



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 649 OF 2014

JOHN NYANGENA.....CLAIMANT

VERSUS

OKOTH JAMALI T/A ALFA BRIDGE SECURITY SERVICES.....RESPONDENT

RULING

Introduction

1. The application before me is the respondent's Notice of Motion dated 22.6.2018. It brought under order 51 rule 15 & order 22 rule 22 of the civil procedure rules and section 3A of the Civil Procedure Act and seeks the following orders:

- (a) That the court be pleased to set aside the judgment delivered on 10.5.1.2018 and all the other consequential orders made thereto.
- (b) Costs of the application be in the cause.

2. The application is supported by the affidavit sworn by Mr. Okoth Jamali on 22.6.2018 and the grounds set out on the body of the motion. The gist of the application is that the impugned judgment was entered without him being served with summons and hearing notice. That had he been served with the court process, would have defended himself. He therefore prayed for a chance to defend himself so that the court can determine the suit on merits.

3. The application was opposed by the claimant vide his replying affidavit sworn on 11.7.2018. The gist of the claimant's objection is that the application lacks merits because the respondent was served with court summons on 1.5.2014. He contended that the on the said day, he accompanied the process server to the respondent's residence at Kayole Estate and pointed to him the respondent. He contended that the respondent and his residence were well within his knowledge. He relied on the affidavit of service to prove the said service.

4. The application was disposed of by written submissions.

Analysis and determination

5. There is no dispute that the court entered a judgment in favour of the claimant on 10.5.2018. The judgment was entered after formal proof pursuant to court directions made on 23.3.2017 under rule 15 (3) of the ELRC (procedure) rules 2016. The issues for determination are:

- a) Whether the respondent was properly served with court summons.
- b) Whether the impugned judgment should be set aside.

Proper service of summons

6. The claimant contended that he accompanied the process server to serve the respondent at his residence on 1.5.2014. He said that he knew both the respondent and his residence at Kayole. The respondent has not denied that the claimant was conversant with his residence. He has also not denied that he was at his Kayole residence on the said day. I therefore find that the claimant has proved on a balance of probability that the respondent was served with court summons on 1.5.2014 which was public holiday. The question that arises is whether the said service was proper and valid.

7. Section 57 of the Interpretation and general provisions Act and order 50 rule 2 of the civil procedure rules excludes Sundays and public holidays when computing time for doing a thing. In my view the corollary to the foregoing is that any service of court process on the said excluded days is invalid. Consequently, I return that the respondent was entitled to reject service of summons on 1.5.2014 as he did.

Review and Setting aside judgment

8. In view of the foregoing finding that no proper service of summons was done, it is obvious that the respondent was condemned without being given an opportunity to defend himself. The purpose of the court is to do justice and in this case, the scale of justice is tilted towards setting aside the impugned judgment. However, such orders are granted upon terms mainly award of throw away costs to the opposing party.

Disposition

9. For the reason that the impugned Judgment was entered without proper service on the respondent, I set it aside the entire judgment and grant the respondent leave to file and serve defence within 14 days of this ruling. I further order him to pay the claimant throw away costs of kshs.10000 within 21 days hereof and in default the claimant will have leave to execute.

Dated, Signed and Delivered Court at Nairobi this 20th day of December, 2018

ONESMUS MAKAU JUDGE