



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 248 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**MWANGANGI MBUMBU.....CLAIMANT**

**VERSUS**

**PRIME STEEL MILLS LIMITED.....RESPONDENT**

**RULING**

Before this Court is the Notice of Motion Application dated 8<sup>th</sup> August 2018 and filed on 9<sup>th</sup> August 2018, brought under rule 3 of the Court Vacation Rules, Article 159 of the Constitution, section 12 and 16 of the Employment and Labour Relations Court Act, rule 32 of the Industrial Court (Procedure) Rules of 2010, sections 1, 1A, 3 and 3A of the Civil Procedure Act and all other enabling provisions of law. The Applicant seeks the following orders:

- a. Spent.
- b. Spent.
- c. That upon such leave been (sic) granted there be stay of execution of the decree dated 16<sup>th</sup> February 2018 and warrants of attachment dated 3<sup>rd</sup> August 2018 and all consequential orders of this court, pending the *inter partes* hearing of this Application.
- d. That the default judgment and all consequential orders entered by this Court against the Respondent; be set aside and the Respondent be given an opportunity to defend this suit on the merits.
- e. That there be a temporary restraining order be issued (sic) as against the Claimant and his agents, to restrain them from threatening or harassing the Defendant thereof.
- f. That costs of this Application be provided for.

The Application is supported by the grounds as set herein below.

The Claimant has obtained a warrant of attachment against the Respondent's property, which is due for attachment any time as the Respondent's goods were proclaimed on 6<sup>th</sup> August 2018.

The Applicant avers that the judgment was obtained irregularly as the Respondent has never had notice and was never served with summons to enter appearance. The Applicant further avers that it has never been served with the 10 days' notice after judgment as required by law to enable it take appropriate action.

It is the Applicant's case that the Claimant is likely to proceed and execute the decree before this Application is heard thus rendering the Application nugatory despite having merit.

On 9<sup>th</sup> August 2018 the interim orders were granted and Applicant ordered to serve the Respondent for *inter partes* hearing.

On 3<sup>rd</sup> October 2018, the Claimant filed his grounds of opposition dated 1<sup>st</sup> October 2018. The Application is opposed on the following grounds:

- a. The Application does not disclose any grounds for grant of the orders to set aside the judgment.

- b. The Defence is a sham and frivolous meant to delay the fair determination of this suit.
- c. The Court's discretion is not designed to assist the Applicant in deliberately obstructing or delaying the course of justice.
- d. The Applicant has failed to demonstrate that it has a defence on merit to warrant setting aside of the judgment.
- e. The Application is an abuse of court process geared to delay the course of justice.

The Claimant further opposed the application vide his Replying Affidavit sworn on 1<sup>st</sup> October and filed on 3<sup>rd</sup> October 2018. The Claimant avers that the Summons, Statement of Claim and Bundle of Documents were duly served upon the Respondent and were received on 16<sup>th</sup> February 2017.

It is the Claimant's case that the Applicant failed to enter appearance, file a reply, attend the pre-trial conference and the hearing. Once the matter was heard, a judgment notice was issued notifying the respondent that judgment would be delivered on 16<sup>th</sup> February 2018 but the respondent again failed to attend court.

The Claimant avers that the judgment entered against the Applicant was regular as it had failed to honour the summons.

It is the Claimant's case that the Applicant was served with a Notice of Entry of Judgment dated 2<sup>nd</sup> March 2018 and its employee, Mr. Patel, acknowledged receipt.

Further, the Applicant was served with a draft decree on 9<sup>th</sup> July 2018 and a Notice of Taxation on 9<sup>th</sup> May 2018. On 26<sup>th</sup> June 2018 a ruling allowing the Claimant's Bill of Costs was delivered. Subsequently, a warrant of sale and attachment was issued to auctioneers who then proclaimed the attachable assets of the Applicant.

It is the Claimant's position that the Applicant was duly served with all the requisite documents and is being dishonest in claiming that it had no notice of the case.

