



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 836 OF 2017

BETWEEN

JOSEPH MUTUA MTINDA.....CLAIMANT

VERSUS

NINE ONE ONE KENYA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odindiko & Company Advocates for the Claimant

Lilan Koech & Company, Advocates for the Respondent

RULING

1. *Ex-parte* Judgment was delivered in favour of the Claimant against the Respondent, for a total amount of Kshs. 465,017, in terminal dues and compensation for unfair termination, on 14th June 2019.
2. There was no Statement of Response on record and the Respondent did not attend Court at the hearing.
3. On 7th November 2019, the Respondent filed an Application asking the Court to stay execution of decree, set aside *ex parte* Judgment, Proceedings and allow the Respondent to file its Pleadings and respond to the Claim out of time. The date of the Judgment is indicated as 21st July 2019 in the Application. The correct date is 14th June 2019.
4. The Application is based on the Affidavit of Diana Kandie, Respondent's Human Resource Manager, sworn on 6th November 2019.
5. The Claimant is opposed to the Application, relying on the Replying Affidavit of Learned Counsel for the Claimant, Aron Odindiko Wandera, sworn on 26th November 2019.
6. Parties agreed on 28th November 2019 to have the Application considered and determined on the strength of their Affidavits and Submissions. They confirmed filing of Submissions on 5th December 2019.
7. Diana states, the Respondent was not served with any document, except the Notice of Entry of Judgment. Judgment was obtained irregularly. The Claimant did not disclose to the Court that he resigned through a letter dated 23rd August 2015. The Respondent has a good response, and ought to be heard. The Claimant misled the Court in his evidence.
8. Counsel for the Claimant states, the Application has no merit. He wrote demand letter before action, dated 3rd October 2017. He served through a Process-Server the Notice of Summons, Statement of Claim and subsequent Mention Notices. The Respondent filed nothing and did not attend Court when required to do so. The demand letter and Affidavits of Service are exhibited.

9. The Respondent served the Claimant with Notice of Entry of Judgment, Decree and Certificate of Costs, at the same address in Mombasa, and in the same mode the initial documents were served. The Respondent does not dispute service of these documents.

10. The Application has no merit and is meant to delay the Claimant in enjoyment of his fruits of litigation.

The Court Finds:-

11. Diana acknowledges receipt of Notice of Judgment, at paragraph 3 of her Affidavit. The Notice is addressed to the Respondent's Offices at Mombasa. It is the same address the rest of the documents are shown to have been served upon, in the various Affidavits of Service, sworn by the Court Process- Server. The Respondent does not dispute that it has an Office at Mombasa, whose details are given in the Affidavits of the Process-Server.

12. The Respondent did not ask to cross-examine the Process-Server on any statement made in his Affidavits of Service.

13. The Court is satisfied that the Respondent was served and was aware of the proceedings, but opted not to participate when called upon to do so.

14. The other issue raised by the Respondent is that it has a good response to the Claim. As in the related ***Cause No. 834 of 2017, Maro Abdallah Jilloh v. Nine One Kenya Limited***, the Respondent submits that the Claimant herein, did not disclose that he resigned through a letter dated 23rd August 2015.

15. There are no other grounds shown in the Draft Statement of Response and the Affidavit of Diana, indicating that there is a good response to the Claim.

16. This lone ground is not correct.

17. In his Witness Statement filed on 2nd November 2017, the Claimant states “ *my Employer made it difficult for me to work and in the long run, forced me to leave.*”

18. In his evidence before the Court, he stated “ *I was not able to continue.*”

19. In its Judgment subject matter of this Application, the Court found and opined, “ *The Claimant was employed by the Respondent in the year 2013 as a Security Guard. He later became Controller and Guard Supervisor. He left employment after being transferred from Mombasa to Nairobi, Kajiado, then Nairobi, without facilitation. He asked for financial assistance from the Human Resource Manager on the last transfer. It was not forthcoming and the Claimant left employment in 2015. The Court agrees with the Claimant that he was constructively dismissed.*”

20. It was clear from the evidence of the Claimant that he resigned, because of an uncondusive working environment. He did not fail to disclose that he resigned. He was granted compensation for constructive dismissal.

21. The assertion by the Respondent that it has a strong response, based on the lone ground that the Claimant did not disclose he resigned, is incorrect. It has not been established that there is a good response to the Claim.

22. Consequently, there is no reason to warrant interference with the *ex parte* Judgment on record. The Respondent was aware of the proceedings and deliberately failed to participate. Secondly, there is no good response to the Claim, shown in the Draft Statement of Response. The Respondent merely denies the contents of the Statement of Claim, adding in the Affidavit of Diana that, the Claimant failed to disclose he resigned. There was disclosure made upon trial. There is no good response, warranting setting aside of the Judgment and hearing of the Claim afresh.

IT IS ORDERED:-

a. The Application filed on 7th November 2019 by the Respondent is declined.

b. Costs to the Claimant.

Dated and delivered at Mombasa this 31st day of January 2020.

James Rika

Judge