



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 5 OF 2018

(Before Hon. Justice Mathews N. Nduma)

MARK ODHIAMBO ADUNGU.....CLAIMANT/RESPONDENT

VERSUS

TILE & CARPET CENTRE LIMITED.....RESPONDENT/APPLICANT

RULING

1. The applicant in the application dated 30th April 2018 seeks an order for stay of execution of exparte Judgment and the consequent decree and certificate of costs thereto in this matter.
2. The application is premised on grounds set out on the Notice of Motion and the supporting affidavit of one Lorrain Namasaka an employee of the respondent whose capacity is not disclosed.
3. The applicant states that the claimant purportedly served summons to enter appearance and statement of claim on the Human Resource Department of the Respondent and not the Legal Department contrary to norm.
4. That the stamp on the face of the summons to enter appearance does not indicate or bear the name of the receiving officer.
5. That notice to enter Judgment was not served on the respondent.
6. That the application has been brought without undue delay. That the respondent be allowed to defend the suit.

Replying Affidavit

7. The Claimant/respondent filed a replying affidavit sworn on 31/12/2019 and deposes that summons to enter appearance was served on 24/10/2018 on the respondent and the recipient appended an official stamp and signature on the face of the copy of summons to enter appearance filed in Court together with Affidavit of service sworn to by one Nadebu P. Caleb on 25/10/2018 a certified court process server.
8. The process server deposes that he is a licensed process server and was given summons to enter appearance by the firm of Ouma Njoga & Co. advocates with instructions to serve the same on the respondent/applicant.
9. That he proceeded to Nairobi at Parkside Towers' head office of the respondent and was guided to 7th floor where the Human Resource Department is situated. That the receptionist guided him to one M/s Joyce Getare of the Human Resource Department. That M/s Joyce Getare informed him that she was empowered to receive the documents on behalf of the respondent and she proceeded to receive them at 9.35 am.
10. That upon receipt of the summons and statement of claim she appended her signature on the copy filed before Court.
11. That the respondent failed to enter appearance and matter proceeded to formal proof on 4th July 2018.
12. That Judgment was delivered on 6th December 2018. That no sufficient cause has been demonstrated by the respondent/applicant for failing to enter appearance nor defend the suit. The respondent was subsequently served with the notice of entry of Judgment, the bill of costs and taxation notice.
13. That the allegation that the notice was not served is false since affidavit of service was filed in proof of service.

14. That the respondent has not raised any triable issues to enable the court exercise its discretion in favour of the applicant.

15. That the respondent would suffer prejudice occasioned by undue delay in opening the matter afresh. That the application be dismissed.

Determination

16. Judgment was delivered on 6th December 2018 and the Court was satisfied that the applicant had failed to enter appearance nor file a defence in the matter despite receipt of summons and statement of claim on 24th January 2018.

17. Indeed receipt of the documents is acknowledged by the respondent and a lame excuse is made that service ought to have been made on the Legal department and not the Human Resource Department.

18. The Affidavit in support of the application contains unfounded statements by an employee named Lorrain Namaseka, who does not disclose her station at the respondent's employ.

19. The lady who received the court process at the Human Resource Department was the most suitable person to explain why the respondent did not defend a matter which fell squarely under the Human Resource Department who received the summons and pleadings.

20. The application was filed on 3rd May 2019 about five (5) months from the date Judgment was entered.

21. **In Shah –VS – Mbogo (1907) EA 166**, the court stated at page 123 as follows:-

22. *“ It is a discretion to set aside an ex-parte Judgment which is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”*

23. The applicant has not alleged inadvertence, excusable mistake or error on its part but instead it boldly admits receipt of court process but gives no explanation whatsoever why an officer at the Human Resource Department was not suited to receive summons to enter appearance and pleadings or how the receipt by the said officer was prejudicial to the filling of a defence to the suit in any way or at all.

24. The Court finds that the applicant deliberately failed to defend the suit and in a Johnny - come – lately approach demand condonation without any semblance of remorse on its conduct likely to occasion the claimant inordinate delay in enjoying the fruits of his judgment were the court to direct the matter already concluded in his favor to commence afresh.

25. The applicant is not deserving of exercise of the Court's discretion in its favour.

26. The application lacks merit and is dismissed with costs.

Ruling Dated, Signed and Delivered at Nairobi this 28th day of May 2020.

Mathew N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Ochuke for Respondent/Applicant

Mr. Njoga for claimant/Respondent

Chispo: court clerk