



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 679 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 13th March, 2019)

JOSHUA ORWARU

BRIAN KIETI

GEORGE RAMOGI AND OTHERS.....CLAIMANTS

VERSUS

STEEL MAKERS LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion on 19th November 2018 under Order 51 Rule 1, Order 1 Rule 11 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The Respondent/Applicant seeks the following orders:-

- 1. This Honourable Court be pleased to allow the firm of Wawira, Ogede & Owino Advocates to come on record for the Applicant and file a Memorandum of Appearance to that effect.***
- 2. This Honourable Court be pleased to set aside its Order of 4th October 2016 allowing the Claimants to proceed with the herein suit ex-parte.***
- 3. That leave be granted to the Applicant to file a Defence out of time.***
- 4. The attached draft Defence be deemed as duly filed and served on the Claimant upon payment of the requisite Court fees.***

2. The application is supported by the Affidavit of James Murigi the Respondent/Applicant's General Manager and is premised on the following grounds:-

- 1. Service of Summons to Enter Appearance upon the Applicant were not tendered as required by the law. Summons were not served at the registered office of the Respondent.***
- 2. As such, the Applicant did not file a Memorandum of Appearance and a Defence in time as required by law.***
- 3. The Applicant has a good defence which raises triable issues***

3. The Claimants filed a Replying Affidavit deponed by each of them and filed on 17th January 2019. They state that the Respondent was served with the Memorandum of Claim and Summons to Enter Appearance on 7th May 2015 and it acknowledged by stamping with the company's official rubber stamp but the Respondent never put in a Memorandum of Appearance.

4. The Claimants state that their Advocates invited the Respondent to fix a hearing date via a letter dated 5th November 2015 and served upon the Respondent on 7th November 2015. However, the Respondent did not show up or even send a representative though the matter was not fixed as the Court diary had been closed. The Respondent did not attend the mention scheduled on 5th February 2016 prompting the Claimants' advocates to request the Deputy Registrar to list the matter for Mention for directions. Despite the directions, the Respondent

failed to comply.

5. The Claimants further state that the matter was fixed for mention on 4th October 2016 when the Deputy Registrar scheduled it for hearing on 20th November 2018 but on the said date the matter was listed before the Deputy Registrar as the Court was on annual leave. On 20th November 2018 Counsel from the firm of Wawira Ogonde & Owino Advocates appeared and informed the Court that he wished to file an Application to set aside its Orders of 5th October 2016 allowing the Claimant's to proceed with the hearing of the suit *ex-parte*.

6. The Claimants state that the Respondent deliberately with full knowledge failed and/or neglected to enter appearance or file Defence, due to indolence on its part ignored the same until 4 years later.

7. The Respondent in its Supplementary Affidavit filed on 29th January 2019 states that at the time the claim was filed the Applicant company's address was MSA/BLOCK/XIX/75 1st Floor Pereira Building, Pramukh Swami Maharaj Road, Mombasa which is the same address captured in the Company's filed annual returns dated 14th August 2015.

8. The Claimants filed a Further Affidavit on 13th February 2019 in which they state that the Respondent/Applicant was effectively served with the Summons to Enter Appearance at their offices situated along Namanga Road adjacent to Shalom Hospital in Kitengela. This is the particular office where the Claimants' advocates have served the Respondent with Summons to Enter Appearance in other matters.

Respondent/Applicant's submissions

9. The Respondent submitted that it was never properly served with Summons of Enter Appearance contrary to the Claimant's averments. The Respondent submitted that the Applicant is a corporation and Order 5 Rules 3 (a) and (b) of the Civil Procedure Rules are set out in a manner that before one proceeds to purport to effect any other alternative/substituted means of service, part (a) of the rule has to be complied with. Order 5 Rule 3 states thus:-

3. Subject to any other written law, where the suit is against a corporation the summons may be served:-

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a):-

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation.

10. The Respondent relied on the case of **Lochab Brothers Limited v Lillian Mumbi Ng'ang'a & 2 others [2014] eKLR** and **Total Kenya Limited v Supa Hauliers Limited [2013] eKLR**.

11. The Respondent submitted that the claims by the process server that he served a Secretary at the Applicant's offices by dropping off documents with a Secretary who is not named nor description provided, is not proper service as provided by the law. In addition, there is no mention in the process server's affidavit to verify whether or not he had attempted to locate the Applicants principal officers for purposes of effecting service. It further submitted that the time this claim was lodged against it, its registered office was located in Mombasa- Plot No. MSA/BLOCK/XIX/75 1st Floor Pereira Building, Pramukh Swami Maharaj Road.

Claimant/Respondents' Submissions

12. The Claimants submitted that Order 5 Rule 3 of the Civil Procedure Rules provides that Summons despite being served on the principal offices of the Corporation may be left at the registered office of the corporation.

13. The Claimants submitted that the Claimants' advocates have dealt with other matters with the Respondent and have all been served at the address indicated. Further, the Respondent/Applicant's actual location is where the suit papers were served as opposed to the location indicated in the Annual Return Form. The Claimant relied on the case of **Maina v Muriuki [1984] KLR 407**.

14. The Claimants submitted that the application is actuated by total malice as proper service of summons was undertaken in the Respondent/Applicant's offices close to 4 years ago.

15. I have examined all the averments of the parties. From the Respondent's affidavit of service filed on 16/5/2016 the Respondents were served and there was a receipt stamp showing they were served at their Athi River offices on 7/5/2015.

16. The Applicant/Respondent are contesting that their address is not at Athi River but in Mombasa as per their annual returns filed in Court

as Appendix A.

17. In view of the fact that the official address of the Respondent is Mombasa as at 14.8.2015, I will give the Respondent/Applicant a benefit of doubt and allow them to file their defence and defend this claim.

18. Costs in the cause.

Dated and delivered in open Court this 13th day of March, 2019

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Ambani holding brief Mr. Owino for Applicant – Present

Miss Oyamo holding brief Njogu for Claimant – Present