



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 179 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st February, 2019)

FRED ODHIAMBO OBURA.....CLAIMANT

VERSUS

SGS KENYA LIMITED.....RESPONDENT

RULING

1. The Application before Court is the one dated 1st February, 2017.

The Application was filed under a Certificate of Urgency through a Notice of Motion filed Under Section 12 (3) (viii) of the Employment and Labour Relations Court Act.

2. The Application seeks the following orders:-

- 1. THAT this matter be certified as urgent and heard ex-parte in the first instance.***
- 2. THAT the ex parte judgment entered herein against the Respondent and all consequential Orders be set aside.***
- 3. THAT there be a stay of execution pending the hearing and determination of this Application.***
- 4. THAT the Costs of this Application be in the cause.***

3. This Application is premised on the grounds that:-

- a) No Service of Statement of Claim was affected upon the Respondent.***
- b) The Respondent has a good Defence on which it should be heard.***

4. The Application is supported by the Affidavit of **MARGATER AMAYO** sworn on 31st January, 2017 in which she reiterates the averments made in the Notice of Motion Application.

5. The Claimant opposed this Application vide a Replying Affidavit filed in Court on 15th February, 2017 deposed by **PATRICK A. JALENY**, Counsel on record for the Claimant/Respondent, in which he avers that on 18th February, 2015, the Respondent were duly served with the Notice of Summons and Statement of Claim by a licenced Court Process Server upon a personnel mandated to receive service on behalf of the Respondent Company who acknowledged receipt of the same by affixing their official stamp and signing on the face of the Notice of Summons.

6. He further avers that from the date of service the Respondent failed to enter appearance and file Defence for a period of about eight months yet the law is clear that once service has been effected the Respondent ought to file a Memorandum of Appearance and Defence within the stipulated period of fifteen days.

7. The Claimant/Respondent contends that failure by the Respondent/Applicant to file the Memorandum of Appearance and Defence even after the lapse of eight months was neglect on the Respondent's part and they cannot come to equity to be allowed to file its Defence as

equity aids the vigilant and not the indolent.

8. The Claimant further contends that the instant Application is an abuse to the Court process and ought to be dismissed with costs as it is only meant to deny the decree holder from enjoying the fruits of his Judgement.

9. In disposing of the instant Application, the parties agreed to file written submissions.

Respondent's/Applicant's Submissions

10. It is submitted by the Respondent/Applicant that the Claimant is being untruthful on service as it is stated in the Affidavit of Service for Service of the Notice of Summons sworn by Bernard Okoyo that service was effected upon a Secretary by the name of Getrude.

11. The Claimant further in the Replying Affidavit sworn by Counsel on record for the Claimant at Paragraph 6 states that the said Getrude accepted service and the documents were signed inside the Applicant's offices before the same were returned to the Process Server stamped and signed.

12. The Applicant further submitted that the true version of events was that service was effected upon a third party by the name Margaret, who on realizing the documents were incomplete crossed out her signature and returned the documents to the Process Server explaining why the stamp and signature are crossed out.

13. In conclusion, the Respondent/Applicant submitted that the Application was brought in a timely manner and as soon as the Applicant realized that the matter was in Court. The Applicant further urged the Court to allow the instant Application in the interest of justice as it has a credible response to the Claim.

14. There are no submissions on record filed on behalf of the Claimant/Respondent.

15. The basis upon which the Applicant comes to Court vide this application is that he was never served with summons to enter appearance and the claim. The Claimant annexed the affidavit of service showing service with an affidavit stamp by SGS Kenya Limited indicating service on 18/2/2015.

16. It is therefore apparent that the Respondent were served with Summons and Memorandum of Claim and they failed to enter appearance. They cannot turn up in 2018 – 3 years down the line and indicate that the person served was a wrong one. They allege the stamp is crossed out which is not true as the recipient actually signed against the stamp.

17. I find the reasons the Applicant submit in seeking stay and setting aside of this Court's judgement dated 5/5/2016 are not valid. I dismiss the application and direct that execution proceeds.

18. Costs be paid by the Applicant/Respondent

Dated and delivered in open Court this 21st day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties