



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 317 OF 2015

BETWEEN

MICHAEL MATHEKA KIMATU.....CLAIMANT

VERSUS

MALIN TYRES LIMITED.....RESPONDENT

RULING

1. Judgment was delivered in favour of the Claimant, on 24th July 2017. The Respondent did not respond to the Claim, and proceedings leading to the Judgment, were *ex parte*. The Respondent was ordered to pay to the Claimant terminal benefits and compensation for unfair termination totaled at Kshs. 190,961, costs and interest.
2. There are Affidavits of Service on record, indicating Court Processes were served to Officers of the Respondent Company, at Respondent's front office on various occasions. The Respondent did not file any response, and failed to attend Court on all occasions.
3. The Claimant sought to execute decree. On 27th November 2017, the Respondent filed an Application, supported by the Affidavit of its Manager Abdirahman Abubakar, sworn on 27th November 2017.
4. Abubakar alleges service upon the Respondent was improper. Affidavits of Service on record indicate service was made on unnamed Officers at the Respondent's front office. Service could only be proper if made on a designated Officer of the Respondent Company. Abubakar alleges also, that the Respondent has a good response, as shown in the exhibited Draft Statement of Response.
5. The Claimant filed Grounds of Opposition and Replying Affidavit sworn by himself on 6th December 2017. His position is that the Application is defective. The Affidavit in support of the Application has not been sworn by a Director or Company Secretary of the Respondent. Service of the Court Processes was properly done. The Process Server, if there was doubt on service, should have been called by the Respondent to Court for cross-examination. This was not done. Rule 12 of the Employment and Labour Relations Court [Procedure] Rules 2016, allows for service on artificial persons, by leaving Court Processes in a conspicuous place at the registered office of the corporate, or at a conspicuous place where the corporate carries on business.

The Court Finds:-

6. The Court does not find fault with the Supporting Affidavit filed by the Respondent. Employers are allowed to give evidence in this Court through their Officers. The Officers are not only allowed to give evidence, but may also, under Section 22 of the Employment & Labour Relations Court Act, represent their Employers in proceedings before the Court. Managers can be deemed to be Employers, under the definition of the term 'Employer' given at Section 2 of the Employment Act 2007. Why would an Officer who qualifies to be an Employer, not swear a simple Affidavit, in matters he is conversant about, in support of an Application made by the Company in which he serves? The Court does not think there is anything objectionable, or fatal, about Manager Abubakar swearing the Supporting Affidavit.
7. Before the Claim was filed in Court, Parties were involved in conciliation at the Labour Office, Mombasa County. There is a tome of correspondence addressed by the Labour Office to the Respondent, inviting the Respondent to conciliation meetings, and requiring the Respondent to produce Claimant's employment records. These letters show the Respondent failed to produce employment records when required to do so. Other letters from the Labour Office went unanswered. On 2nd March 2015 the Labour Office wrote to the Respondent demanding the Respondent pays terminal dues to the Claimant within 14 days, in default of which the Labour Office, would take legal action against the Respondent. The Respondent was required to pay to the Claimant a modest amount of Kshs. 45,750 in terminal dues, but failed to deposit this with the Labour Office, escalating the dispute to Court for adjudication.

8. There was a demand letter issued to the Respondent through the same address shown to belong to the Respondent in its Supporting Affidavit. The letter is dated 25th March 2015. The Respondent did not settle the Claim, or even give an answer to the demand letter.
9. Against this background, it can be concluded that the Respondent was unwilling to submit to the different processes of dispute resolution. It cannot be said the Respondent was not aware of the dispute. It has been aware right from the time of conciliation. The failure to respond when the Claim was filed in Court fits this pattern and practice, of unwillingness to submit to the processes of dispute resolution.
10. Service of the Court Processes; the failure by the Respondent to file Response and attend Court; should be viewed within this context.
11. The Court is persuaded the Respondent was aware of the Claim filed against it in this Court, but in keeping with its tradition, ignored the proceedings.
12. The Affidavits of Service show the Court Processes were at the very least, left at the Respondent's front Office. The physical address of the business given in the respective Affidavits, where the front office is located, is not denied. Court Processes were served not once, but repeatedly, with the same result: no response filed and no appearance in Court. The Court cannot think of a more conspicuous place in an enterprise, than the enterprise's front office.
13. The Court has in the past observed that it is not always an easy task, for Employees directing Process-Servers to effect service on Employers, to know who Company Directors, Company Secretaries or Principal Officers are.
14. In an employment dispute such as the one before this Court, the conduct of the Parties in other dispute resolution processes preceding Court adjudication; whether a pattern of frustrating the administration of justice is discernible; are relevant considerations, where service of Court Processes is disputed. In this case, it is clear to the Court that failure by the Respondent, to file its Statement of Response, fits a pattern of noncompliance shown at conciliation, and shown also, by Respondent's inaction upon demand issued by the Claimant before filing of the Claim.
15. Lastly, the Draft Statement of Response does not disclose weighty issues, warranting the Court to reopen proceedings. The issues raised are lightweight. It is admitted the Claimant was employed by the Respondent; but the Respondent states, the Claimant was not committed to his work. Of what relevance in the proceedings, is commitment to work? The Respondent states the Claimant's contract was not terminated by the Respondent; the Claimant absconded. No details are given about the Claimant absconding. The record from the Labour Office does not capture any occasion where the Respondent complained, about the Claimant absconding. This was never an issue at the Labour Office. There is no letter from the Respondent asking the Claimant to show cause why, he should not be disciplined for abandoning work. Abubakar states in his Supporting Affidavit that Parties have another civil case elsewhere. The Claimant could not therefore be said to have placed himself beyond the reach of the Respondent. He ought to have been disciplined for abandonment of work.
16. Other statement made in the Draft Response, is that the Claimant was guilty of arriving at work late, and engaged in drunkenness. It is not pleaded if these infractions were relevant to termination. It is denied that demand letter issued before action. There is on record a demand letter, addressed to Respondent's acknowledged postal address. Judgment comprises compensation for unfair termination; annual leave; and notice pay. The Draft Statement of Response does not show a sustainable case for justification, and procedural fairness, in the process of termination, which would have effect on compensation and notice pay. No record of Claimant's annual leave is attached to the Draft Statement of Response. If annual leave was utilized, or paid for in cash, the Respondent ought to exhibit documents in the Draft Statement of Response, showing utilization or payment. It is not sufficient to state "*the claim is denied in toto.*"
17. The Court is satisfied the Respondent was aware about the Claim filed herein. Court Processes were on more than one occasion, served at the Respondent's front office. Awareness about the dispute as a whole goes back to the time, when a complaint was lodged against the Respondent by the Claimant at the Labour Office. What was brought to Court is an escalation of a dispute, which both Parties were always aware about. There is nothing disclosed in the Draft Statement of Response, worth consideration of the Court, in another round of hearing. Parties were granted equal opportunity to state their respective positions, and a fair determination was made.

IT IS ORDERED:-

a. The Application by the Respondent dated 27th November 2017 is dismissed.

b. Costs to the Claimant.

Dated and delivered at Mombasa this 9th day of March 2018

James Rika

Judge