

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1673 OF 2015

FREDRICK ODUOR OCHIENG.....CLAIMANT

- VERSUS -

MARKETING AFRICA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2019)

RULING

The respondent filed the notice of motion on 07.01.2019 through Omulele & Tollo Advocates. The application was under section 1A, 1B, & 3A of the Civil Procedure Act, Cap. 21; Order 9 rule 9, Order 10 rule 11, order 22 rule 22, order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law. The substantive prayer is that the Honourable Court be pleased to set aside the judgment made by Abuodha J on 28.09.2018 and all consequential orders therefrom; the annexed draft statement of response be deemed duly filed and served upon the claimant; and costs of the application to be in the cause.

The application is based on the supporting affidavit of William A. Kalombo, the respondent's chief executive officer and upon the following grounds:

- a) The respondent was not served with summons to enter appearance together with the statement of claim so that the respondent is entitled to file the response.
- b) Prior to default judgment, the respondent had not been served with any document in the suit.
- c) The judgment notice was not served and the respondent was not aware of the judgment of 28.09.2018 and came to know about the judgment on 27.09.2018 upon being called by the Court Clerk one Edward of cell phone No. 0737327389 conveying judgment date of 28.09.2018.

The claimant has opposed the application by filing on 28.01.2019 his replying affidavit through Amuga & Company Advocates. The claimant exhibits the affidavit of service of summons and the statement of claim sworn by Emmanuel Omondi, a Court process server and filed on 28.10.2015. Service was upon one Peter at the applicant's office and who introduced himself as the manager. Another affidavit of service filed on 01.03.2016 shows that one William Kalombo, the respondent's director, was served the same documents on 09.02.2016 at 7.20am and he acknowledged receipt by signing the documents. In the supplementary affidavit of William A. Kalombo filed on 05.03.2019, the respondent including the said William A. Kalombo deny service.

The Court has considered the affidavits filed for the parties. There is no ground to doubt that the process servers effected service as set out in the affidavits of service. Indeed the summons was served upon the said William A. Kalombo, the respondent's director. On a balance of probability and taking the material on record into account, the Court returns that the applicant relied on material non-disclosure and mislead the Court that it had not been served. In that regard the Court finds that the respondent is not deserving of the exercise of Court's discretion in its favour as it comes with dirty hands.

Further the respondent became aware of the judgement being delivered as notified by the phone call on 27.09.2018 but for unexplained reasons failed to attend Court on 28.09.2018 and missed to attend the delivery of the judgment. Even after the phone call, the respondent says it did not have notice of the judgment. Once again the Court finds that the respondent is misleading the Court in that regard.

The claimant having become aware of the delivery of judgment on 27.09.2018, the last correspondence on compromise to satisfy the judgment terms was on 26.11.2018 yet the application was filed on 07.01.2019. In the circumstances of the case the Court returns that the applicant has failed to explain the delay in moving the Court and the claimant is entitled to lament that the application is calculated to unfairly delay execution or satisfaction of the decree.

The Court returns that the material and evidence on record show that the applicant deliberately failed to discharge its obligations towards the just and expeditious hearing and determination of the suit as per section 3 of the Employment and Labour Relations Court Act and the application will therefore fail.

In conclusion the application filed on 07.01.2019 and dated 17.12.2018 is hereby dismissed with orders the applicant to pay the claimant the costs of the application.

Signed, dated and delivered in court at Nairobi this Friday 19th July, 2019.

BYRAM ONGAYA

JUDGE