



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 471 OF 2014**

**JARED ODHIAMBO OJAO.....CLAIMANT**

**V**

**POLY PIPES LIMITED.....RESPONDENT**

**RULING**

1. On 27 November 2015, the Court awarded the Claimant Kshs 1,702,931/- as compensation for unfair termination of employment, and other entitlements accruing out of the contract of service.
2. The Cause had proceeded as an *undefended* Cause after the Court found that the Respondent had been served with Notice of Summons and other processes of Court, but had failed to file a Response or attend the hearing.
3. On 25 January 2016, the Respondent having got wind of the judgment moved Court through a motion seeking

1. ....

2. THAT there be a stay of the *ex parte* proceedings and judgment/decree pending *inter partes* hearing.

3. THAT this Honourable Court be pleased to set aside the *ex parte* proceedings of 15<sup>th</sup> July, 2015 and the subsequent judgment and the case be re-opened for trial and/or hearing.

4. THAT the Defendant be granted leave to file Memorandum of Response.

5. THAT the costs of this application be provided for.

4. The Court directed the motion to be served upon the Claimant for *inter partes* hearing on 17 February 2016.
5. When the motion was called out, the Claimant was not represented and the Court allowed the motion to proceed.
6. The substance of the Respondent's motion are that, *the Notice of Summons was not served upon it and that if any service was effected, it was effected upon a person who was an employee and not a Director, Shareholder or Principal Officer; it has a good/meritorious defence to the Claim and that it is in the interest of justice to grant the orders sought.*
7. The Respondent filed some 3 authorities in support of its application.
8. It is correct as submitted by the Respondent that according to the Industrial Court (Procedure) Rules, 2010, service upon a company ought to be upon a Director, Secretary or Principal Officer.
9. In this regard, the Respondent while not denying that one Mukesh Patel was served urged that the said Mukesh Patel was only a junior employee and that in any case he did not bring to its attention

- the service.
10. It has bothered the Court that the said Mukesh Patel who is admitted was served did not swear an affidavit to disclose what he did with the Summons and other processes which were served upon him.
  11. Further, the exact designation and responsibilities of Bwana Mukesh were not disclosed. This information would have been pertinent because the term *Principal Officer* is not defined in the Rules, but to my mind a Principal Officer would include an employee exercising managerial or command prerogative.
  12. In the case at hand, it cannot be discounted that Mr. Mukesh exercised managerial prerogative within the Respondent's establishment. It was upon the Respondent, in seeking the exercise of the Court's discretion to make candid and full disclosure.
  13. The Respondent also alleged that it had no information about the Cause and the proceedings which were conducted subsequently.
  14. Granted the Rules envisage service upon named officers of a corporation, but in my view, and considering the realities of the workplace and modern life and society, it would be tendentious and legal *technism* to insist on personal service upon the 3 named officers (Director, Shareholder or Principal Officer) in litigation involving juristic persons.
  15. In this regard, information ought to supersede personal service, and I note that in cases of contempt where the liberties of citizens are at stake, the jurisprudence has now moved from personal service to knowledge.
  16. From the material on record, and as set out in detail in the judgment being impugned as irregular, the Court finds that the Respondent had knowledge and information about the Claim and the progress it was undergoing, as service was effected not once, but severally.
  17. The Respondent also urged that it had a right to a hearing and one of the authorities cited by the Respondent examined the question of a right to a hearing.
  18. For me, the element of the right to a hearing which is implicated in this case is the one of affording the Respondent an opportunity to be heard.
  19. I would find that the Respondent was afforded that opportunity, first by being served with Notice of Summons and subsequently by mention and hearing notices. It wasted the opportunities and it ought not to cry wolf now that it has a right to a hearing.
  20. The Respondent had the opportunity to advance the good defence it is now purporting to bring forth.
  21. Before concluding, the Court has realised during the preparation of this ruling that there is no evidence on record that the Respondent served the application upon the Claimant as was directed. That is regrettable.
  22. For these reasons, the Court reaches the conclusion that the motion dated 22 January 2016 is not merited and ought to be dismissed. It is so ordered.

**Delivered, dated and signed in Nakuru on this 7<sup>th</sup> day of March 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Chepkwony & Co. Advocates (did not appear during application)

For Respondent Mr. Ombui instructed by E.M. Juma & Ombui Advocates

Court Assistant Nixon