



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2046 OF 2014

GEORGE KIROGA KANIARUCLAIMANT

VERSUS

CAROLINE CHERONO T/A

CHOCHO HOUPOUR RESTAURANT.....RESPONDENT

RULING

1. The Respondent, Caroline Cheronno t/a Chocho Houpour Restaurant by application and Notice of Motion filed on 21st December, 2016 is seeking for orders that there be stay of execution proceedings herein and the Warrants of Sale of Movable property in execution issued on 15th December, 2016. That the court to set aside the judgement and orders of 6th October, 2016 and the Respondent be granted leave to defend and file defence to the claim.
2. The application is supported by the annexed affidavit of Caroline Cheronno and on the grounds that the Respondent was served with warrants in execution following judgement and orders herein. The Respondent was never served with the claim or hearing notice and the matter proceeded ex parte and only got to lean of the matter and proceedings when served with warrants of execution.
3. The Respondent perused the file and noted in the Affidavit of Service by Peter Mwangi Njoroge states that on 11th February, 2015 he found a lady at the Respondent restaurant who accepted service but declined to sing and thus the service is ineffective as the designation or the name of the lady who is said to have been served is not disclosed. The Claimant then proceeded to serve the Respondent by way of post and the address indicted is not that of the Respondent whose address in Postal No.47063-00100 Nairobi.
4. The failure by the Respondent to attend court on the dates the hearing was scheduled or failure to file reply to the claim was not deliberate as the Respondent was never served. Upon knowledge of the matter herein the Respondent has moved without delay and filed the application herein.
5. Ms Cheronno in her affidavit avers that as the Respondent she only learnt of the matter when served with execution orders on 15th December, 2016. There was no service and the postal address used to serve is not that of the respondent. The Respondent has a good defence and draft is attached.
6. In reply, the Claimant filed his Replying Affidavit and avers that the Respondent was properly served with summons, mention and hearing notices but failed to attend court. The court proceeded to hear the matter on the basis that the Respondent was dully served and aware of the suit against them. A Process Sever registered with the court, Diffinah Maithaga has sworn affidavit confirming service upon the

Respondent by physical service or postal address. The address now alleged to be the proper address for the Respondent is private and personal and not the business address.

7. The Claimant also avers that the claim was heard on good basis and upon the court being satisfied that there was proper service; the Respondent were notified of judgement on 31st octobr, 2016 and failed to make payment and thus execution proceeded on this basis. The orders sought should not issue.

8. Both parties filed written submissions.

9. The Respondent submits that service upon the Respondent was ineffective as it does not disclose who was served and the postal address used is not that of the respondent. In **Centre Shop versus Pharis Nkari Gitari & another [2009] eKLR** the court held that where the process server does not specify place of service such service is ineffective. In **Delphis Bank Limited versus Samwel O Balla & 3 others [2005] eKLR** the court held that service is ineffective if a third party is served.

10. The Claimant submits that the Respondent was properly served and Affidavits of Service filed to confirm such service. The hearing proceeded on the basis that the Respondent was aware of the suit and took the option not to attend. The application herein only made to deny the Claimant the fruits of his judgement and should be dismissed with costs.

Determination

11. The respondent's application is premised on the facts that the hearing proceeded *ex parte* and there was no service until the execution stage when warrants of execution were served on 5th December, 2016. In the Affidavit of Peter Mwangi Njoroge he states that on 11th February, 2015 the Respondent was served, the person upon whom service was effected is not described and as such the Respondent was not served. That the postal address used to effect service is not the address of the respondent.

12. The matter came for hearing on 1st December, 2015 but the court was not satisfied with the details in the Affidavit of Service and directed the Claimant to serve again. New dates were allocated for hearing on 26th September, 2016.

13. On the due date, the court was satisfied that the Respondent was served as affidavit of service filed on 23rd September, 2016 by Daffinah Moithaga set the details with a postal address, the physical location of the Respondent and the person served. Even where the address cited at No.11869-00100 may be in error the process server at paragraph 3 avers;

On the material date [6th june, 2016] I proceeded with the Hearing Notice to the respondent's business premises, situated at Turskys Greenspan mall, off Jakaranda Road, Donholm where I met the Supervisor whom after introducing myself and purpose of my visit accepted service but refused to stamp and sign on my copies.

14. Save for the challenge to the postal address, the contents of this affidavit on physical service is not challenged. In reply to the application, the Process Server, Daffinah Moithaga has sworn an affidavit confirming how the Respondent was served. This affidavit of Service is not challenge in its contents or the fact of subsequent service after the disputed service done by Mr Mwangi earlier.

15. As such, on 26th September, 2016 when the court proceeded with hearing of the claimant's case, and having stopped previous shearing scheduled for 1st December, 2015 for the Respondent to be served against, the court was satisfied that indeed the Respondent had been served.

16. In the affidavit of Ms Cherono sworn on 21st December, 2016 at paragraph 8, challenge is with regard to the Affidavit of Service by Peter Mwangi Njoroge. The court had chance to look at this affidavit on 1st December, 2015 and noted the contents were not satisfactory. Fresh service was effected by Daffinah

Moithaga on 6th June, 2016 and this is not challenged.

17. I find the court proceeded *ex parte* on good grounds, the respondents was properly served but opted not to attend at the scheduled hearing. The reasons advanced for non-attendance and failure to file defence in good time or be at the hearing are not satisfactory as a party who upon being aware of a suit against them decides to seat back and only attend upon execution is not a diligent litigant and such conduct should not be allowed to stall justice for a Claimant who has moved court and proceeded for hearing and obtained judgement. Such judgement should not be stopped by an indolent litigant.

I find application herein is without merit and the same is hereby dismissed with costs.

Dated, delivered in open court at Nairobi this 23rd day of March, 2017.

M. MBARU

JUDGE

In the presence of:

.....