



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 720 OF 2017**

**BENSON AMUHAYA.....CLAIMANT**

**- VERSUS -**

**ELMAK CHEMICAL LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> June, 2019)

**RULING**

The Court entered judgment in the suit on 31.05.2018 against the respondent and in favour of the claimant for:

- a) The declaration that the termination of the claimant's contract of service by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs. 243, 400.00** by 01.08.2018 failing interest to run at court rates from the date of this judgment till full payment.

On 29.01.2018 the respondent filed a notice of motion under sections 1A, 1B, and 3A of the Civil Procedure Act, Order 9 rule 9(a) and rule 10 and Order 10 rule 11 of the Civil Procedure Rules and all other enabling provisions of law. The application was filed through Muchoki, Kangata, Njenga & Company Advocates and was supported by the affidavit of Mumin Mohamed Adow, the director of the respondent company.

The substantive prayers are for orders that the judgement and all proceedings flowing therefrom be set aside; leave be granted to defend the suit; the draft defence exhibited be deemed duly filed upon paying requisite fees; and costs be awarded to the respondent.

The grounds for setting aside the judgment are that the proceedings were ex-parte and judgment entered in circumstances whereby the respondent was not aware of the suit because summons to enter appearance and the statement of claim was not served upon the respondent. Further the respondent has a defence raising triable issues.

The draft defence states thus, **“3.The Respondent avers that the Claimant took three days off on 23<sup>rd</sup> September 2016 to attend to a burial at his rural home and never returned to work for a period of three months during which time he failed to take calls from the Respondent Company. 4. The Claimant's employment was terminated after he absconded from duty and he was therefore rightly terminated from employment.”** In the claimant's replying affidavit filed on 10.04.2019 at paragraph 2 thereof, the claimant states that the draft defence states that he was given permission on 23.09.2016 to attend the father's burial whereas, the exhibited certificate of death shows that his father died on 02.10.2016 and the burial permit shows that the body was released on 03.10.2016; and the claimant says that thereafter the interment he reported on duty. That he was granted permission on 27.10.2016 and he resumed on 07.11.2016. The Court finds that the applicant has established a triable issue in that regard which cannot be resolved on affidavits as filed. The parties are clearly in dispute on the duration the claimant was not at work on account of attending the father's interment and how the parties' respective obligations were affected in that regard.

Second, the process server was cross-examined. The process server served the hearing notices but the details on the identity of the person served and the relationship with the respondent was not explained in the affidavits. Further the affidavit of service of the summons and the statement of claim showed service was upon the respondent's director by the claimant in person. The rules of the Court impose upon the party to proceedings to effect service and the Court finds that service of the summons by the claimant in person satisfied the rules. The form on affidavit of service appears to provide for advocate, a police officer or a process server and states that any of the three can be deleted as appropriate. The Court considers that once the rules imposed duty to serve the summons on the claimant and there was no provision that the persons designated in the form are the only ones that may effect service, the Court returns that in this case the claimant effectively served the summons and the statement of claim upon the respondent's director. The director in the supporting affidavit denies such service but there is no reason to doubt service was effected because while chance was given to cross examine, the applicant's advocate failed to cross-examine

the claimant in that regard. Taking into account the triable issue established, the respondent will be granted leave to defend the suit and the application is determined with orders as follows:

- 1) The judgment herein and processes flowing from it are set aside and the applicant is granted leave to defend the suit.
- 2) The applicant to file and serve the statement of response, list and copies of documents, together with the witness statements not later than 01.07.2019.
- 3) The claimant may file a statement of reply to response, further documents and further witness statement by mention date for directions on hearing of the suit.
- 4) Parties are invited to fix the convenient mention date.
- 5) Costs of the application in the cause.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 21<sup>st</sup> June, 2019**.

**BYRAM ONGAYA**

**JUDGE**