



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 859 OF 2016

BETWEEN

NDUVA KILUNGYA.....CLAIMANT

VERSUS

KASSAM HAULIERS LIMITED.....RESPONDENT

RULING

1. The Claimant obtained an *ex parte* Judgment against his former Employer, the Respondent herein, on 29th September 2017. Judgment is for the amount of Kshs. 655,738 in terminal dues and compensation for unfair termination, among other Orders.

2. The Respondent filed an Application on 18th October 2017, asking the Court to stay execution of Judgment, and allow the Respondent to respond to the Claim. The Application is supported by the Affidavit of Ibrahim Hussein Mangale, Human Resources Manager of the Respondent, sworn on 17th October 2017.

3. The Respondent faults service of the Court Processes leading to the *ex parte* Judgment. Mangale states he is the Human Resources Manager. The Affidavit of Service filed by Court Process Server Nickson Nyange Rodgers Mabishi, indicates service of the Court Processes was made on one Abdallah. Abdallah is described as the Human Resources Manager by the Process Server. He is not the Human Resources Manager. He is a Storekeeper. Mangale is the Human Resources Manager.

4. The Claimant opposes the Application. He filed a Replying Affidavit, sworn on 27th October 2017. He states Abdallah introduced himself to the Process Server as the Human Resources Manager. The Respondent was served with the Summons and the Statement of Claim and failed to file Response. The matter was fixed for mention on 20th June 2017. The Respondent was served with Mention Notice, but did not attend Court. The Claimant scheduled the matter for formal proof. Hearing Notice was served on the Respondent. The Hearing Notice was in fact received by Ibrahim Hussein Mangale. The Respondent did not attend Court on hearing, on 25th July 2017. There is no Affidavit sworn by Abdallah stating he was not authorized to receive Court Processes. The draft Statement of Response raises no triable issues.

5. The Application was fixed for hearing on 2nd November 2017, when the Respondent failed to attend Court to prosecute its Application. There was an Order made dismissing the Application with costs.

6. By consent of the Parties, the Order for dismissal was reversed on 7th November 2017. It was agreed Respondent's Application is considered and determined on the strength of the Affidavits and Submissions on record. Parties confirmed the filing of their Submissions on 11th December 2017.

The Court Finds:-

7. The Notice of Summons and copy of Statement of Claim, together with Claimant's supporting Documents, and Witness Statement, was served on one Abdallah, by Process Server Mabishi, on 30th November 2016.

8. Abdallah identified himself to the Process-Server, as the Human Resources Manager. He is a Storekeeper, the Human Resources Manager being Ibrahim Hussein Mangale.

9. The matter was fixed for formal proof. Although not required under the Employment and Labour Relations Court [Procedure] Rules 2016, to serve a Hearing Notice on the Respondent on formal proof, the Claimant served Hearing Notice on the Respondent on 8th July 2017. This time, Notice was received by Ibrahim Hussein Mangale, who identified himself as Human Resources Manager. The matter was heard in the

absence of the Respondent, more than 2 weeks after service of the Hearing Notice, on 25th July 2017.

10. The Respondent filed its Application to be allowed to respond to the Claim, on 18th October 2017, 3 months after receiving the Hearing Notice.

11. Rule 12 of the E&LRC Rules regulates service on the corporate. Service may, not must, be effected on the Secretary, Director or any other Principal Officer of the corporate. Where the Process Server is unable to find the Officers above, the Rules allow for service by way of leaving the Court Processes, at a conspicuous place at the registered office of the corporate; sending Court Processes by registered courier service to the registered office of the corporate; leaving the Court Processes at a conspicuous place where the corporate carries out business; or by sending Court Processes to the last known address of the corporate. The Court may also authorize service by any other mode.

12. The Rules tacitly acknowledge, it is not always easy for the Process Server, to identify Principal Officers of corporate to effect service. Such Officers may also not be readily available, for service. They may not be willing to identify themselves, so as to frustrate unwelcome Court Processes. Employees who bring these Claims hardly know who Directors, Company Secretaries or Principal Officers are. They do not know about the management structures of their Employers. They cannot always point out with certainty, to the Process Servers, Directors, Company Secretaries or Principal Officers of their Employers. Cases of concealment, or misidentification of Officers, are not uncommon.

13. The Affidavit of Service on the Notice of Summons, and copy of Statement of Claim, indicate the Process Server, quite reasonably, approached a Security Guard at the Respondent's main gate. He introduced himself to the Guard, and explained the purpose of his visit. He was directed by the Guard to the Administration Block. This is where he found Abdallah who presented himself as the Human Resources Manager, authorized to receive Court Processes. He received the Court-Processes.

14. The Court does not think the Process Server needed to ask Abdallah to produce his employment badge, to confirm his designation, to effect service. It is sufficient that the Process Server was directed to the Administration Block, and was received by an Officer who indicated he was authorized to receive Summons. Even had the Process Server left the Court Processes at a conspicuous place in the Administration Block, without necessarily, engaging Abdallah, service would, arguably, have been acceptable. Of importance is that the Respondent was aware there was a Claim made against it, by its former Employee, but chose not to respond as required by the law.

15. Abdallah has not sworn an Affidavit denying what is stated by the Process-Server. Mangale has not stated if any action was taken by the Respondent against Abdallah for impersonation. The Court is satisfied the Respondent was aware of the Claim filed against the Respondent from the inception, but opted to ignore the proceedings.

16. If there was defect in service of the Notice of Summons and copy of the Statement of Claim, [the Court is of the view no defect has been established], there is no defect shown in service of the Hearing Notice. The only fault with the Hearing Notice attributable to the Claimant, is perhaps that he was not legally bound to notify the Respondent about formal proof. Mangale received the Hearing Notice before hearing took place, and Judgment delivered. The Rules do not require Hearing Notice on formal proof is served on a recalcitrant Party. The Respondent however was served with a Hearing Notice in good time. Notice of Judgment issued on 29th September 2017. The Respondent did nothing until 18th October 2017.

17. The draft Statement of Response attached to the Application does not raise substantial issues. Paragraph 4, for instance states, that the Claimant's gross salary was Kshs. 28,427, '*and the Claimant is put to strict proof thereof...*' It is not clear why the Claimant should be put to strict proof thereof. The figure adopted by the Claimant and which was endorsed by the Court in its Judgment, is a monthly salary of Kshs. 28,000. The Respondent attaches a Police Abstract Form to the draft Response. It was not denied by the Claimant that he was involved in an accident while driving Respondent's motor vehicle. Orders granted, such as an on annual leave pay, are merely contested in the draft Response, without disclosure of any annual leave records. No contract of employment is attached to the draft Statement of Response, contradicting what is stated by the Claimant, to have been his terms and conditions of service. The Respondent alleges the Claimant absconded, and that his contract was not terminated by the Respondent. There is no indication if the Respondent made attempts at tracing the Claimant and subjecting him to a disciplinary hearing for the employment offence of absconding. The Parties are involved in a Civil Suit at the Chief Magistrate's Court Mombasa, and have access to each other. The draft Statement of Response does not raise substantial issues.

18. *The Application filed by the Respondent on 18th October 2017 is dismissed with costs to the Claimant.*

Dated and delivered at Mombasa this 23rd day of February 2018.

James Rika

Judge