



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 284 OF 2016

DOMINIC RINGOMA.....CLAIMANT

VS

VICTORIA ENGINEERING CO. LTD.....RESPONDENT

RULING

1. This ruling flows from the Respondent's application brought by Notice of Motion under certificate of urgency dated 13th February 2018 seeking stay of execution and setting aside of judgment entered by my brother **Makau J** on 31st March 2017. The Respondent also seeks leave to defend the suit.

2. The application, which is supported by an affidavit sworn by the Respondent's Administrative Officer, Rose Ndururi is based on the following grounds:

- a. That failure to enter appearance in time was not deliberate but was caused by the apparent lack of service on the Respondent;
- b. That the Claimant had issued a seven (7) days' proclamation notice and Warrants of Attachment dated 22nd January 2018 and unless restrained by the Court execution would proceed;
- c. That if execution is allowed to proceed, the Respondent's business will be significantly disrupted thereby causing irreparable harm to the Respondent and third parties dealing with the Respondent;
- d. That the execution proceedings effected by the Claimant are unlawful for breach of the mandatory provisions of Order 22 Rule 6 of the Civil Procedure Rules which require service of notice of entry of judgment on the Respondent prior to execution;
- e. That no valid Warrants of Attachment are in existence which renders the execution unlawful;
- f. That the application has been brought without delay;
- g. That granting the application will not occasion any prejudice to the Claimant that cannot be compensated by costs;
- h. That on the other hand, if the application is not granted, the Respondent will be extremely prejudiced as they will have been condemned unheard;
- i. That the Respondent has a good defence on merit and it is only fair that it be allowed to ventilate it at a full hearing.

3. The Claimant's response is contained in his own replying affidavit sworn on 21st February 2018. He depones that he filed his claim on 7th April 2016. Summons were taken out on 11th April 2016 and service on the Respondent effected on 18th April 2016.

4. The Claimant further depones that the matter was fixed for mention on 2nd June 2016, for purposes of taking a hearing date. This date was duly communicated to the Respondent. On the said date, the Court being satisfied that service had been effected, and the Respondent having elected not to respond to the claim, the Court directed that the matter proceeds to formal proof. The Claimant states that the Respondent was notified of the date for formal proof.

5. Judgment was delivered in favour of the Claimant on 31st March 2017 after which a bill of costs was drawn and served on the Respondent.

6. According to affidavits of service filed by the Claimant, service in this matter was effected severally on the Respondent's Manager in Taita

Taveta County. There was no objection to the contents of the affidavits of service. Indeed, the only issue raised by Counsel for the Respondent in oral submissions before the Court, is that the summons were served at a site office rather than the Respondent's Head Office in Nairobi. In response, Counsel for the Claimant submitted that the site where service was effected had proper administrative offices. In any event, it is at this same site where the Claimant's employment was terminated.

7. In my view, the Respondent's argument that summons were served at the wrong site is a feeble excuse which cannot move the Court to set aside an otherwise lawful judgment. Service on a manager of a body corporate cannot be said to be inadequate service.

8. Similarly, the omission to serve notice of entry of judgment and/or an error in the dating of the Warrants of Attachment cannot constitute a valid reason to defeat the Claimant's award.

9. Ultimately, the Court finds that the Respondent has failed to make a case for the setting aside of the judgment entered on 31st March 2017. The Respondent's application dated 13th February 2018 is therefore dismissed with costs to the Claimant. The interim orders granted on 19th February 2018 are vacated.

10. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Kitonga for the Claimant

Mr. Chepkaka for the Respondent