



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1911 OF 2014

PETER MUTUA MUINDI.....CLAIMANT

VERSUS

ANSALDI ROBERTO.....RESPONDENT

RULING

The respondent, Ansaldo Roberto filed application dated 21st January, 2021 seeking for orders that there be stay of execution of the judgement and decree issued in favour of the claimant against the respondent; the court to set aside the proceedings in this suit and the judgement; and the court to summon Paul Musyoki Muli and Wycliffe Shikuku M'mada for purposes of cross-examination as regard to the contents of their Affidavits of Service in this matter; and the respondent be allowed unconditional leave to defend the claim.

The application is supported by the Affidavit of the respondent and on the grounds that the respondent was never served with summons, memorandum of claim or other pleadings and remained unaware of these proceedings until issuance of the warrants of attachment in execution of the decree.

The respondent avers in his affidavit that he was shocked to be served with warrants of attachment since he had never been served with summons. He has a good defence against the claim and will suffer irreparable loss and damage if not allowed to be heard in his defence.

He has perused the court file and the affidavits of service filed indicating that he was served with summons on 9th January, 2015 and 6th June, 2015 save on such dates he was not in the country as evidenced by his passport.

The alleged service of mention and hearing notices and judgement on 25th October, 2018 is not true as on such dates he was not in the country as evidenced by his passport and prays to have the process server be called for cross-examination to ascertain how service was affected.

There shall be no prejudice suffered by allowing the respondent to defend the suit.

In reply, the claimant filed his Replying Affidavit and avers that the passport extracts submitted by the respondent do not show his whereabouts on the material dates he alleges that there was no service of summons, mention and hearing notices and this matter proceeded for hearing with his full knowledge. The mere allegations are not sufficient to set aside the judgement herein which is proper and lawful and the decree should be satisfied.

The respondent as the applicant submitted that summons herein were never served and he had no knowledge of the matter until warrants of attachment were served. On the dates alleged that there was service, he was not in the country. In the case of **John Akasirwa v Alfred Inat Kimusi [2001] eKLR** the court held that Order 5 Rule 9(1) requires strict compliance with service upon a respondent which was not done in his case. In **Cooperative Bank of Kenya Limited v Said Sheikh Ahmed [2004] eKLR** the court held that where a party is not within the court jurisdiction for a process server to say there was service is improbable.

The judgement herein should be set aside and the respondent allowed defending the suit.

The claimant submitted that the allegations made by the respondent are not true as he does not state his whereabouts on the date he was served save to attach entry and exit stamps from immigration. The passport extracts do not state the makers and cannot be relied upon and should be dismissed. There was proper service and there exists a valid judgement and the claimant should be allowed to enjoy the award and to execute the warrants of attachment.

Determination

The gist of the application before court is that the court should stay the execution of the judgement and decree herein; set aside the

proceedings and the decree; process servers be called for examination; and the respondent be granted leave to defend the suit. These orders are sought on the grounds that there was no service of summons, mention and hearing notices and the matter proceeded without the knowledge of the respondent.

The jurisdiction of the court to stay execution, set aside its decisions is wide and unfettered. In **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that;

This discretion (to set aside ex parte proceedings or decision) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

An applicant must demonstrate sufficient cause to warrant stay of execution and the setting aside of proceedings. That there was no negligence and one is acting in good faith in view of the given facts and circumstances of each case. in Wachira Karani v Bildad Wachira [2016] eKLR the court held that;

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...

In this case, the respondent's case is that there was no service of summons.

The claim herein was filed on 10th November, 2014 and Amended Memorandum of Claim on 21st November, 2021.

In the Affidavit of Service sworn by Paul Musyoka Muli dated 18th April, 2015 he avers that;

On 9th day of January 2015 ... I proceeded to his residence [the respondent] at Karen, Hardy Road, Koitobos lane hose No.82 within Nairobi County, where upon arrival at about 10.50am I met the security personnel and introduced myself and the reason of my visit and he went and called him and I served him with summons to enter appearance, memorandum of claim and amended claim which he acknowledged receipt of the same but declined to sign on my copies.

Under the then applicable Rules of procedures, the Industrial Court (Procedure) Rules, 2014 required that summons be served upon a respondent pursuant to Rule 11 and which provides that;

11. (1) The Court shall issue summons in Form 2 set out in the First Schedule.

(2) A claimant shall serve the summons issued under paragraph (1) to the respondent together with the statement of claim.

(3) Summons shall be valid in the first instance for a period of six months beginning on the date of its issue and the Court may extend the validity from time to time if satisfied that it is just to do so. the Process Server hence under oath stated that summons herein were effected personally upon the respondent but who acknowledged receipt but refused to sign on the copies.

The respondent asserts that on 9th January, 2015 he was out of the country and has attached passport extracts to confirm such facts. Annexure "AR2" have various exits and entries in and out of the country to various destinations.

There is no contrary evidence that such entries and exits in and out of the country are not true. This is *prima facie* that he was not in the country at the material time the Process server alleges to have served summons upon the respondent in person at his residence as described in the Affidavit of Service.

Without service of summon herein, the proceedings thereof lacked a proper foundation.

Under Rule 11 of the then applicable court rules, the claimant was allowed to seek service through the court or by registered service in the event efforts to serve the respondent failed.

On this basis, the resulting proceedings and judgement thereof were invalid.

The court finds the respondent was not properly served with summons and the failure to attend court was not deliberate or with intent to defeat the course of justice. See **Philip Ongom, Capt v Catherine Nyero Owota Civil Appeal No. 14 of 2001 [2003] UGSC**.

This court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as held in the case of **Wachira Karani v Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR**.

The respondent has however failed to demonstrate what defence exists in this case. Such lapse on the fact of the fact that there is access to the pleadings herein and such is imperative where leave is sought to defend the suit, on the findings above, judgement herein and all consequential orders thereof is hereby set aside save the respondent shall pay costs due to the claimant all at Ksh.20,000 within 30 days. The respondent shall file defence herein within 14 days, serve the claimant who shall reply within 14 days of service and after which time parties

shall attend for hearing directions.

Accordingly, application dated 21st January, 2021 is hereby allowed in the following terms;

- a) Judgement herein and decree and all consequential orders thereof are hereby set aside;**
- b) The respondent shall pay the claimant costs of Ksh.20,000 within 30 days;**
- c) The respondent shall file defence within 14 days and serve the claimant who shall have a right of reply within 14 days thereof;**
- d) Taking note of the age of the file, a hearing date shall be allocated on priority basis; and**
- e) Costs in the suit.**

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021.

M. MBARU

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: OKODOI

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