



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.56 OF 2017

WINFRED MWONGELA NZAVI.....1ST PETITIONER

OBADIAH MULINGE NDAMBUKI.....2ND PETITIONER

VERSUS

TRANSGLOBAL CARGO CENTRE.....1ST RESPONDENT

LUFTHANSA CARGO AG.....2ND RESPONDENT

RULING

1. The ruling herein relates to application and Notice of Motion by the 2nd respondent, Lufthansa Cargo AG dated 11th July, 2017 filed under the provisions go section 12(3) and 16 of the Employment and Labour Relations Court Act, and Rule 17(7) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;

This court be pleased to set aside and or vary the ex –parte order made on 23rd June 2017 and all other consequential orders

2. The application is supported by the annexed affidavit of Reuben Ngugi and on the grounds that on 29th June, 2017 the 2nd respondent's Cargo handling Manager was served with a copy of a court order issued on 23rd June, 2017 and which related to the petitioners' application dated 15th June, 2017. Upon perusal of the court file it emerged that the 2nd respondent had not been served with the application as alleged by the process server one Jacob Mulanda who had left the same with a guard at the respondent's premises. Such service of summons and orders issued was irregular and contrary to the rules of the court.

3. The orders issued ex-parte were therefore obtained without proper and sufficient proof of service of the application. The 2nd respondent is seeking that the orders be set aside as they were procured irregularly and without being given a fair hearing in the matter. There is a good defence to the petition on issues of law which can be argued given the opportunity.

4. Other grounds in support of the application are that the petitioner's claims with regard to employment can only be validly made against their employer the 1st respondent. There is no privity of contract with the 2nd respondent who is wrongly enjoined in these proceedings. The 2nd respondent ought not to be shut out in the disclosed circumstances s as to meet the ends of justice.

5. In reply, the petitioners filed a Replying Affidavit sworn by Obadiah Mulinge Ndambuki the 2nd petitioner and who avers that the petitioners were initially employed by the 1st respondent in the year 2006 and 2007 respectively and in the year 2011 were both transferred to work for the 2nd respondent who trained them locally and abroad and kept them in employment until June, 2017.

6. Mr Ndambuki also avers that on 16th May, 2017 the petitioners received letters from the 1st respondent informing them of an intended redundancy that was to be effected on 15th June, 2017 and as a result of the 2nd respondent terminating the standard ground handling agreement between them and the 1st respondent under which the petitioners had been employed. By virtue of the agreement, the petitioner had become the employees of both respondents.

7. The petitioners were not aware of the termination of the agreement between the respondents and the notice to terminate employment on account of redundancy had not been communicated in accordance with the provisions of the Employment Act as required.

8. Mr Ndambuki also avers that he guided the process server to the offices of the 2nd respondent for service on 16th June, 2017 where he showed him the gate that was being manned by G4S Security Guard at 4.20pm. the petitioner was present when the guard, Mr Robert Soma

introduced himself to the process server and told him that there was no manager in the office to receive service and he offered to accept the same for and on behalf of the 2nd respondent. It was not within the knowledge of the process server as to who was in the 2nd respondent's office as he was denied access by the security guards at the gate. The orders issued on 23rd June, 2017 by the court were confirmed in the interim on the basis that service upon the respondents had been effected. Such was procedural and on merit. The 2nd respondent had been made aware of the court orders of 16th June, 2017.

9. The respondents are legally bound to follow the provisions of section 40 of the Employment Act in so far as the petitioner's rights are concerned. The termination of the standard ground handling agreement and the employment of the petitioners should be given due consideration and protection in law.

10. The parties made their oral arguments in court and also filed list of authorities and case law.

11. I have carefully considered the arguments advanced by the parties in this case and the relevant law and authorities as enumerated. These have been put into account herein and the issues which emerge for determination are;

Whether there was proper service upon the 2nd respondent;

Whether there was/is an employment relationship between the petitioners and the 2nd respondent;

Whether the court should review, vary and or set aside the orders issued on 23rd June, 2017.

12. On 16th June, 2017 the petitioners moved the court seeking urgent orders. The court noting the urgency and the grounds and basis of the application and orders sought, issued interim orders and directed the immediate service upon the respondent and attendance for hearing directions on 23rd June, 2017.

13. On the due date, the respondents were not in attendance and the interim orders were confirmed based on the averments made in the Affidavit of Service filed as sworn by Jacob Mulandi Okwemba confirming service upon the respondents. Parties were also directed to take a date for the hearing of the petition.

14. The 2nd respondent has challenged service on the grounds that Mr Jacob Okwemba did not effect service as required and therefore the court proceeded to confirm the interim orders in the absence of the 2nd respondent and thus denied them the right to a hearing to argue their defence.

