REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 103 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th May, 2020)

DAVID GICHERU ……PETITIONER/RESPONDENT

VERSUS

GICHEHA FARMS LIMITED …..……..1ST RESPONDENT

BROOKSIDE DAIRIES LIMITED.....….2ND RESPONDENT

RULING

1. Pending before me for determination is the Notice of Motion Application dated 4th February, 2020. The Application is filed Under Article 159 (2) (d) & (e) of the Constitution of Kenya, Section 3 and 20 of the Employment and Labour Relations Court Act, Rule 17, 26 and 27 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the inherent jurisdiction of the Court and all powers of the Court.

2. The Application seeks the following Orders:-

> ***1. THAT this Application be certified as urgent and service thereof be dispensed with in the first instance.***
>
> ***2. THAT there be stay of proceedings and execution pending hearing and determination of the Respondent's instant Application.***
>
> ***3. THAT the ex-parte proceedings and default judgment entered in favour of the Petitioner be set aside and the Respondent be given unconditional leave to defend the Claim by filing their Submissions in response to the Petitioner's Submissions.***
>
> ***4. THAT the costs of this Application be provided for.***

3. This Application is premised on the grounds that:-

> ***a) The Respondents became aware of the Judgment on 1st February 2020 upon encountering a Newspaper Article in the Star Newspaper of 31st January 2020 which Article confirmed entry of Judgment.***
>
> ***b) To date the Respondent and their Advocates have not been served with a Mention Notice to confirm filing of submissions and a judgment notice by the Petitioner.***
>
> ***c) In the circumstances the Respondents have been condemned unheard.***
>
> ***d) The absence of the Respondents and their Advocates in Court during the mention to confirm filing of submissions and to take a judgment date was not intentional but an inadvertent omission caused by the lack of proper service of the Mention Notice and Judgment Notice.***
>
> ***e) The Respondents are keen to have the Petition heard and determined on merit without delay.***
>
> ***f) The Respondents stand to suffer prejudice by being denied a chance to be heard. Any prejudice on the Claimant can be compensated by way of costs.***
>
> ***g) The Application has been filed without delay.***

4. The Application is further supported by the Affidavits of **JOHN NJUGUNA**, the Advocate on record for the Applicant and **GRACE MANUGU**, the Group Human Resource Manager at the Respondents' companies, in which they reiterates the averments made in the Notice of Motion Application.

5. Both deponents maintain that the Respondents' became aware of judgment in this matter in a Newspaper Article in the Star Newspaper of 31st January, 2020. The deponents attributed this to lack of proper service of the Mention and Judgment Notice by the Petitioner herein.

6. It is further contended that the Respondents herein were in the circumstances condemned unheard leading to an unfair trial. The respondents urged this Honourable Court to allow its instant Application.

7. The Petitioner in response to and in opposition to the Application dated 4th February, 2020 filed a Replying Affidavit deponed by **DONALD B. KIPKORIR R. FRED MOIN SIYOI** sworn on 19th February, 2020 counsel on record for the Petitioner herein, in which he avers that proper service of Court processes were effected on the firm of Wanaina Ireri Advocates LLP on record for the Respondents herein as evidenced by the Affidavits of Service filed to confirm the same.

8. He further contended that on 24th October, 2019 the Court having been satisfied of proper service issued directions on filing of written submissions to the main Petition and proceeded to issue a Judgment date for 21st January, 2020.

9. It is further contended that the Court in its Judgment considered the Respondents' Replying Affidavit that is on record. The Petitioner further maintained that the respondents' failure to attend Court can be attributed to its negligence and not failure to effect service.

10. The Petitioner further maintained that the instant Application is an afterthought and is only meant to delay him from enjoying the fruits of the Judgment entered in his favour. He further maintained that setting aside of the Judgment will greatly prejudice him.

11. The Petitioner further contended that the Respondents/Applicants' Application fails to establish any factual and/or legal basis for the Orders sought therein to be granted. It is on this basis that the Petitioner maintained that the instant Application is hopeless, unjustifiable, non- meritorious and urged this Honourable Court to dismiss the same with costs to the Petitioner.

