



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.61 OF 2016

JOSEPH OGEMBO MOSE CLAIMANT

VERSUS

LOCHAB BROS COMPANY LTD RESPONDENT

RULING

The ruling herein relates to the respondent's application (Lochab Bros Company Ltd) dated 17th April, 2019 and seeking for orders that there be stay of execution of the judgement and the same be set aside and quashed especially the decision made on 28th March, 2019.

The orders sought are on the grounds that there is an error apparent on the face of the record and there exists sufficient cause to warrant the setting aside of the judgement herein and fundamentally the respondent should not be condemned unheard.

The application is supported by the Affidavit of Ranjit Singh Lochab and who avers that he is the managing director of the respondent and on 8th April, 2019 he learnt of judgement herein for the sum of Ksh.329, 067.45 after notice by the claimant dated 3rd April, 2019. The respondent had retained *Nyambegera & Company Advocates* to represent them in this matter and had not received any communication from the advocates on the hearing of the matter. This forced the respondent to instruct new advocates and who has filed the current application.

In the judgement of the court it is noted that the respondent was served with the hearing notice on 14th February, 2019 for the hearing on 28th February, 2019 but such hearing notice was not served on the firm of *Nyabegera Advocate* as the advocate on record and the particulars of the person served is not indicated.

Mr Lochab also avers that in the Affidavit of Service filed, the process server fails to articulate proper service upon the advocates on record for the respondent and does not meet the provisions of Rule 11(5) of the Court Rules. Service Upon the firm of *Onkangi Onkangi & Associates* was not proper as these were not the advocates attending herein for the respondent.

The hearing date was therefore not brought to the attention of the respondent to enable them attend at the hearing and which resulted in ex parte judgement being entered against the respondent. had the respondent been allowed to attend it would have been apparent that the claimant was not in its employment and if he was he absconded duty, was in breach of his employment contract for being violent and neglecting his work and such gross misconduct warranted summary dismissal.

Mr Lochab also avers that the respondent should be allowed a hearing by the judgement being set aside and hearing commences afresh.

In reply, the claimant filed his Replying Affidavit and avers that the judgement entered herein on 28th March, 2019 is procedural as the same was entered after the respondent failed to attend court despite being served with the hearing notice.

On 31st August, 2015 the respondent entered appearance and defence through *Nyambegera & Company Advocates* and who were served with several notices to attend and fix a hearing date but failed to attend or show up in court when the matter was allocated a hearing date by the court. On 16th March, 2018 the respondent's advocates were served a mention notice and indicated they had no instructions to accept service for the respondent as there were no instructions to attend. That M/S Okangi & Okangi Advocate had separated with Mr Nyambegera and all correspondence should go to the former though no notice of change of advocate was filed.

There was no attendance during the hearing and the court proceeded to hear the claimant and issue judgement. Despite calling he advocate attending the matter, there was no attendance.

Both parties filed written submissions.

The court has put into account the Notice of Motion and the affidavits by the parties and written submissions.

On 28th February, 2019 the court heard the claimant in the absence of the respondent on the basis that the respondent had been served and failed to attend court. there was an Affidavit of Service filed and sworn by John Abuom and file don 27th February, 2019 and who averred that on 13th February, 2019 he received instructions from the claimant's advocate to serve the firm of Nyambegera & Company Advocates for the respondent and then travelled to Eldoret but at the law firm the secretary informed him to serve the respondent as there were no instructions. He proceeded to the respondent's firm and who directed him to serve upon M/S Onkangi Onkangi & Associates who had been retained instead of the firm of Nyambegera & Company Advocates.

In this regard therefore, the hearing notice for the 28th February, 2019 was served upon the firm of Onkangi Onkangi & Associates and not the firm of Nyambegera & Company Advocates. The process server sent by the claimant's advocate though directed to serve the firm of Nyambegera & Company Advocates with the hearing Notice got instructions from the secretary therefrom and then form the respondent and served a third party. Such was without reference to the instructing party, the claimant.

From the record, the respondent was represented by the firm of *Nyambegara & Company Advocates* until 11th April, 2019 when there was Notice of change of Advocates and appointed the firm of *Wambua Kigamwa & Company Advocates*. There is no other record where the respondent has appointed the firm of *Onkangi Onkangi & Associates* as the representative in this matter.

For the process server to thus go out of his way and be misled by the secretary or any other person purporting to act for the respondent other than the appointed legal representative(s) herein is irregular.

Under Rule 33 of the Court Rules and read together with Rule 11 with regard to the court take into account errors of the record and service upon a respondent and a corporate, on the face of the returns filed and leading to the hearing and ex parte judgement herein, there is an error apparent and there exists good grounds for the setting aside of the judgement and subsequent orders entered into following the decision of 28th March, 2019. Had the Affidavit of Service filed by John Abuom and filed on 27th February, 2019 been audited sufficiently, it would have become apparent that a third party and a party separate and distinct from the respondent or its legal representative had been served.

A perusal of the Hearing Notice inviting the respondent to attend on 28th February, 2019 was indeed served on a third party. The respondent or the legal representative were not served with the hearing notice.

Accordingly, application filed by the respondent and dated 17th April, 2019 is hereby found with merit and is hereby allowed. Judgement delivered on 28th March, 2019 and all consequential orders therefrom are hereby set aside.

Taking into account that the claimant has on 12 different occasions made effort to have the matter fixed for hearing and when the respondent remained absent, there shall be no orders as to costs. The court shall also fix a hearing date in court upon the ruling herein.

Delivered at Nakuru this 23rd day of September, 2019

M. MBARU

JUDGE

In the presence of: