



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2430 OF 2017**

**ZACHARY MOKAYA MAINA.....CLAIMANT**

**VERSUS**

**SQUID KENYA LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. The application before me is the respondents Notice of Motion dated 28.5.2018. it seeks the following orders:

1. THAT the Honourable Court be pleased to set aside the orders of the Court dated 10th May 2018 wherein court ordered that the matter proceed uncontested.
2. THAT the Respondent be granted leave to file a Response to the Memorandum of Claim out of time.
3. THAT the costs of this application be in the cause.

2. The application is premised on the grounds on the body of the motion and the supporting Affidavit sworn by Bruce Kaniu on 28.5.2018. In brief the applicant contends that the reason for the failure to file defence in time was because she was not served with summons to enter appearance and the claimant's pleading. That she only became aware of the suit herein after she was served with mention notice and when she wrote to the claimant's counsel requesting for the copies of the pleadings and the summons but he I declined. As a result, her counsel perused the court file and obtained copies on 30.4.2018. She therefore prays for a chance to be heard on her defence which she contends that it is good, solid and raises triable issues. It is her further contention that the application has been made without undue delay.

3. The claimant has opposed the motion by Replying Affidavit sworn by his counsel Mr. Henry Kamau Nyaga on 8.6.2018. In brief, the counsel contends on 15.12.2017, he personally went to the respondent's office to serve the memorandum of Claim herein plus summons to enter appearance but the same was rejected. That again on 21.2.2018, he went to serve the respondent with a mentor notice indicating that the matter was set for mention in court on 10.5.2018 when her counsel served him with a Notice of Appointment filed on 27.4.2018. He therefore prays for the application to be dismissed with costs because as demonstrated by the Affidavit of service and the admission by the respondent, the respondent was served with the process of the court but she neglected to file her defence as prescribed by the procedure rules. It is his view that the claimant will suffer prejudice if the application is allowed because he will have been made to shoulder the applicant's indolence which has delayed his right to fair and expeditious process of litigation.

**Analysis and Determination**

4. After careful consideration of the application, affidavits and submissions presented to the court, the issues for determination are:

- (a) Whether proper service of summons and claim was made to the respondent.
- (b) Whether the failure to file defence was deliberate or through inadvertence at excusable mistake.
- (c) Whether the draft defence filed raise tribal issues.
- (d) Whether claimant can be reasonably compensated by costs for the delay.

## **Proper Service**

5. What is in dispute herein is the service of summons upon a corporate body. The relevant provision is Rule 12 of the Employment and Labour Relations Court (Procedure) Rules (ELRCRs) 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 sub paragraph (a), by:***

***(i) Leaving the pleadings at 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 pleadings by registered post to the least known postal address of the corporate body if it does not have a registered office or postal address.***

***(2) Notwithstanding anything contained in this rule, a party may, with the leave of the court, effect service of process by any other manner.”***

6. Mr. Nyanga, learned counsel who allegedly served the summons stated that he personally served the summons and the pleadings on 15.12.2017 and later filed an affidavit of service, which I have carefully perused and considered. Paragraph 3 and 4 of the Affidavit stated as follows:

***“3. That I found and tried to personally served (sic) the above mentioned company secretary who is duly authorized to receive service on the company’s behalf. She refused service by stating that the Managing Director had expressly instructed her not to receive the same after the copy was taken to him for acceptance.***

***4. That I hereby return the rejected copies of the summons and memorandum of claim to this Honourable Court.”***

7. From the foregoing paragraphs, it is clear that the claimant’s counsel opted to serve by the method provided under Rule 12(1)(a) aforesaid, that is, personal service on the Principal Officer of the respondent. He deponed in the said paragraph, of his affidavit of service that he tried to serve the company secretary but upon taking copies of the summons and pleadings to the Managing Director, the Secretary rejected the documents telling him that the MD had expressly told her not to accept the service. In paragraph 4 the counsel states that he returned the rejected copies of summons and memorandum of service to this Honourable Court.

8. The question that arises from the foregoing account is whether of not the company secretary allegedly served was a principal officer of the respondent. After careful consideration of the said affidavit of service, I noted that the identity of the company secretary was withheld. It is therefore not clear whether the counsel dealt with an office Secretary or Corporate Secretary within the meaning of the Companies Act and Rule 12(1) (a) of the ELRCRs. The said ambiguity was not clarified by the counsel’s Replying Affidavit. Without clarity of the person who was served, I find that the claimant has not proved a balance of probability that he served process on a principal officer of the respondent.

9. In addition to the foregoing, the court has noted that the process server was not allowed access to the office to the Principal Officer, the MD but only dealt with the lady he refer to as the Company Secretary. Assuming she was not a Principal Officer of Respondent a diligent process server would have opted for either of the alternative methods of service provided under Rule 12(1)(b) of the ELRCRs that is, leaving a copy of the pleadings at conspicuous place at the registered office or any other place where the respondent carried out business or sending the same by registered courier service or registered post to the registered office. Admittedly, however the counsel returned the rejected pleadings to the court. That was not proper service within the meaning of Rule 12 I must therefore exercise discretion in favour of the applicant as prayed for the sole reason that the process server did not clarify, whether or not the company secretary he served was a Principal Officer of the respondent. In view of the foregoing, I do not see the need to deal with the other questions for determination save compensation by costs.

## **Costs for the delay**

10. The respondent has contended that she became aware of the suit herein after being served with a mention notice. From the Affidavit of Service sworn on 8.5.2018 the mention notice was served on 21.2.2018 but she did nothing until 30.4.2018 when she appointed counsel who on 30.4.2018 perused court file and obtain copies of pleadings. That even after receiving copies on the said day, the respondent never filed any defence until 10.5.2018 when the matter was mentioned in court for pretrial directions. The foregoing account manifests indolence on the part of the respondent because she slept on her right to file defence from 21.2.2018 till 10.5.2018 when the court made the impugned orders. I therefore condemn the respondent to pay to the clamant thrown away costs of Kshs.15,000 within 21 days hereof and in default the claimant will be free to execute for the same.

## **Conclusion or Disposition**

11. For the reason that there is ambiguity as to the person allegedly served with the summons and rejected, I review and set aside the order I made on 10.5.2018 directing the suit to proceed by formal proof. In addition, I grant the applicant leave to file and serve her Memorandum of Appearance and defence within 14 days of today. Finally the claimant is awarded thrown away costs of Kshs.15,000 payable as directed above.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018**

**ONESMUS N. MAKAU**

**JUDGE**