12. The Application proceeded orally on 11th March, 2020.

Submissions by the Parties

13. The Applicant submitted that the instant Application has been brought without delay having learned of the Judgment on 1/2/2020 through a News Paper Article.

14. The Applicant further submitted that they were no properly served with court processes and were therefore not present in court. It is further submitted that the Applicant has been greatly prejudiced by the Petitioner's failure to effect proper service and was therefore accorded an opportunity to file its submissions to the Petition.

15. The Applicant maintained that the Petition was therefore not heard on merit and urged this Court to be guided by the case of **Wachira Karani Vs Bildad Wachira (2016) eKLR** where the Court held that:-

> ***"The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter…"***

16. In conclusion the Respondents'/Applicants' urged this Honourable Court in the interest of Justice to allow its Application as prayed.

17. **Petitioner's Submissions**

18. The Petitioner on the other hand submitted that the Judgment in this matter was not an ex-parte judgment and that the Court considered the response filed by the Respondents in response to the Petition herein.

19. The Petitioner maintained that he did effect service as required by law and an Affidavit of Service filed to confirm service. He further maintained that the Respondents are being dishonest in claiming that service was not effected.

20. The Petitioner further submitted that this Court having rendered its decision 21st January, 2020 is *functus officio*. To buttress this argument the Petitioner cited the case **Joystar Cereals Commodities Limited Vs Grofin SGB Kenya Limited (2019) eKLR**.

21. In conclusion the Petitioner urged this Honourable Court to find that the instant Application is void of merit and proceed to dismiss the same with costs to the Petitioner.

Rejoinder by Respondents'/Applicants'

22. In a brief rejoinder the Respondents'/Applicants' maintained that proper service was not effected in October and July 2019. It is further maintained that the failure to attend court was not as a result of negligence on their part as alluded by the Petitioner.

23. The Applicants further maintained the Judgment as delivered by this Honourable Court was not on merit as their submissions were not considered by the Court.

24. I have considered the averments of the Parties herein. I note that on 24/10/2019, this Court issued directions on a judgement to be delivered on 21/1/2020. A judgment notice was to issue. The Applicants aver that no judgement notice was issued upon them despite this direction.

25. Judgement was delivered on 21/1/2020 as directed before in the absence of Parties.

26. The Applicant contends that he has been prejudiced by not being served with the judgement notice. They also aver that they have not been served with mention notice to confirm filing of submissions.

27. This matter came up for directions on 19/6/2019. From the affidavit of service, the Respondents had been served with a mention notice which was also stamped by Counsel for the Respondents.

28. The Respondents did not attend Court and this Court gave directions that the Petition proceeds by way of written submissions. When matter came up for Mention on 18/7/2019, the Petitioner requested for more time to file their submissions.

29. The Court ordered them to file their submissions in 7 days and Respondents though absent were allowed 14 days to file their submissions.

30. On 24/10/2019, the Petitioner appeared in Court and indicated they had filed their submissions on 8/10/2019 and served them upon the Respondents on 11/10/2019.

31. The Respondents have not denied receiving these submissions in October 2019. From that point on until judgement was delivered on 21st January 2020, the Respondent still had an opportunity to seek directions and file their submissions. They did not do so.

32. Despite not being served with a judgment notice, this does not negate the earlier proceedings where the Respondent though served with a mention notice failed to attend Court and despite service of submissions upon themselves, they did not file their own submissions and waited until they had knowledge of the judgement to file this application.

33. In this Court's view, the Counsel for the Respondents ignored their duty to the Respondents and failed to attend Court and file the necessary documents. This omission cannot be excused. The Respondents are the author of their own misfortune and therefore the application to set aside the judgement is denied.

34. Since they have no other pending action that would necessitate a stay I also deny the application for stay.

35. Costs in the Petition.

Dated and delivered in Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njuguna for Respondent – Present

Miss Muiruri holding brief Kipkorir for Petitioner – Present