



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**CAUSE NO. 96 OF 2017**

**AGAPETUS NYONGESA MASINDE.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT, BUNGOMA HIGH SCHOOL .....RESPONDENT**

**RULING**

1. The Respondent/Applicant filed application dated 10<sup>th</sup> June 2019 seeking the following orders:
  - (a) Stay of execution
  - (b) Setting aside of the ex-parte judgment and all consequential orders.
  - (c) The applicant be granted leave to file responses to the claim and matter be heard on merit.
2. The application is based on the grounds set out on the face of the Notice of Motion to wit:
  - (a) The claimant has a judgment in his favour in the sum of Kshs. 1,044,076 and may execute it any time to the detriment of the applicant.
  - (b) The applicant was not served with statement of claim and summons to enter appearance and the applicant too was not aware of the hearing.
  - (c) That the applicant has a good defence to the case.
  - (d) It is in the interest of justice that orders sought are granted.
  - (e) The respondent will not suffer any harm if the orders sought are granted.
  - (f) The balance of convenience is in favour of the applicant
3. The application is opposed by a replying affidavit of the respondent in which he deposes that it is false that the applicant was not served with the court process because the applicant was on 1<sup>st</sup> November 2017 served with the statement of claim and summons to enter appearance and the Applicant duly received signed and stamped on the respondent's copy duly filed in court and marked "ANMI (a) and (b).
4. Furthermore, an affidavit of service was filed by one Emmanuel Wanyonyi confirming service of the statement of claim and summons on the applicant and therefore it is not true that the said affidavit does not disclose the name of the person who received the documents.
5. That the process server duly complied with *Rule 11(6) and (7) of the Employment and Labour Relations Court (Procedure) Rules, 2016*.
6. That the suit was fixed for directions after lapse of 21 days upon service and the applicant was served with mention date by hand delivery and through registered mail as per Annex "ANM 2 (a) and (b). That the applicant did not attend court on the mention date and the matter was set down for formal proof on 26<sup>th</sup> February 2018 and thereafter judgment on 2<sup>nd</sup> March 2018.
7. That an application to review the judgment dated 14<sup>th</sup> March 2018 was filed by the respondent and same was served on the applicant herein. On the date of hearing the application for review on 30<sup>th</sup> May 2018, the applicant did not attend the hearing. A ruling was delivered on 27<sup>th</sup> July 2018 and computation of the award confirmed on 25<sup>th</sup> January 2019.

8. The matter was then fixed for taxation and the applicant again did not appear and taxation proceeded and ruling delivered.

9. It is apparent that the applicant was not keen at all in defending the suit. The application is an afterthought brought after inordinate delay to defeat the justice of the case. That there is no defence to the suit herein and annexed statement of response constitute mere denials. That the application be dismissed with cost. That the applicant is a judgment debtor and should satisfy the decree in favour of the respondent.

**Determination**

10. The supplementary affidavit filed by the applicant on 15<sup>th</sup> October 2019 does not contest the fact that the applicant was duly served with the statement of claim and summons and duly acknowledged receipt. There is also no explanation for the inordinate delay in bringing this application on 10<sup>th</sup> June 2019, about one year and three months from the date judgment was delivered on 2<sup>nd</sup> March 2018.

11. The applicant has an obligation to tell the truth on the issue of service to warrant consideration by the court. The application is based on a falsehood regarding the matter of service. The applicant does not deserve exercise of discretion in his favour whilst not being honest about the matter.

12. The inordinate delay in bringing this application is prejudicial to the claimant/respondent and setting aside of the judgment in this matter would amount to denial of justice to the claimant/respondent.

This decision has been arrived at upon considering the various authorities presented by the applicant including **Shanzu Investments Limited vs Commissioner of Lands Civil Appeal No. 100 of 1993 (1993) eKLR.**

13. The application is dismissed with costs.

**Ruling Dated, Signed and delivered this 5<sup>th</sup> day of March, 2020**

**Mathews N. Nduma**

**Judge**

**BUNGOMA**

**Appearances**

J.O Makali for Respondent/Applicant

Mr. Were for Claimant/Respondent.

Chrispo – Court clerk.