

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 9 OF 2017

ADAN ROBA.....CLAIMANT /RESPONDENT

VERSUS

SUMMER DISTRIBUTORS.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant's notice of motion application dated 5th July 2019 seeks to have the order of the Court made in June 2019 when the case proceeded *ex parte* in absence of the Respondent or counsel for the Respondent. The Applicant thus sought the re-opening of the case to allow the Respondent to tender evidence in its defence. The Claimant proceeded on 27th June 2019 the date set for hearing. The Applicant asserts that the hearing notice was served on M/s Rimita & Co. Advocates as well as M/s Anyungu Anampiu & Co. Advocates the present and former advocates for the Claimant respectively. The Respondent was thus not served. The Respondent seeks the reopening on this ground as no service was effected on the Respondent.

2. The Claimant/Respondent filed a replying affidavit in which he deposed that the hearing proceeded in the absence of the Respondent and that he had been served by the Court. He deposed that the hearing notice clearly indicated that hearing was scheduled for 27th June 2019. He deposed at the hearing there was no appearance by the Respondent and the court took his evidence and gave directions on the filing of submissions. He deposed that he had already filed his submissions in compliance with the directions of the court and was awaiting judgment. He deposed that the Court should be guided by the return of service filed by the court process server who served the hearing notice in this matter. He urged the court to consider that the rules of natural justice were adhered to before the matter proceeded and that the Respondent/Applicant had a window to file submissions in the matter. He urged the dismissal of the Respondent/Applicant's motion with costs.

3. At the hearing of the motion there was no attendance on part of the Claimant/Respondent. Mr. Mokuia argued the motion on behalf of the Respondent/Applicant. He submitted that in response to the motion, the Claimant had filed a replying affidavit. He submitted that the Respondent/Applicant did not participate in the hearing and directions were given for submissions to be filed and judgment was reserved. He argued that the Respondent/Applicant was not served and the basis for this surmise was the fact that the hearing notice prepared was indicated to be served on M/s Rimita & Co. Advocates and M/s Anyungu Anampiu & Co. Advocates who he stated were the present and former advocates for the Claimant. He urged the Court to review the annexure at paragraph 5 of the Affidavit in support of the motion and note. He submitted that on account of non-service the Respondent/Applicant was absent at the hearing. He stated that the Respondent had diligently attended court through counsel and this was the only time there was no representation and the absence was well explained. He submitted that in the interest of justice the case should be reopened and the Respondent heard as there would be no prejudice suffered by the Claimant on account of the re-opening.

4. The Respondent is right. The Court process server served only the present advocates for the Claimant M/s Rimita & Co. Advocates as well as M/s Anyungu Anampiu & Co. Advocates the former advocates for the Claimant. There is no service upon the firm of Mokuia Obiria & Associates Advocates who appear for the Respondent. As such, the failure by the Respondent to appear in court on 27th June 2019 was not deliberate. The Respondent was simply not served. In the premises it is in the interests of justice to reopen the matter and permit the Respondent to call evidence in its defence as well as have an opportunity to cross-examine the Claimant. The inevitable outcome of this motion is that the proceedings of the Court on 27th June 2019 are vacated. As the error in service was from the Court side there will be no order as to costs. Immediately after this Ruling directions will be given for the hearing and disposal of the suit.

It is so ordered.

Dated and delivered at Meru this 29th day of January 2020

Nzioki wa Makau

JUDGE