



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

**CAUSE NO. 439 OF 2015**

**JAMES MWANGI MUCHERU A.K.A MUGO.....CLAIMANT**

**VERSUS**

**GIKOE MUNGARIA INVESTMENTS CO. TD.....RESPONDENT**

**PETER KIMANI WARAHO.....DEBTOR/APPLICANT**

**RULING**

**Introduction**

1. The Application before this Court is the Notice of Motion dated 26.11.2019. It is brought under Order 10 Rule 11, Order 50 Rule 6, Order 1 Rule 3 & 6 and Order 51 Rule 1 of the Civil Procedure Rules 2014 and Section 3A of the Civil Procedure Act and seeks the following Orders:

- a) **THAT** this Application be certified as urgent and the same be heard ex-parte in the first instance.
- b) **THAT** the Honourable Court be pleased to lift the warrants of arrest issued on 13<sup>th</sup> February, 2018 and renewed on 22<sup>nd</sup> May 2019 and 29<sup>th</sup> October 2019 pending the hearing and determination of this Application.
- c) **THAT** the interlocutory judgment and/or default orders and/or decree issued on 15<sup>th</sup> April 2016 and all consequential orders be set aside.
- d) **THAT** the Respondents/Applicants herein be granted leave to file and serve their statement of defence out of time.
- e) **THAT** the Honourable Court be pleased to direct that the two process servers, **MARY GATAVI NJUE** and **GEORGE OMONDI OGOLA**, be availed for cross examination.
- f) **THAT** the Honourable Court be pleased to enjoin **NEW MUNG'ARIA INVESTMENT COMPANY LIMITED** as a Respondent in this matter as named in Paragraph 3 of the Statement of Claim.
- g) **THAT** costs of this Application be provided for.

2. The Application is premised on the grounds as set out on the body of the Motion and the supporting sworn by Mr. Peter Kimani Waraho on 26.11.2019. In brief, the applicant contends that the respondent was never served with summons to enter appearance and such the default judgment was irregular; that the property attached in execution of the impugned judgment do not belong to the respondent Judgment Debtor; that the persons enjoined as directors of the respondent after the lifting of the corporate veil are not directors of the respondent judgement debtor; that the applicant is neither a director nor shareholder of the respondent judgment debtor; and that the respondent and the applicant are separate legal persons.

3. He further contended that the claimant was appointed by his father as caretaker of a premises at Makandara under unknown terms, which property of New Munga'aria Investment Company which was disbanded and replaced by New Munga'aria Investments Company after the claimant left the premises at Makandara. He denied that the claimant was employed by the New Munga'aria Investment Company. Finally he contended that the respondent is unknown to him and he has never operated the said company.

4. The Applicant avers that he has a meritorious Defence with high chances of success therefore urging this Honourable Court to allow his

Application as prayed.

5. The Claimant filed a Replying Affidavit on 17.1.2020 to oppose the application herein. In brief, he contended that the Application lacks merits and is tainted with falsehoods; that the suit was properly filed against the Respondent who was his former employer; and that the Respondent terminated his employment vide her letter dated 8.1.2014 and as a result he filed the suit to claim compensation for unlawful and wrongful termination of his employment Contract.

6. He further averred that proper service was effected upon the Respondent in his presence but she deliberately failed to enter appearance and file defence; that the Affidavits of Service filed confirm that service of the Court processes was effected; that the respondent has resorted to use different names to avoid legal obligations. He further maintains that the Judgment Debtor has been aware of the matter and that service of the Court processes was done personally. Therefore, he contended that the impugned judgment was rightfully entered against the Respondent.

7. The Claimant further averred that based on a search on the Respondent company, he successfully sought to lift the corporate veil and serve the Director of the Respondent Company directly. He further contended that applicant was a director of the respondent and he was receiving instructions from him on how to perform his duties for the Judgment debtor.

8. Finally, the Claimant further contended that the instant Application is only meant to deny him enjoyment of the fruits of his judgment and urged this Honourable Court to dismiss the same with costs to the Claimant.

#### **Submissions by the Parties**

9. The Applicant reiterated in her submissions that the Claimant lifted the veil against persons who are neither directors nor shareholders of the Respondent Company and as a result wrongfully obtained warrants of arrest against the said director in execution of the summary judgment entered in his favour.

10. It is further submitted that the claimant relied on the Certificate of incorporation for **NEW MUNGAÁRIA INVESTMENT CO. LTD** despite naming a different company as Respondent in this matter. She further argued that the summons served upon **PETER KIMANI WARAHO** was not proper service since he was neither a shareholder nor director of the Respondent Company and he was not authorised to receive any processes on behalf of the Respondent. Consequently, it was submitted that the summary judgment in favour of the Claimant was obtained through material non-disclosure and it should be set aside. To buttress this argument, the Applicant cited and relied on the cases of **Salomon Vs Salomon (1897) A.C. 22** and **Electrowatts Limited Countryside Suppliers Limited & Another (2014) eKLR**.

