



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

CAUSE NUMBER 834 OF 2017

BETWEEN

MARO ABDALLAH JILLOH..... CLAIMANT

VERSUS

NINE ONE ONE KENYA LIMITEDRESPONDENT

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. 603,845, in terminal dues and compensation for unfair termination, on 21st June 2019.
2. There was no Statement of Response on record and the Respondent did not attend Court at the hearing.
3. On 6th 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.
4. The Application is based on the Affidavit of Diana Kandie, Respondent's Human Resource Manager, sworn on 1st 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 13th June 2017. 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. There was no reply. 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, 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 has not sought to cross-examine the Process-Server on his Affidavits.

13. The Respondent states it has a good response to the Claim. In his evidence in Court, the Claimant told the Court there was disagreement with the Respondent about proposed transfer to Nairobi. He was told to go home because he was not ready to transfer.

14. The Respondent states that the Claimant failed to inform the Court that he resigned.

15. The Court finds there is merit to this limb in the Application. Although the Claimant states he was told there was no more work, he did not tell the Court he resigned. He exhibited a letter of resignation, which he said nothing about in his evidence. In his Witness Statement, he does not state in clear terms, that he resigned. He attributes termination decision entirely on the Respondent.

16. He alludes to constructive dismissal, while maintaining that he was advised there was no more work.

17. In the view of the Court, there does seem to be a good and weighty response to the Claim, which the Respondent should be allowed the opportunity to canvass. The fact, and circumstances, of Claimant's resignation / exit from employment, needs to be understood by the Court fully, before it can be said with a sense of finality, that the Claimant's contract was terminated by the Respondent unfairly, or at all.

18. The Respondent should however meet Claimant's throw away costs, having received Claimant's Pleadings and Court Summons, and failed to respond to the Claim in time.

IT IS ORDERED:-

a. The ex-parte Judgment and all consequential orders issued pursuant to that Judgment, are set aside.

b. The Respondent is granted leave of 14 days from the date of this Ruling to file its Pleadings and Documents.

c. Within the same number of days, the Respondent shall pay throw away costs of Kshs. 25,000 to the Claimant.

d. In event the Respondent does not comply with order [b] and [c] above, the orders made today shall immediately collapse.

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

James Rika

Judge