



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 105 OF 2017

(Before Hon. Justice Mathews N. Nduma)

MOSES WASIKE MUNIALO.....CLAIMANT/RESPONDENT

VERSUS

CHINA NATIONAL AEROTECHNOLOGY

INTERNATIONAL ENGINEERING.....RESPONDENT/APPLICANT

RULING

1. In two notice of motion applications dated the 1st February 2019 and 6th February 2019 the respondent/applicant prays for the following reliefs *inter alia*:

(i) The judgment delivered on the 27th July 2018 and the decree thereto be set aside *debito justitiae* and all proceedings leading thereon be vacated.

(ii) The court be pleased to lift and or set aside the 'purported' attachment and the 'intended' sale of motor vehicle registration number KCM 465C and the claimant/respondent pay auctioneer fees.

(iii) Costs of the applications.

2. The grounds upon which the applications are premised are found on the face of both notices of motion and may be summarized as follows:

3. The claimant has through Kennedy Shikuku trading as Eshikom Auctioneers attached and detained motor vehicle registration number KCM 465C in execution of the decree issued by the court. That the attachment was never preceded by a notice of 7 clear days and thus unlawful. That the attachment is calculated to defeat stay orders issued by the court on 1st February 2019.

4. That the judgment was obtained without proper service of the summons and memorandum of claim and accompanying documents. The service was done contrary to the requirement in law as regards to service of summons to companies and in total disregard of the rules of service.

5. That the applicant became aware of the cause herein after its properties were proclaimed. That the applicant has a good defence and should be accorded a chance to defend the claim.

6. That the claimant will not suffer any prejudice if orders are granted. The application was done timeously. That it is in the interest of justice and fair play that the applications be granted.

Response

7. The claimant/respondent filed a replying affidavit on 7th March 2019 opposing the application dated 1st February 2019. The respondent deposes that service of summons to enter appearance and statement of claim were served on the respondent by a process server on 30th January 2018 and the process server Mr. Charles Sifuna Otunga on 28th February 2018 filed in court an affidavit of service. That the claimant is aware that service was received by one Moffat Roberts a Human Resource Manager of the applicant at the institution situated at Namwela Trading Centre in Chele town. That the said manager signed at the foot of the notice of summons.

8. That the applicant did not enter appearance nor file a response to the claim. The court issued direction on the suit on 28th May 2018 and the matter proceeded to formal proof on 23rd July 2018. That judgment was delivered on 27th July 2018 and the applicant was served with the decree and bill of costs dated 27th July 2018 and notice of entry of judgment and taxation notice dated 6th August 2018 on 4th September 2018. Affidavit of service by one Charles Otunga was duly filed and is dated 4th September 2018.

9. That the Applicant showed no interest at all in defending the suit. That the claimant is duly advised by counsel that service was proper and in terms of *Order 5 rule 3 (a) and (b) of the Civil Procedure Rules 2010*. That Robert Moffats being the Human Resource manager was a principal officer of the corporation and service was appropriate and lawful.

10. That the applicant has not sought to cross examine the process server Mr. Charles Sifuna Otunga who effected service. That the draft response is a mere denial and poses no triable issues. That the application lacks merit and it be dismissed.

11. The Applicant filed a further affidavit on 29th March 2019 in which it deposes that service was not proper as it was not served on the secretary and or director or principal officer as Robert Moffats was not a principal officer in the company.

12. That service was not brought to the attention of the company secretary, director or principal officer. That the decree, bill of costs and notice of entry of judgment was also not received. Service was therefore not proper. That the defence raises triable issues and the judgment be set aside and matter be heard a fresh.

13. The claimant filed a further replying affidavit on 24th July 2019 in respect of the Application dated 6th February 2019 in which he deposes that the execution levied by the Auctioneers was levied after 8 days on the 1st February 2019 upon service of a proclamation notice thereto on 25th January 2019. A copy of the proclamation notice showing the respective dates was attached to the affidavit. That attachment took place on 1st February 2019 being the 8th day from the date of proclamation. A copy of the notification of sale of the property is attached to illustrate the fact deposed to. That the attachment was lawful and proper and should not be lifted. The application lacks merit and it be dismissed.

14. Both parties filed written submissions and list of authorities.

Determination

15. The court is satisfied that service of summons to enter appearance and statement of claim were served on one Mr. Moffat Roberts, the Human Resource Manager of the applicant who signed at the foot of the summons on behalf of the respondent corporate entity. The assertion by the applicant that service could only be effected on a director of the company holds no water at all.

16. In terms of *Employment and Labour Relations Court (procedure) Rules 2016 Rule 12(1)*, service on a corporate body may be effected:

(a) On the secretary, director or any other principal officer of the corporate body.

17. Service on the Human Resource manager of the company of a claim relating to Employment matters was proper and lawful. Indeed, no other officer is more suited to receive service of the court process in Employment matters than the Human Resource Manager. He is the principal officer for this purpose. The assertion that the officer is not qualified to receive service on behalf of the corporation has no basis in law or fact.

18. There is no explanation by the respondent why the respondent despite receipt of the summons to enter appearance and statement of claim failed to defend the matter. The respondent did not take any step at all to defend the matter until proclamation of its goods took place and the first application was filed on 1st February 2019.

19. Judgment in the matter was delivered on 27th July 2018. The suit was served on the respondent on 21st December 2017. The application was thus brought more than seven (7) months from the date of judgment and more than one year from the date the respondent received the summons and the statement of claim in this matter.

20. It is the court's considered opinion and finding that the respondent deliberately bid its time and delayed taking any step so as to delay the justice of the case by raising technicalities on the manner of service down the line. The respondent therefore deliberately failed to defend the suit. The application to set aside the judgment of the court lacks merit.

21. The court is persuaded by the decision of the court in ***Scooby Enterprises Limited vs Kisii County Assembly Service Board (2016) eKLR*** where the court held that the assertions by the applicant that summons were served on the County Speaker and not the clerk was mischievous, dishonest and misleading and did not befit the court to exercise its discretion to set aside the judgment of the court.

22. This court finds that there is no plausible or sufficient reason to set aside its judgment and dismiss the application dated 1st February 2019 accordingly.

23. With regard to the 2nd application dated 6th February 2019 that the attachment was not procedural because the claimant/respondent did not await 7 days upon proclamation of the goods to attach and detain the same, the court has carefully examined documentary evidence and the deposition by the parties in this matter and is satisfied that proclamation notice was served on the applicant on 25th January 2019 and the attachment was levied on the 1st February 2019, eight (8) clear days from the date of proclamation as per the notification of sale attached on

the application dated 6th February 2019.

24. The applicant's assertion that 7 days period notice was not observed is false and lacks merit.

25. Accordingly, the court equally dismisses the application dated 6th February 2019 and holds that the attachment of the motor vehicle registration number KCM 465C was both procedural and lawful.

26. In the final analysis applications dated 1st February 2019 and 6th February 2019 are dismissed with costs to the claimant/respondent.

Ruling Dated, Signed and delivered at Nairobi this 13th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due 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. Anwar for the Respondent/Applicant.

Mr. Ofsula for Claimant/Respondent

Chrispo – Court Clerk