11. She further argued that she has meritorious defence with high chances of success and prayed for leave of this Honourable Court to file and serve the same for purposes of a fair trial. Finally, she submitted that she has met the threshold for the grant of the Orders sought in the Application and urged this Honourable Court to allow the Application as prayed.

#### **Claimant's submissions**

12. On the other hand, the Claimant submitted that the instant Application is devoid of merit as the Applicant has failed to meet the threshold for the granting the orders sought in the Application as set out in the case of **Wachira Karani Vs Bildad Wachira (2016) eKLR**. He further submitted that the draft Defence does not disclose any triable issues to warrant the setting aside of the impugned judgment and that the same is an afterthought.

13. He contended that Mr Peter Kimani Waraho is a listed director of New Mungaária Investments Company was always aware of the suit after being served with summons and court process on several occasions. He further contended that the respondent traded in different names including New Mungaária Investments Company and Kanjeru Investment Company limited, in order to defeat the legal obligations to pay the judgment debt. He therefore urged this Honourable Court to dismiss the Application in its entirety with costs to the Claimant.

#### **Issues for determination and analysis**

14. After considering the material presented by parties as summarised above, the issues for determination are:

- a) Whether the respondent herein was served with summons to enter appearance.
- b) Whether the application meets the legal threshold setting a default judgment.
- c) Whether New Mungaária Investments Company should be enjoined as a respondent to the suit.

#### **Was the respondent served with summons to enter appearance.**

15. The Statement of Claim was filed on 20<sup>th</sup> March, 2015 and service of the Summons to enter appearance and the pleadings were allegedly effected by a Process Server called Mary Gatavi Njue according to the Affidavit of Service sworn on 29.9.2015. In paragraph 2 of the Affidavit of service, the affiant stated that she was given the summons and pleadings by the claimant's advocates on 11.5.2015 to serve the respondent. In paragraph 3 and 4 of the affidavit stated that on the same day at 3.00 pm she proceeded to Murangá Road where the said Advocates offices were located and served a gentleman by the name Mwalimu Kimani and he accepted the service by signing the forefront of her copies, which she allegedly returned to court.

16. Rule 11(5) of the Industrial Court (Procedure) Rules, 2010 (which was applicable to service herein) provides that:

***“An affidavit of service shall be accompanied by evidence of acknowledgment of receipt of the served document signed by the recipient, respondent, claimant or appellant as the case may be or the person accepting service on their behalf.”***

17. I have carefully considered the court record, and especially the said affidavit of service by Ms Mary, Gatavi Njue. The affidavit does not give the details of the place of service and how she identified the person she served with the court summons. She just went to Murangá Road and introduced herself to a stranger called Mwalimu Kimani and served the documents on him. She never stated whether she knew him before, or the link between the person she served with the respondent. Although she allegedly returned copies of the served documents to court by the said affidavit, no signed copies of served documents are on record. The claimant did not also annex the same to the Replying Affidavit.

18. Putting all the factors in consideration I find that the alleged service was not proper service and indeed there is no evidence to support the alleged service of summon and pleadings on the respondent. Consequently, I am satisfied that the impugned default judgment was not regular since the respondent was not properly served with Summons to enter appearance as required under Rule 11 of the said Procedure Rules.

19. I have also considered the draft defence filed by the applicant and satisfied myself that it raises triable issues as the alleged employment contract between the parties and the terms involved are contested.

20. Having found that the respondent was not served with Court summons, I am satisfied that the applicant has established a good cause for setting aside the impugned judgment. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that:

***“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”***

21. Finally, I have considered the prejudices which may befall the parties if the application is allowed or disallowed and found that justice will be best served if the application is allowed with costs to the claimant.

#### **Joinder of New Mungaária Investments Company**

22. As regards the claim for joinder of New Mungaária Investments Company, the same shall await the respondent/ applicants to file pleading because so far it is unclear who has a cause of action against the said Company.

23. In conclusion, I allow the application in the following terms:

(a) The judgment dated 15.4.2016 and all consequential orders and warrants of arrest are set aside.

(b) The respondent/applicants are granted leave to file defence and serve the claimant within 14 days from the date hereof.

(c) The respondent/applicants shall pay the claimant throw-away costs Kshs. 20,000 before the next hearing and in default the claimant will be at liberty to execute for the same.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> November, 2020.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**