



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 3 OF 2017

(Before D. K. N. Marete)

DR BENJAMIN CHARLES AKENGA.....CLAIMANT

VERSUS

ST CAMILLUS FOUNDATION.....1ST RESPONDENT

TABAKA MISSION HOSPITAL.....2ND RESPONDENT

FR JULIUS MORARA.....3RD RESPONDENT

THE REGISTERED TRUSTEES OF THE CATHOLIC

CHURCH DIOCESE OF KISIL.....4TH RESPONDENT

BISHOP JOSEPH MAIRURA OKWEMWA.....5TH RESPONDENT

RULING

This is an application dated 18th May, 2018 seeking the following orders of court;

1. This application be certified urgent and be heard ex-parte and be heard in the first instance.
2. There be issued an order of stay, staying the execution of the Judgement and decree herein pending interparties hearing and final determination of the instant application.
3. The Judgement of this court of the 15th November 2017 and the entire decree and ex parte proceedings culminating to the entry of Judgement herein be set aside.
4. Costs of this application be provided for.

It is grounded as follows;

- i. The suit herein proceeded to hearing and subsequently determined in the absence of Counsel of the Respondents/Applicants and without the respondent's testimonial evidence.
- ii. Counsel for the Respondents came to learn that this matter had been heard and judgment delivered when they were served with a Notice of taxation dated on 28th February, 2018.
- iii. Prior to service of the said taxation notice, no hearing notice and/or notice of delivery of judgment was served upon counsel for the respondents.
- iv. The matter herein proceeded ex parte without notice to the respondents.
- v. The respondents have on record a memorandum of response to the claim and they are entitled to a hearing as guaranteed under

Article 50 of the constitution.

vi. The Respondents are entitled to a fair hearing in view of the contested issues herein and it be impartial to ventilate their defence in court.

vii. The Respondents were never given notice of the judgement herein hence the delay in bringing this application.

viii. This application has been brought in time without any unreasonable delay and if the orders sought are granted there will be no prejudice occasioned to the Plaintiff/Respondent.

ix. It is in the interest of justice that this Honourable Court stays the execution of the ruling of this Court dated 11th April, 2018 with all consequential orders thereto.

The claimant/respondent in a Replying Affidavit sworn on 26th May, 2018 opposes the application.

This matter came for hearing on 31st May, 2018 when Mr. Begi, Counsel for the respondent/applicant submitted a case for the application on grounds that the respondent had not been served with a hearing notice, or at all. It is the applicants other case that they were not involved in the proceedings and only came to learn of the judgement when they were served with a notice of bill of costs dated 26th January, 2018.

The applicant further submits that they made this application but this notwithstanding, the taxing officer proceeded to tax the bill and delivered a ruling on 11th April, 2018 thus commencing execution. Her case is that the only service received is on notice of taxation.

The applicant submits that service in this case was by registered post. The best form of service is personal service. In this nature of service, leave of court is necessary under Order 5b rule 17. This was not sought in the circumstances.

The applicant further submits a case of cross-examination in cases of disputed service. In the circumstances, the serving officer, David Obara has not described himself as a process server non attached a licence for such practice. She disputes service on such grounds and prays that they be heard on service. They have a defence.

Mr. Obosso, counsel for the respondent opposed the application. This is firstly on grounds that the application is premised on the Civil Procedure Act and rules instead of the Employment and Labour Relations Court (Procedure) Rules, 2016. In the latter, rule 11 provides for process service by registered post. Here, this was effected and an affidavit of service and accompanying certificate of posting is attached.

His further submission is that there is no denial of receipt of notice to collect mail by the applicant. The letters of service have not been returned to the respondent, in any event, posting was on the addresses provided by the applicant. Again, the process server describes himself as such and is available for cross-examination. However, this has not been preferred by the applicant ostensibly for fear of authenticating such service.

Absence of the respondent in these proceedings was despite service. This is acknowledged in the judgement. Besides, paragraphs 9-21 of the Replying Affidavit clearly illustrates the mode of service.

The claimant/respondent further submits that the applicants did not seek stay of proceedings or even taxation. The applicants were always indolent in pursuing their matter and therefore should allow the claimant/respondent to enjoy the fruits of his deserved judgment. Evidence of this is that notice of taxation was served on 13th February, 2018 but this application was filed on 4th April, 2018 and no explanation has been given for this delay.

The respondents have a right to be heard but cannot keep us waiting for ever. It is unmeritorious and should be dismissed with costs.

However, in the event this court is inclined to allow the application, the claimant/respondent prays for a deposit of the decretal amount in court, throw away costs at Kshs.40,000.00 and an allowance conditional upon a cross-examination of the claimant's evidence and a presentation of the evidence in defence.

A construction of the respective cases of the parties tilts this application in favour of the claimant/respondent. The realistic position is his submission that the causative of the events we are now embroidered in is the massive indolence on the part of the respondent/applicant. Their submission of a case of no process service leading to hearing and conclusion of this suit in their absence is not founded. The claimant/respondent resounds a case of service – postal service, which is denied by the respondent/applicant. I treat this as mere denial. There is not a scintilla of evidence in support of the proposition of no service.

I see a case of a litigant who is bent on indulging the court and her rival litigant forever. And all this is without any basis. This must be nabbed at the bud. I also note that the case of the respondent/applicant was considered during the judgement but this was found disabled. Look at this;

These are demonstrative of a case in his favour. The respondent has not rebutted this overwhelming case of the claimant and the defence collapses in toto. I therefore find a case of unlawful termination of employment and hold as such. This answers the 1st issue for determination. (emphasis mine.)

The court in coming up with a determination took into account the respondent/applicant's Reply to Statement of Claim dated 8th February, 2017 on record.

I am therefore inclined to dismiss this application with costs to the claimant/respondent.

Delivered, dated and signed this 20th day of June 2018.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Begi instructed by Aboki Begi & Company Advocates for the respondent/applicant.
2. Mr. Obosso holding brief for Getange instructed by Obosso & Company Advocates for the claimant/respondent.