



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 431 OF 2015

JOHN BUSULA LIBASIA.....CLAIMANT

VS

J C B VENTURES CO LTD.....RESPONDENT

RULING

1. This ruling flows from the Respondent's application brought by Notice of Motion under certificate of urgency dated 20th April 2018. In the application, the Respondent seeks orders to set aside the proceedings herein and unconditional leave to defend the claim.

2. The application which is supported by an affidavit sworn by the Respondent's Administration Manager, Mwadime Msangi is based on the following grounds:

- a) That the matter proceeded *ex parte* and judgment has been entered in favour of the Claimant;
- b) That the Respondent did not have prior knowledge of the proceedings since it was not served with the summons and/or hearing notice;
- c) That the Respondent moved expeditiously after gaining knowledge of the suit;
- d) That the Respondent has a good defence to the suit and it is only fair and just that it be given an opportunity to ventilate its case on merit;
- e) That the Claimant will not be prejudiced in any way as he shall be compensated by way of thrown away costs;
- f) That the Respondent shall suffer great prejudice if the proceedings are not set aside as it shall be condemned unheard;
- g) That it is in the interest of justice that the orders sought are granted.

3. In his affidavit in support of the application, the Respondent's Administration Manager, Mwadime Msangi depones that at the time summons are said to have been served, the Respondent had no employee in the position of secretary.

4. Msangi therefore takes issue with the averment by the process server, Timothy Kiringi Kitsao, to the effect that summons were served upon a secretary.

5. The Claimant's response is found in a replying affidavit sworn by Kitonga Osborn Kiiva, Advocate on 4th May 2018. He depones that summons were served upon and received on 1st February 2016 by one Joseph Mwangeti, who identified himself as the Manager. Counsel adds that the matter was subsequently fixed for mention on 29th March 2017 for purposes of taking a hearing date. The Respondent was duly notified of this date.

6. Counsel states that the Court was satisfied that proper service had been effected and therefore fixed the matter for formal proof on 13th June 2017. The Claimant was however unable to attend court on that date and the matter was rescheduled to 19th July 2017, on which date my brother **Rika J** proceeded to hear the Claimant. Judgment was delivered on 28th July 2017. A decree, bill of costs and taxation notice were subsequently drawn and served upon the Respondent.

7. Counsel asserts that all along the course of this matter until its adjudication, the Respondent has been notified of the proceedings but has elected to ignore the matter only to rush to court at the point of execution.

8. It is further deponed that the Respondent's application is a ploy to delay the Claimant from accessing the fruits of his judgment. Additionally, the Respondent is guilty of inordinate delay which has not been explained.

9. The single issue for determination in this application is whether the Respondent has made out a case for setting aside the *ex parte* judgment entered on 28th July 2017. The law on this issue is clear and it is as set out in *Shah v Mbogo & another [1967] E.A 116* where the Court of Appeal stated thus:

“The court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

10. The current application turns on the question whether proper service was effected on the Respondent. The Court was referred to the decision in *Lochab Brothers Limited v Lillian Ng’ang’a & 2 others [2014] eKLR* where **Ochieng J** restated the importance of proper service in litigation.

11. From the several affidavits of service filed by the process server, it is evident that service was effected on an unnamed secretary and the Respondent denied having an employee in that position at the material time.

12. Yet, in the replying affidavit sworn by the Claimant's Counsel, it is deponed that service was effected upon a Manager by the name Joseph Mwangeti. The apparent contradiction between the affidavits of service and the replying affidavit were not explained to the Court.

13. In any event, confirmation of service can only be by way of an affidavit of service sworn by the process server who in this case has deponed that he served an unidentified secretary. This cannot be said to be proper service on a body corporate. On this ground alone, the Court finds and holds that this is a proper case for setting aside the *ex parte* judgment entered on 28th July 2017.

14. The said judgment is therefore set aside and the Respondent granted leave to defend the Claimant's claim. Parties are directed to take a date for pre-trial conference in the normal manner. The costs of the application will abide with the outcome of the retrial.

15. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF JULY 2018

LINNET NDOLO

JUDGE

Appearance:

Mr Kitonga for the Claimant

Mr Olwande for the Respondent