



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 568 OF 2015
SWALEH TSUIBA MBADICLAIMANT
VERSUS
MSB EDUCATION INSTITUTERESPONDENT
RULING

INTRODUCTION

1. The application before the court is the respondent's Notice of Motion dated 4/4/2017 which seeks the following orders:

- (a) That the application for review of the judgment of the Honourable court delivered on 20/1/2007 and/or any resulting orders of decrees be allowed.
- (b) That the Honourable court be pleased to quash the judgment delivered on 20/1/2017 together with all proceedings antecedent and subsequent thereto and issues orders that the suit be heard again.
- (c) That in the alternative, the Honourable Court be pleased to review and/or set aside the judgment delivered on 20/1/2017 together with all proceedings antecedent and subsequent thereto and issues such further orders as this honourable court may deem fit in consideration of the Respondent/Applicant's case.
- (d) That the Respondent/Applicant be granted unconditional leave to file its statement of response to the memorandum of claim, list and bundle of documents, list of witnesses and witness statement.
- (e) Such other orders as this honourable court may deem just and convenient to meet the ends of justice.
- (f) That cost of this application be in the cause.

2. The Motion is supported by the affidavit sworn on 4/4/2017 by the applicant's administrator Mr. Maurice Muli Munywoki. The gist of the motion is that the applicant was never served with summons to enter appearance and defend herself in the suit and as such the judgment was irregular. In addition the respondent contends that the claimant was a habitual offender and as such his termination was justified and it was done after following a fair procedure.

3. The Motion is opposed by the claimant vide his replying affidavit sworn on 11/5/2017. The gist of the claimant's objection is that the respondent was served with summons and all the pleadings on 15/10/2015 as per the affidavit of service sworn by the process server Mr. Gordon Odhiambo on 17/11/2015. Accordingly, the claimant contends that the respondent deliberately failed to file defence to the suit and as such the judgment is regular and should not be interfered with. He further contended that the respondent lacks valid defence, that is capable of upsetting the impugned judgment.

ANALYSIS AND DETERMINATION

4. After careful consideration of the Motion and the rival affidavits and submissions filed, the issue for determination is whether the Application has merits and should be allowed. There is no doubt that the application is anchored on the ground that the respondent was never served with summons to enter appearance. That contention is not correct in view of the copy of the served summons which was returned to the court by the process server on 16/12/2015. The copy of the summons bears on the rear side the stamp of the respondent, signature and the date of service being 15/10/2015. The information corroborates paragraph 2 and 3 of the Affidavit of service by the process server sworn on 17/11/2015 where he deposed that he served the respondent's Principal with the summons and all the pleadings on 15/10/2015 and the service was acknowledged by signing and stamping at the rear side of the summons. Consequently I find and hold that the application lacks merits.

5. I have also perused the draft defence annexed to the application and considered its merits against the termination letter dated 20/7/2016. First and foremost no evidence has been adduced to prove that the letter was served upon the claimant. Consequently and on a balance of probability, I agree with the claimant that the said letter was written after the judgment and backdated to suit the purposes of the present motion. Even if the termination letter annexed to the application was served upon the claimant, the applicant would still lack a valid defence capable of upsetting the impugned judgment. The said letter merely confirms that the claimant was terminated for alleged misconduct and poor performance and that no fair hearing was accorded to him before the termination.

6. Under Section 45(2) of the Employment Act, terminating employee without according him a fair hearing as prescribed by Section 41 of the Act is unfair and the employee is entitled to reinstatement or compensation of upto 12 months gross salary. In this case the court found that the termination of the claimant's service was unfair for being done without following a fair procedure. Consequently even if the court were to set aside the ex parte judgment and entertained the draft defence filed by the respondent, the court's decision would not change from the impugned decision.

DISPOSTIION

For the reason that the Notice of Motion dated 4/4/2017 lacks merits, I proceed to dismiss it with costs.

Dated, signed and delivered this 17th November 2017

O. Makau

Judge