



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1142 OF 2013

JOHN MWANGI CLAIMANT

VERSUS

NUPLAN ENGINEERING & DESIGN LTD RESPONDENT

RULING

1. By a Notice of Motion dated 9th July, 2015 the respondent seeks the setting aside of the ex parte hearing and judgment in this matter and that the respondent be granted leave to file a defence in the matter and further that the same thereafter proceed to trial on merit.
2. The application was supported by the affidavit of Gilphas Otieno Opiyo who deponed on the main that he had been authorized by the respondent to swear the affidavit on its behalf. He further states that the respondent became aware through its advocate that ex parte judgment was delivered on 18th May, 2015 on 22nd May 2015. Mr. Opiyo deponed that neither the respondent nor its authorized agents were served with any notice of the suit.
3. The claimant opposed the application and filed a replying affidavit stating in the main that one Morris Otieno Ndeda a director of the respondent was served with the summons to enter appearance and that he was present when the hearing notice was served on one William Kimondio who was employed by the respondent as a supervisor. The claimant further attached the affidavit of Peter Mwangi Njoroge the Court Process server who allegedly served the summons on the respondent's director, one Mr. Ndeda.
4. Courts of law are enjoined by the principles of natural justice to ensure that unless cannot be avoided, all its judgments and decisions are made after hearing all the parties concerned in the matter before it. A decision reached after a hearing of parties on merit is more sustainable than one made exparte. However the Court where it is reasonably persuaded that a party having been served with summons fails or ignores to enter appearance to those summons will proceed to hear and dispose of such matter in the absence of the party served.
5. The applicant in this case avers that they were never served with the summons to enter appearance yet the affidavit of the process server one Peter Mwangi Njoroge clearly states that summons to enter appearance were served on one Mr. Ndeda who identified himself to the process server as a director of the respondent. The said Mr. Ndeda is one of the Board members who passed a resolution on 19th May, 2015 at the respondent's head offices at Ngong Town authorizing Mr. Gilphas Apiyo to swear an affidavit in

support of the present application for setting aside. No reason was given why Mr. Ndeda could not swear an affidavit to controvert the allegations against him by the process server.

6. Further, whereas the respondent avers that there are triable issues in the matter no draft defence has been attached to the application to demonstrate this. In the circumstances the Court is not satisfied that this is a proper case for it to exercise its discretion to set aside the ex parte judgment delivered on 18th December 2014 with the consequence that the application is dismissed with costs.

7. It is so ordered.

Dated at Nairobi this 12th day of February 2016

Abuodha J. N.

Judge

Delivered this 12th day of February 2016

In the presence of:-

.....**for the Claimant and**

.....**for the Respondent.**

Abuodha J. N.

Judge