The Claimant avers that the Application is the Applicant's attempt to subvert justice as this seems to be a trend developed by the Applicant where it waits until the execution process to seek orders of setting aside the judgment, despite being served with pleadings. Further, there are other cases where despite service, the Applicant has failed to enter appearance.

The Claimant avers that the Applicant has not given sufficient explanation for failure to enter appearance even though it was properly served.

The Applicant filed the Further Affidavit of Stephen Kioko sworn on 9<sup>th</sup> November 2018 where it averred that Stanley Okoth and Charles Mateka were not authorized to receive process on its behalf. The Applicant avers that it never received a judgment notice or a certificate of taxation as the wrong employees were served, who never brought the pleadings to the Applicant's attention.

The Applicant also avers that its manufacturing plant at Kitengela is for production and that only Directors and Key Officers are authorised to receive service of process and all of them are situated at its Headquarters in Westlands. Further, that the said process servers had disowned previous service on the alleged matters and have denied the Affidavits of Service purportedly sworn by them.

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

The application was heard on 3<sup>rd</sup> October 2018.

#### **Submissions by the Applicant/Respondent**

The Applicant submitted that it was not served as required under order 5 Rule 3 of the Civil Procedure Rules, which specifies the persons allowed to receive summons as the secretary, director or a principal officer. Further, that service is to be effected in the premises of the company. It is also the Applicant's submissions that the people served were not its employees and that Kajiado was not its principal office.

The Applicant submitted that the Claimant is misleading this Court by asserting that summons were served, because the process server who effected service had inconsistencies in the manner of service.

The Applicant submitted that its draft defence raises triable issues as the Claimant was paid all his dues and relies on the case of ***Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs. Augustine Kubede (1982-1988) KAR*** where the court held that Courts had the discretion to set aside judgment in default of appearance.

#### **Submissions by the Claimant**

It is the Claimant's submissions that the Applicant has not denied that the persons served were its employees. The Claimant further submits that no formal application has been made to cross examine the process servers.

The Claimant submitted that if the Applicant was genuine, it should have applied to set aside judgment after service of judgment notice, which it did not. The Claimant submitted that the Applicant was fond of waiting until judgment is delivered, to move the court hence this is a

delaying tactic. The Claimant relies on the case of *Felister Nduku Nzaku vs. Joyce Wairimu Gitau [2017] eKLR*. The Claimant further submitted that the Applicant has come to court with unclean hands.

### **Determination**

After considering the parties' arguments and the evidence adduced, the following are the issues for determination:

1. Whether the Applicant was duly served with the pleadings in the cause herein.
2. Whether the Applicant is entitled to the orders sought.

### **Whether the Applicant was duly served with the pleadings in the cause herein**

According to the record on the file, summons and statement of claim were served upon the respondent by **ABEL MARUBE ONDIEKI**, process server, on 16<sup>th</sup> February 2017 at the respondent's premises located in Kitengela, Kajiado County. Service was effected upon the respondent's Assistant Human Resource Manager, **MR. STANLEY OKOTH** who accepted service but declined to acknowledge service on the process server's copy.

Pre-trial mention notice was served by the same process server at Kitengela on 30<sup>th</sup> May 2017 and effected upon **MR. CHARLES MATEKA**, Assistant Human Resource Officer.

Notice of taxation was served upon the respondent by **MICHAEL KAMAU NJONJO** at the respondent's offices at Westlands, along Westlands Road House No. 40 and was received by **MR. PETER KAGUAMBA**, Human Resource Manager who was known to the process server from previous service.

The proclamation was served upon the respondent on 6<sup>th</sup> August 2018 by **STEPHEN KIMANI KARUU**, licenced auctioneer at the respondent's premises in Kitengela. The service was effected upon 'MR. STEPHEN' who accepted service but refused to sign the auctioneer's copy.

The respondent's application is supported by the affidavit of **PETER KAGUAMBA** of Post Office Box Number 285 Kitengela who is described as the Human Resource Manager, authorised and competent to swear the affidavit on behalf of the respondent, who deposes that the respondent was never served with summons, pre-trial notices and hearing notices. He avers that service was according to the court record served upon "*unknown purported Human Resource Managers.*"

In the further affidavit of the respondent sworn by **STEPHEN KIOKO** of Post Office Box 285 Kitengela, he deposes that Stanley Okoth and Charles Mateka are not authorised to receive process on behalf of the respondent and it is not explained why the process server went to serve them, instead of effecting service on the Directors or other Principal Officers. He further deposes that the said employees did not understand the content of the documents served and never brought the documents served to the attention of the respondent's key management for necessary action.

Rule 11 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:

“ ...

(6) *An affidavit of service shall be accompanied by evidence of acknowledgement of receipt of the served document signed by the recipient, respondent, claimant or appellant as the case may be or the persons accepting service on their behalf.*

(7) *If for any reason the signature of the recipient cannot be secured, the process server shall state so in the affidavit of service.”*

From the foregoing, the following conclusions may be drawn –

That **MR. PETER KAGUAMBA**, the person served with notice of taxation is the Human Resource Manager of the respondent, and is an authorised officer as deposed in his affidavit in support of the instant application. Service upon him was therefore proper.

It is also evident from the further affidavit of **STEPHEN KIOKO** that both Stanley Okoth and Charles Mateka who were the other officers served on behalf of the respondent, are in the employment of the respondent as admitted in the said affidavit of **STEPHEN KIOKO**.

It is also apparent from these affidavits that both the Kitengela and Westlands offices were recognised offices of the respondent as the addresses on both affidavits of **PETER KAGUAMBA** and Stephen **KIOKO** are in Kitengela.

It is not conceivable that Stephen Okoth and Charles Mateka who are Assistant Human Resource Officers, did not understand the contents of documents which were served upon them, which service they freely accepted after the process server explained to them the purposes of the service. They were not as described in Mr. Kioko's affidavit, employees who did not understand the content of the documents served, and did not bring them to the attention of the respondent's key management for necessary action.

From the foregoing I find that the respondent was properly served as service was effected upon its Assistant Human Resource Officers. The respondent was thus aware of the contents of the documents served upon it through the said Assistant Human Resource Officers.

It is therefore evident that PETER KAGUAMBA who swore the affidavit in support of the application was not being truthful when he deposed that the respondent was never served with summons to enter appearance, pre-trial and hearing notices or when he stated that the persons served, him included, were “*unknown purported Human Resource Manager.*”

The judgment notice and taxation notice were served by the court and the service of the same was properly effected.

I therefore find that the respondent was properly served with summons, pre-trial and hearing notices, judgment and taxation notices.

**Whether the Applicant is entitled to the orders sought**

Having established that the service upon the Applicant was proper, is the applicant entitled to the orders sought?

In *Shanzu Investment Ltd vs. the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR*, the court held that

***“The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgement is varied, it must be done on terms that are just’,”***

In the case of *Patel vs. East Africa Cargo Handling Services Limited (1974) EA 75 at page 76 cited in Lochab Bros. Limited vs. Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 others (2013) eKLR* it was held that:

***“... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by rules.”***

Hoffman J. stated in *Films Rover International Ltd v Cannon Film Sales Ltd (1986) e All ER 772 at page 780 – 781*, cited in the *Lochab Case*,

***“A fundamental principle is .... That the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong.”***

I have considered the draft defence and in the interest of justice make the following orders –

1. That the application is granted and judgment and consequential orders set aside in part on the following terms –

- (i) The respondent shall within 14 days file defence, documents it wishes to rely on and witness statements;
- (ii) The respondent shall within 14 days deposit the decretal sum into court or in an interest earning account in the joint names of claimant’s and respondent’s advocates.
- (iii) The respondent shall pay the claimant a sum of Kshs.20,000 as thrown away costs within 14 days.
- (iv) The respondent shall pay auctioneer’s costs
- (v) In default of compliance with any of the foregoing conditions the judgment will be revived.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**