



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 373 OF 2017

(Before Hon. Justice Mathews N. Nduma)

MOSES OLOO MISEH.....CLAIMANT

VERSUS

MIGORI COUNTY ASSEMBLY SERVICE BOARDRESPONDENT

RULING

1. The Applicant seeks to set aside Judgment of the court delivered on 22nd February, 2018 on grounds that no service of summons to enter appearance and the memorandum of claim were served on the Respondent. That service was effected on the Migori County Assembly and not on the County Assembly Service Board the Applicant herein.
2. That the suit was filed on 22nd August, 2017 after the 2017 general elections before the County Assembly of Migori was properly constituted. That the County Assembly service Board could not have been properly constituted to answer to the Claim in any event until the Speaker and Deputy Speaker were elected in February, 2018.
3. That the Respondent has an arguable defence. That the application was brought without undue delay. That the court exercise its discretion to uphold justice of the case by allowing the Respondent to be heard on its defence.
4. That the Respondent is ready and willing to abide by any terms and conditions set by the court.

Replying Affidavit

5. The application is opposed vide a Replying Affidavit of the Claimant, Moses Oloo Miseh. He deposes that summons to enter appearance were served upon the Respondent on 17th October, 2017 by a process server called Vitalis Onyango Akuku whose affidavit of service was filed in court on 7th November, 2017. That this was a 2nd service because on 23rd August, 2017 the advocates for the Claimant had also effected service on the Respondent vide G4S courier. A copy of the way bill shipment receipt is as attached. The Secretary of the Respondent confirmed receipt of the claim and used it as a basis to terminate the contract of the Claimant by a letter dated 21st September, 2017 which was produced as an exhibit in the suit.
6. That in terms of section 12(4) of the County Government Act No. 17 of 2012, the clerk of the County Assembly is the Secretary of the county Assembly Service Board.
7. That according to the process server, he effected service of the summons to enter appearance on the clerk.
8. That reference to Migori County Assembly in the judgment is just a normal typographical error which the court may correct at any time.
9. That the Claimant had negotiated an out of court settlement severally at the Migori County Offices, in vain.
10. That the application is a blatant abuse of court process and it be dismissed with costs.

Determination

11. The overriding objective is to determine cases, without undue delay upon hearing both parties. Although the right to a fair hearing is paramount, the courts always frown at any attempts to defeat the ends of justice by obstructing expedient disposal of cases.

12. In the present case, the facts set out by the applicant as to the person who was served with summons to enter appearance is factually in correct.

13. The affidavit of service clearly indicates, the clerk to the Assembly who is also the secretary of the Assembly Service Board was served. The applicant is well aware of this fact, and instead of being candid with the court chooses to exploit a clerical error on the judgment on the court which refers to the Respondent as “Migori County Assembly” instead of the County Assembly Service Board, Migori County. This was a typographical error which the court proceeds to correct forthwith.

14. An Applicant who approaches a court of equity must have clean hands by being candid to the court.

15. Clearly, the secretary of the Respondent, who is the clerk to the county Assembly Service Board received summons in the suit. The process server has not been questioned in this respect by the applicant and that remains the fact of the matter.

16. In the circumstances, the court refuses to use its discretion to accommodate a party who is not candid with the court and seeks to exploit a typographical error to deny the Claimant/Respondent expedient justice in this matter.

17. The court always lean towards allowing applications of this nature to uphold the right to a fair hearing of the applicant, but the application must be brought in good faith placing all the facts on the table. This unfortunately is not the case in the present matter. The court is not satisfied that the Claimant would not suffer injustice if the judgment is set aside. The Respondent simply failed to defend the case without any justifiable reason.

18. The application is dismissed with costs. The typographical error on the judgment is corrected to reflect the Respondent as “Migori County Assembly Service Board” as reflected in the pleadings.

Dated and Signed in Kisumu this 19th day of July, 2018

Mathews N. Nduma

Judge

Appearances

M/s. Aaron for Applicant

Mr. Nyamwea for Respondent

Chrispo – Court Clerk