



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

CAUSE NO. 1117 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DANIEL MALABA ADOGA..... CLAIMANT

VERSUS

MOHAMED MUZEUR SHAZAD/A SHAZAD

ENTERPRISES.....RESPONDENT

RULING

The suit herein was heard in the absence of the respondent and judgment delivered on 11th October 2019. Vide a notice of motion dated 19th and filed on 21st November 2019, the respondent seeks the following orders –

1. Spent.
2. That pending the inter-parties hearing and determination of this application, the Court be pleased to stay execution of the judgment dated 11th October 2019 and all consequential orders premised thereon.
3. That the Court do hereby set aside the ex-parte Judgment dated 11th October 2019 entered herein and all the consequential Orders premised thereon.
4. That the Court do allow the Respondent's Advocate to cross- examine Mr. JOSEPH ROMINO ADEDE so as to ascertain the veracity of his affidavits of service sworn on 20th March 2017, 29th March 2018, 13th January 2019 and 8th May 2019 respectively.
5. That the Respondent be granted leave to file it's Memorandum of Defence and defend the Claim herein.
6. That costs of this application be provided for.

The grounds in support of the application on the face of the application and in the supporting affidavit are that the respondent was not aware of the suit having not been served with summons, claim, mention and hearing notices or any other documents and pleadings.

The Respondent avers that he did not become aware of the judgment against him until the 14th of October 2019 when he came across an online link, Cause No. 1117 of 2016 - Kenya Law, while conducting an online search of his business to ascertain its online footprint.

The respondent avers that the affidavits of service sworn by the Claimant's process server, JOSEPH ROMINO ADEDE on 20th March 2017, 29th March 2018, 13th January 2019 and 8th May 2019 contains material falsehoods in that no service has ever been effected upon the Respondent or at all.

He urges the court to exercise its discretion and set aside the judgment and proceedings, and allow the respondent to file its defence.

The claimant opposed the application and filed a replying affidavit sworn by Daniel Malaba Adoga, the claimant, who deposes that the judgment was regular as the respondent failed to file appearance and defence or to attend court even though he was properly served, that the application is a waste of time and is intended to delay the conclusion of this matter.

Determination

Courts have unfettered discretion to set aside default judgments provided that there are justifiable reasons for exercising the discretion in favour of a party seeking such orders. In the case of **Shah v Mbogo [1967] EA 116** the court observed as follows:-

"...that firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, 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 course of justice."

In the instant application the applicant/respondent states he was not aware about the suit having not been served. He further states he has a good defence and has annexed a draft thereof to the application.

I have looked at the affidavits of service. They are dated 20th March 2017 for service of summons and claim, 29th March 2018 for service of hearing notice, 13th January 2019 for service of hearing notice and 18th May 2019 for service of claimant's written submissions. What struck me is the similarity of the said affidavits of service. In all of them, the process Server, one JOSEPH ROMINO ADEDE, states –

3. "That on the same date accompanied by the Claimant I proceeded to the Respondent's premises situated at Industrial area next to Hillock Hotel.
4. That the Claimant herein led me into the offices of the Respondent whom he informed me was known by the name Mohamed Muzeur.
5. That I introduced myself to Mr. Mohamed Muzeur and informed him the purpose of my visit therein.
6. That onday of at 9.30 am I served Mr. Mohamed Muzeur with a copy of the claimant's written submissions and a copy of mention notice dated on
7. That Mr. Mohamed Muzeur accepted my service but declined to sign my copy saying he is going to instruct an advocate to take over the matter.
8. That whatever is deponed hereto is true to the best of my knowledge, information and belief."

[Emphasis added]

The questions that beg answers from the said affidavits of service are: Was there need for the Process Server to be accompanied by the claimant in all the instances he served and to be introduced to the respondent? I would have expected, and it is logical, that after the first service the process server would not need to be accompanied by the claimant and would not need introduction to the place of work or the respondent as he would have known both the place and the person, having been introduced at the first instance when he served the summons.

It is for this reason that I would give the respondent the benefit of doubt that no service was effected upon him at all and exercise my jurisdiction in his favour. I therefore set aside the proceedings and judgment herein. I grant the applicant leave to file and serve defence together with all relevant documents and witness statement with 21 days from the date of delivery of these orders.

Costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE