



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT MOMBASA**

**CAUSE NUMBER 569 OF 2014**

**BETWEEN**

**GEORGE OKONO.....CLAIMANT**

**VERSUS**

**LITTLE CHEF HOLDINGS LIMITED.....RESPONDENT**

**RULING**

1. Ex-parte Judgment was delivered on 16<sup>th</sup> June 2017, in favour of the Claimant, for a total sum of Kshs. 425,700, comprising compensation for unfair termination and terminal benefits.
2. There is an Affidavit of Service filed by Process- Server Alfred Owino Ouma, sworn on 9<sup>th</sup> December 2014, indicating the Respondent was served with the Notice of Summons and Statement of Claim, through its Cashier, Hadija Shiko, on 24<sup>th</sup> November 2014.
3. The Respondent filed an Application on 18<sup>th</sup> August 2017, seeking to have the ex parte Judgment set aside, and the Respondent allowed to respond to the Claim. The Application is based on the Affidavit of Respondent's Director, Julius Kamau, sworn on 17<sup>th</sup> August 2017.
4. Kamau disputes that the Respondent was served with the Court Processes by Ouma. He states that the Company should have been served through its Secretary, Principal Officers or Directors as required under the E&LRC [Procedure] Rules 2016. Kamau further depones that his Company has a good response, which raises triable issues.
5. The Court has not seen any Affidavit filed by the Claimant in reply to the Application filed by the Respondent. None is alluded to in the Submissions filed on behalf of the Claimant, in challenging the Application.
6. While the Notice of Summons and Statement of Claim were served on Respondent's Cashier Hadija Shiko, and while Hadija Shiko told the Process-Server that she had authority to receive the Processes, the Affidavit of Service is silent on attempt made to serve Respondent's Secretary, Director or Principal Officer.
7. It would be proper to serve through Shiko, in event the Officers of the Company contemplated under Rules 12[1] [a] of the E&LRC Rules were unavailable. It would have been proper because receipt by Shiko, would satisfy the requirement of leaving the pleadings at a conspicuous place, at a registered office of the Respondent. The cashier's office is a conspicuous place, being central to the day to day operations of any business. Such service would satisfy the requirement of Rule 12[1] [b] [i] of E&LRC Rules.
8. Rule 12[1] [b] however, kicks in, only while service under Rule 12[1] [a] has been attempted and for whatever reason, failed. The Affidavit of Service must be clear that an attempt has been made to effect service under Rule 12[1] [a], and disclose why service failed, to justify the alternative procedure under Rule 12[1] [b].
9. Unfortunately, Ouma does not disclose in his Affidavit of Service, whether he made any attempt to serve Respondent's Secretary, Director or Principal Officer. He does not state that he failed in tracing these persons. He states he first met a Waiter at Little Chef. He introduced himself to the Waiter. The Waiter directed him to Shiko. He does not explain why he did not ask either from the Waiter or Shiko, where the Secretary, Director or Principal Officer could be found.
10. The Proclamation of Attachment is shown to have been served upon Director Kamau, by the Auctioneers instructed by the Claimant. What was the difficulty in serving the originating processes upon the Director? The record shows the matter had been fixed for hearing several times before the Rules of 2016 came into force. The Claimant had been directed to serve hearing notices upon the Respondent. There is no evidence that any hearing notice was at any one time served.
11. The Court does not think that by proceeding with the *ex parte* hearing, it had made a ruling on the propriety of service, as argued by the

Claimant's Advocate. The issues raised in the Application seeking to set aside *ex parte* Judgment, were not raised at the time. Orders for formal proof, or *ex parte* hearings, are reversible. They are made based on the Court's preliminary view on the propriety and adequacy of notice. If by proceeding *ex parte* the Court has made a final view of propriety of service, there would be no room for revisiting of *ex parte* Judgments and Orders.

12. *Ultimately the Court finds service of the Notice of Summons, and Statement of Claim, to have been improper.*

**IT IS ORDERED:-**

*a) Ex-parte Judgment delivered on 16<sup>th</sup> June 2017 is set aside.*

*b) The Respondent is granted unconditional leave to respond to the Claim.*

*c) The draft Statement of Response filed on 18<sup>th</sup> August 2017, shall be deemed as duly filed and served, upon payment of requisite Court fees.*

*d) Costs in the cause.*

**Dated and delivered at Mombasa this 13<sup>th</sup> day of June 2019.**

**James Rika**

**Judge**