



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1328 OF 2013

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

VERSUS

HOMELABD SECURITY SERVICE LTD.....RESPONDENT

RULING

1. The respondent, Homeland Security Services Ltd by application and notice of Motion dated 26th May, 2016 and seeking for orders that;

The judgement dated 25.2.2015 and ex parte orders herein be set aside.

The applicant/Respondent be granted leave to file defence out of time.

A stay of execution herein be granted pending the hearing and determination of this cause.

2. The application is supported by the annexed affidavit of Lydia Kibue and on the grounds that the statement of claim was never served and the Respondent got a copy of the same from the court file. The Claimant has instructed auctioneers to proclaim goods at the place of business and due for execution, a situation that will paralyse the Respondent business.

3. The Respondent has never had employees under the Kenya National Private Security Workers Union, the Claimant and there is no contract between the parties herein. None of the alleged employees attached the letter of appointment or payslip and the Claimant is a stranger.

4. The Respondent business never took off and the same was closed for business indefinitely. The Claimant is a stranger and was never hired by the Respondent or hired any guards from the Claimant union. The Respondent has no physical address after its closure.

5. The ex parte judgement and orders and decree should be set aside and the Respondent allowed to file defence for a fair and full hearing of this matter.

6. Ms Kibue in her affidavit confirms the grounds to the application on the basis of being the Respondent advocate and conversant with the matters herein.

7. In reply, the Claimant filed **Replying Affidavit sworn by Daniel Kilonzo** and one of the claimants with authority to reply to the respondent's application and avers that when the suit was filed, it was on the

grounds that the Respondent had withheld salaries and a complaint was made to the Chief Industrial Relations Officer and a letter was served upon the respondent. A conciliator was appointed and parties invited to a meeting on 4th June 2013 and the Respondent failed to attend. Another letter was written to the Respondent for a meeting on 24th June, 2016 when the Respondent sent a representative and the issue in dispute was deliberated upon and the conciliator made findings and recommendations vide letter 5th August, 2013 by R. M. Kilonzi, the Conciliator.

8. The Respondent declined the conciliator's recommendations and the same was thus referred to court by the Claimant union on 19th August, 2013. Summonses were issued and subsequent hearing dates taken, the Respondent declined to sing the same despite service. A return of service dated 29th, May 2014 was filed by affidavit dated 17th June, 2014. Subsequent notices were served and the Respondent declined to accept service. The court took into account these facts and heard the Claimant and judgement was to be delivered on notice from 2nd October, 2014.

9. Service having been effected upon the Respondent there was fair notice and the judgement delivered is valid. On 1st December, 2015 the Claimant drew letter forwarding draft copies of decree for the respondent's approval and necessary amendments and the Respondent director directed the Claimant to refer all its matters to their advocates on record but there was no response.

10. A bill of costs was subsequently filed and notice of taxation issued and served on the Respondent who failed to respond or oppose. A ruling notice was issued on 20th September, 2016 and ruling read on 28th September, 2016.

11. Mr Kilonzi also avers that he personally instructed a private process server on 23rd September, 2016 to serve the ruling notice on the Respondent and an Affidavit of Service was filed to this effect. This confirms the Respondent has at all material times been aware of this suit but ignored to enter appearance or file defence.

12. The draft defence attached to the application states that the claimants were trainees is a blatant lie as the Respondent had issued them with job identification cards. The Respondent has been operating business and is at an advanced stage of disposing off its assets to defeat the course of justice by wanting to close shop indefinitely as intimated in the supporting affidavit. The application herein in only meant to delay the enjoyment of the fruits of judgement in the award for the Claimant and should not be allowed.

13. In view of the shaky nature of the Respondent financial position which can be confirmed from the manner in which they terminated the claimant, they should be ordered to deposit the decretal sum of Kshs.733, 680.00 in court pending hearing and disposal of the matter as otherwise the application has no merit and should be dismissed with costs.

14. The Respondent filed **Further Affidavit by Ms Kibue** who avers that the deponent in reply Mr Kilonzi does not have authority to reply to the respondent's application. The Claimant representing the grievant is not similar to Mr Kilonzi. The Claimant union has written to the Respondent noting that they no longer represent the grievant.

15. The Respondent was never served with summons to appear or defend this claim. The filed affidavits of service were never acknowledged by the respondent. These are falsified returns to the court. The judgment was entered exparte and the Respondent was not heard and has a good defence.

16. Both parties filed written submissions

Determination

17. Putting into account the application by the Respondent seeking to set aside judgement and stay of execution of the orders thereon for them to be able to file defence and be heard in their defence, the same

is premised on the grounds that the hearing in this case proceeded without their notice and was not served. The Claimant has opposed the same on the basis that before filing suit the matter was considered by a conciliator and the Respondent rejected the recommendations made. The Respondent was duly served, refused to accept service and the court took into account the returns filed and proceeded to hear the Claimant and render judgement the matter has now closed as the taxation process has been done and execution now stopped by the respondent. The Claimant should be allowed to enjoy the fruits of their judgement.

18. Before going into the issues raised by both parties, the Respondent has filed this application seeking to set aside judgement of the court delivered on 20th February, 2016. The Respondent is thus attending after judgement has been rendered. Notice of appointment of Advocate is filed on 2nd November, 2016 after judgement. Such is not procedurally addressed.