15. Summons issued by this court to a corporate body are regulated under Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides that;

12. (1) Service on a corporate body may be effected-

(a) On the secretary, director or any other principal officer of the corporate body;

(b) Where the process server is unable to find any of the officers of the corporate body mentioned in subparagraph (a), by-

(i) Leaving the pleadings at a conspicuous place at the registered office of the corporate body;

(ii) Sending the pleadings by registered courier service to the registered office of the corporate body;

(iii) Leaving the pleadings at a conspicuous place where the corporate body carries out business; or

(iv) Sending the pleadings by registered post to the last known postal address of the corporate body if it does not have a registered office or postal address.

16. A corporate body can therefore be served through the secretary, director or any other principal officer. Such a body can also be served through leaving the summons or pleadings at a conspicuous place at the registered office of the corporate, place of business, or by registered post. In this case, the process server Mr Jacob Okwemba avers in his Affidavit of Service that on 16th June, 2017 at 4.20pm he was at the 2nd respondent offices where he found a security guard Mr Robert Soma who accepted service.

17. It is not contested that Mr Robert Soma was guarding the 2nd respondent's premises. Upon introduction by the Process Server and noting the nature of business he required to undertake, such a security officer of the respondent ought to have declined service or allowed the Process Server access to the office for service upon the officers of the 2nd respondent. where there were specific orders and or instructions upon such a security officer not to accept service of court documents or indeed any documents from third parties, such officer ought to have indicated as much.

18. Noting the urgency of matters before court and the specific direction issued to the petitioner to effect service upon the respondent before close of business on 16th June, 2017, I find the Process server Mr Jacob Okwemba acted in a responsible manner in ensuring compliance as

directed by the court.

19. The non-attendance of the respondents on 23rd June, 2017 as required is not explained. Whether there was service on a security guard who should not have been served but went ahead to accept service, the 2nd respondent ought to have attended court on 23rd June, 2017 to argue for more time or give a defence. In the Affidavit of Reuben Ngugi in support the Notice of Motion there is no effort to show what Mr Robert Soma did with the summons served upon him. where such pleadings are. There is no affidavit from such person to assist the court as to what or where the documents served upon him went. I take it the 2nd respondent as properly served at its offices and the process Server filed proper returns. Such service at the registered offices of the respondents is allowed under Rule 12 of the Court Rules. This is the essence of the case cited by the 2nd respondent in **Lochab Brothers Limited versus Lilian Mumbi Ng'ang'a & others, Civil Appeal No.114 of 2006** service upon a body corporate can be through its officers, registered post or at the registered offices. In this case the petitioner had to effect service before close of business and this was done by 4.20pm on the date the impugned orders were issued.

20. The question of the employment of the petitioners is challenged by the 2nd respondent on the grounds that there was no secondment of the petitioners to the 2nd respondent as they remained the employees of the 1st respondent. That where the 2nd respondent trained the petitioners abroad, employment status with the 1st respondent did not change.

21. The question of employment of the petitioners by the 1st or 2nd respondent and the nature of agreements between the two respondents is a matter all the parties went into. Whether there was transfer, secondment, agreement or employment of the petitioners by either respondent or both, such is a question of fact which should be interrogated at a full hearing. In the case of **Mary Nyangasi Ratemo & others versus Kenya Police Staff Sacco Limited & another, Cause No.255 of 2011** and also in the case of **David Barasa versus British Peace Support Team (E.A) and another Cause No.1445 of 2013** and also in the case of **Elizabeth Washeke and others versus Airtel Networks (K) Ltd, Cause No.1972 of 2012** these are judgments of the court which heard the parties on their merits and arrived at an informed judgements based on the pleadings, evidence and submissions of the parties. The court had a chance to interrogate the intentions of the parties, the documents exchanged in the course of employment and thus issue final orders.

22. The averments by the 2nd respondent that there was secondment of the petitioners to them by the 1st respondent were vehemently opposed. It will therefore aid justice for the court to hear all the parties herein on their merits noting the prayers sought by the petitioners in their Petition. The respondents shall also have a chance to file their responses to the Petition for the court to hear arguments and issue final orders upon hearing the merits.

23. To therefore determine whether there was employment between the petitioners and the 2nd respondent at this stage would therefore deny the petitioners a fair chance to argue their petition on its merits and also deny the court relevant material to rely upon in issuing final orders. This does not negate the urgency of the matters raised by the 2nd respondent that there is an agreement between the respondents which has expired and is only left alive due to the interim orders herein.

Accordingly Application dated 11th July, 2017 is declined. the parties should exchange their responses to ensure pleadings close and a hearing date for the main Petition is allocated on priority. Costs in the petition.

Read in open court at Nairobi this 20th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant:.....

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