant.

28. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Obiero for the Claimant

N/A for the Respondent

Ms. Christine Omollo – C/A