19. The Claimant on the other had filed the claim in August, 2013. The same is filed and signed for by Isaac M Andabwa and has his Verifying Affidavit and avers that he is the Secretary General of the Claimant union. The Replying Affidavit herein is sworn by Mr Kilonzi who avers that he one of the claimants and has authority to reply to the respondent's application.

20. On 11th March, 2016 Mr Muema Kisilu, Daniel Kilonzi, Nicholas Mutuku filed notice to act in person as the 4th, 8th, 2nd Claimant respectively. The Bill of costs and taxation process was attended to by Nicholas Mutuku as the *Claimant*.

21. Section 2 of the Labour Relations Act, read together with section 2 of the Employment and Labour Relations Court Act and the Rules of the Court, where a trade union such as the Claimant union has filed a claim, the authorised officer to attend and appear for the union is the Secretary General or another person authorised in writing by such Secretary General. Mr Kilonzi does not attach his letter of authority to attend to the proceedings herein. The Claimant is one, the Kenya National Private Workers Union, and Mr Kilonzi cannot thus describe himself as *one of the claimant/decreed holder* as there is only one such claim and decreed holder.

22. The veracity of the replying affidavit is thus lost.

23. Without the Claimant union moving the court as appropriate, the notice of the grievant to act in person must be procedurally processed and addressed for the court to note the changes and proceed as appropriate. The Claimant herein remains the union.

24. Also, the written submissions filed by the Claimant are by *ONGARO & ASS ADVOCATES* for the claimant. There is no record on the appointment of this firm to act for the claimant. The entry of this firm into the proceedings has no history at all.

25. It is apparent each party has work to do with regard to regularising and putting its house in order. Particularly the Claimant where the grievant represented by the union wish to come on record as acting in person, such must be formally processed for the court to give appropriate directions. Where the Claimant union or any grievant wishes to be represented by advocate, such rights exists but such must be formally processed for the court to direct as appropriate.

26. On the issue at hand as to whether the ex parte judgement should be set aside, the court on 18th June, 2014 heard the Claimant ex part on the basis that the Respondent had been served but failed to enter appearance or file defence and despite being invited for the hearing, declined to attend.

27. On 17th June, 2014 the Claimant filed Affidavit of Service sworn by Jairus Shiamala who avers that on 30th May, 2014 he received copies of hearing notices from the Claimant with instructions to serve the respondent. He avers that;

... at about 10.00 a.m. I proceeded to the respondent's advocate office along Mimosa Road. I

introduced myself and the purpose of my visit. I personally served them with the said notices which they declined to accept service thereof and did not stamp.

28. On 21st July, 2014 the Claimant had filed another Affidavit to confirm service of a mention notice and filed the Affidavit of Jairus Shaimala who avers that on 14th July, 2014 he received a mention notice from the Claimant to serve upon the Respondent and that;

... I travelled towards Ngong Road China Centre where the Respondent office is situated and upon my arrival and introductions as having documents to serve then they refused my service and refused to sign.

29. On another occasion, on 28th July, 2014 the Claimant filed Affidavit of Service and Mr Jairus Shamala as the process server avers that on 24th July, 2014 he got instructions to serve a hearing notice upon the Respondent and thus avers that;

... I remember very well that I travelled to the respondent's office along Ngong Road. Upon my arrival and introduction as having documents to serve them they refused service.

30. It is apparent from these affidavits that the person of Jairus Shamala/Shiamala either did not serve at any of the cited Respondent or never served at all. The Rules of the Court requires that a process server serving a corporate should describe the person/s served effectively and the premises upon which the server visited, the time and dates be very clear. For the court to be able to proceed with the hearing on the basis that the Respondent is absent, there must be a proper record of service.

31. The Hearing Notice leading to the hearing on 18th June, 2014 was premised on allegations that service was effected upon the Respondent through its advocate *situated along Mimosa road*. The details of such advocate(s) are not set out. The description given is vague, misleading and out of character for an authorised process server. There cannot be a firm of advocates situated along Mimosa road. I take it this is a public road and unless the house, building or location is set out, what is stated in this affidavit cannot be a good basis of service.

32. Also, at this date of 18th June, 2014 the Respondent had not appointed their advocates. Which advocate in these proceedings was then served?

33. With doubts thus raised with regard to the service upon the respondent, I find good foundation for the application before court. The orders and judgement premised on alleged service upon the Respondent should be set aside.

34. Before conclusion, the Respondent has confirmed in their submissions confirmed that the firm is financially not stable. To enable the court hear both parties on their merits noting the above, and to avoid the judgment eventually rendered, it is only fair and just that there be a security deposit with the court. Such will enable the Respondent file their defence; allow the Claimant to put its house in order and allow the court to hear both parties. Upon judgement, where there is a finding that the claim is valid, such deposited amounts shall be appropriately applied and where the claim is found without merit, such an amount shall dully revert to the respondent. Either party's interests shall have been taken into account so as to avoid the filing of defence being purely academic.

The respondent's application dated 26th May, 2016 is hereby allowed on condition that the Respondent shall deposit with the court the sum of Kshs.733, 680.00 within seven (7) days from this date; the judgement of 20th February, 2015 is hereby set aside; the Respondent shall file and serve defence within 14 days; upon service the Claimant shall file and serve reply to defence within 14 days. Costs in the cause.

Dated, signed and read in open court this 25th day of May, 2017

M. MBARU

JUDGE

In the presence of:

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