



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE 1929 OF 2014

PETER NZIOKA MWEU.....CLAIMANT

VERSUS

NEW VISA PLACE.....RESPONDENT

RULING

1. By a motion dated 15th March, 2018 the respondent sought stay of execution of the judgement of the court delivered on 2nd September, 2016 and further that the said judgement be set aside for the reason that the respondent was never served with summons to enter appearance and file a response to the claim.

2. The respondent further averred that it had a good defence to the claim hence the same should be heard afresh on merit. The court has perused the application together with the affidavit of John Njoroge Keige and the attached documents in support of the application and observes as follows:

3. First, the court process was not the first time the respondent was interacting with the claimant's claim. Mr Keige in his affidavit though denies service on the respondent, concedes that the claimant through his counsel issued a demand letter and that the respondent through their counsel Mr Muli and Company sought time to seek instructions from their client. This was through a letter dated 18th July, 2014. Counsel for the respondent further asked the claimant's counsel to provide on a without prejudice basis, documents in support of the claimant's claim for the respondent's consideration. The claimant's counsel in response furnished the respondent's counsel with;

- a. Letter of recommendation from the respondent
- b. Computation of terminal dues by the District Labour Office dated 24.2.2014
- c. Letter of 14.3.2014 from County Labour Office -Nairobi

These documents were received by the claimant's counsel.

4. The respondent has further complained that the claimant's counsel knew it had a counsel on record yet did not serve them with summons to enter appearance on respondent's behalf. Service of summons is a very important aspect of a case since it gives the person sued a notice of the case against them and opportunity to admit the claim or file a defence. The affidavit of service in this matter was filed by an advocate, an officer of the court and a member of the Bar. Counsel has deponed that she attempted to have the summons acknowledged by the respondent but without success. She further stated that the respondent's agents who were to receive summons on behalf became hostile to her and threatened to call the police on allegations that she had gone there to cause disturbance.

5. In the present application, no prayer has been sought to cross-examine counsel for the claimant over her affidavit of service. The respondent has instead filed an affidavit comprising of argumentative facts including denial that it had a reception. Assuming, which the court doubts, there was no service, what defence does the respondent have to the claim?

6. In the draft defence attached to the application the respondent does not deny the claimant was its employee from 2004 and his contract ended in October, 2013. The respondent gives reason for the end of the contract as fall in business and that some members of staff were laid off legally and all their dues paid. The respondent does not allege the claimant was among those whose dues were paid.

7. The respondent justifies the action of terminating the services of its employees including the respondent by stating that the law recognizes that jobs can be rationalized when economic and social circumstances do not allow for continuation of employment.

8. The court agrees with the respondent that jobs can be rationalized and terminated for lawful reasons. In this particular case, the respondent seems to be alluding to a declaration of redundancy and further alleges the same was done according to law but has not attached with draft defence as required by the court rules any evidence of the redundancy procedure as undertaken for the court to see if the same was in conformity with Section 40 of the Employment Act.

9. The court therefore is not persuaded that his application is merited both on the issue of service and possibility of putting up a reasonable defence if the court were to set aside the ex-parte judgment and order a fresh trial. The application is therefore dismissed with costs.

10. It is so ordered.

Dated at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.