

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 23 OF 2016

ALOISE ABUNGU MAGO & 3 OTHERS....CLAIMANTS/ RESPONDENT

VERSUS

JASWANT SINGH & BROTHERS.....RESPONDENT/APPLICANT

RULING

1. The motion before me is the Respondent's notice of motion application seeking *inter alia* the temporary stay of execution of the decree issued by this honourable court pending the hearing and determination of this application or further orders of the Court, that the honourable court be pleased to set aside the judgment and decree entered herein against the Respondent pending the hearing and determination of this application or further orders of this court, and that the judgment passed herein against the Respondent and all consequential orders be set aside and the Respondent be granted unconditional leave to defend. The motion was supported by grounds on the face of the application and the affidavit of Hardev Juttla annexed thereto. The motion was opposed by the Claimants who filed a replying affidavit sworn by Mwangi K. Kiminda, Advocate for the Claimants.

2. Parties consented to disposing the notice of motion application by way of written submissions. The Respondent/Applicant submitted that there was no service of the claim or summons as envisaged under Order 5 rule 3 of the Civil Procedure Rules 2010. The Respondent/Applicant submitted that only directors of the company or principle officers of a company can receive service for and on behalf of a company. Relying on Rule 11(2) and 11(5) of the Industrial Court (Procedure) Rules 2010, the Respondent/Applicant submitted that there was a need to serve the summons issued upon the respondents together with the memorandum of claim or appeal and shall file an affidavit of service accompanied by evidence of service upon the respondent signed by the recipient, respondent or the persons accepting service on their behalf. The Respondent/Applicant submitted that the court was misled to enter judgment for which service was not effected adequately. The Respondent/Applicant submitted that the summons were alleged to have been served on 11th February 2016 yet return of service was only filed on 20th November 2018 more than 2 years later. The Respondent/Applicant submitted that the notice of proclamation was served at the residence of the director and not at the office and that there was no proclamation made as alleged in the affidavit.

3. The Claimant/Respondent submitted that the process server intended to serve the director with process and that he inquired of the director's whereabouts from the foreman/supervisor and was informed that the director was at a site the foreman could not locate. It was submitted that the process server affixed the summons on the outer door of the registered offices of the Respondent/Applicant having failed to locate the director. The Claimant/Respondent submitted that the Respondent/Applicant had not denied its offices are at Lunga Lunga Road, Industrial Area where the notices were served. The Claimant/Respondent submitted that service was effected in accordance with the Civil Procedure Rules specifically Order 5 Rule 3(b)(i) and the trial judge considered the service proper. The Claimant/Respondent submitted that the affidavit of service was filed on 20th November 2016 and not 20th November 2018 as alleged by the Respondent/Applicant. The Claimant/Respondent submitted that the reason execution was put on hold was because the Claimant/Respondent moved from Nyeri to Kisumu and that there was no breach of the law in executing now as Section 4(4) of the Limitation of Actions Act did not bar the execution of the decree on the judgment given on 25th November 2016. He thus urged the court to dismiss the notice of motion entirely with costs.

4. The issue before the court can be distilled from the tenor of the motion and the submissions of parties is whether there was a regular judgment and whether the judgment so entered can be set aside and unconditional leave to defend given. In the case before me, it is contended that the Respondent/Applicant was not served with summons as the service was not in conformity with the law. If there was no proper service, was the judgment entered by the court regular or irregular *ex parte* judgment? The Court of Appeal in the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** (Makhandia, Ouko & M'Inoti JJA) held that

In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173.

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango

5. In this case there was a mandatory requirement for the Claimant to show that there was proper service. However, the service asserted to have been made was woefully inadequate to persuade the court that a regular *ex parte* judgment was the result of the said service. As held by the Court of Appeal such a judgment as in this case ought to be set aside *ex debito justitiae*. As the Respondent/Applicant succeeds in this motion, there will be a conditional stay of execution granted and a *de novo* hearing of the case to take place within 30 days of the judgment. The Respondent/Applicant will file and serve a defence within 14 days of today failing which the motion will stand dismissed with costs and the conditional leave to defend vacated. Costs of this motion to abide the outcome of the main suit.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar