REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 907 OF 2010

BENSON P.N. MURUGAMI.....**CLAIMANT/RESPONDENT**

VERSUS

COMPRITE KENYA LIMITED……..... **RESPONDENT/APPLICANT**

RULING

1. The application before me is the Respondent's Notice of Motion application dated 25th April 2016. The motion is brought under Order 12 Rule 7, Order 42 Rule 6(3), Order 45 Rule 1, 2 and 5, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A and 3B and Section 80 of the Civil Procedure Act cap 21 Laws of Kenya, Article 50 of the Constitution of Kenya 2010 and all other enabling provisions of the law. It seeks that the Court be pleased to set aside the ex-parte judgment of 19th April 2016 and that costs be in the cause. The motion is premised on grounds on the face of the motion as well as the affidavit of John Odera Were. In brief, the grounds were that the judgment obtained herein was null and void *ab initio* as the Respondent was not served with a hearing notice or entry of judgment as required by law, that the Respondent's case has merit and raises triable issues and therefore it should be given an opportunity to defend itself and that the Respondent would suffer prejudice if the judgment was not set aside. The affidavit was to the same effect as the grounds and annexed correspondence with the Claimant/Respondent and the Court.

2. The Claimant/Respondent filed a replying affidavit sworn by James Nyakundi dated 17th May 2016 on 19th May 2016. In it, it was deposed that the Respondent/Applicant was attempting to mislead the Court and that on enquiry of the notices served on the advocates and parties for the service week were through the post office and that the Judiciary website also contained the notices of the service week. It was also deponed that the Law Society website also carried notices of the service week and invited litigants to consult the notice boards of the Employment and Labour Relations Court. He deposed that the Daily Nation and Standard carried out adverts on the service week activities. He further deponed that from the foregoing it would be highly unlikely that the firm of Rustam Hira was not served with the notices or did not notice the advertisement in the websites and the media. It was deponed that should the Court be minded to set aside the judgment the Respondent/Applicant should be ordered to deposit the decretal sum in a joint account.

3. The application was urged on 19th May 2016. The appearances were Mr. Were for the Respondent/Applicant and Mr. Nyakundi for the Claimant/Respondent. Mr. Were submitted that the judgment was delivered without the Respondent's participation and that the Judge was of the view that the Respondent had been notified of the hearing date. He submitted that the Respondent

had indicated that it had not been served and was shocked to be served with a judgment. He submitted that the facts relied upon by the Claimant/Respondent were unsubstantiated as there was no annexure showing service and that there was no proof of service. He submitted that the Respondent had shown how the matter had come up for fixing of hearing dates on 15th March 2016 and that the file was not available. He submitted there was an attempt to fix case last year but there was no success. He submitted that he did not know how the date was fixed and that when he called Mr. Nyakundi he was informed that a notice had been served by the Court. He stated there is no proof of service and sought to set aside the judgment and stay the execution so that a hearing can be held.

4. In opposition of the application Mr. Nyakundi submitted that the Respondent/Applicant's motion was solely premised on the basis that the notice of 7th March 2016 was not served. He stated that the matter was fixed by the Court and that he received the notice through the Court and that a quick glance at the notice indicates that the notice was sent to the parties through their correct addresses. He submitted that on inquiry, he was informed at the Registry that all the notices for the service week were sent out on the same day. Further he submitted that he was informed that the activities of the service week were posted on the Judiciary website, the LSK website and was advertised in the newspapers and was on the notice board of this honourable Court. He contended that it was highly unlikely that the firm of Rustam Hira could not have noticed the advertisement. He submitted that the advocate could perhaps not have been at Rustam Hira & Co. when the notice could have reached the Respondent's lawyer. He submitted that it would not be fair and prejudicial if the fruits of the litigation were delayed. He stated that if the Court is however inclined to grant the application then it should be on terms that a deposit be made into a joint account so that the successful party gets the benefit of interest upon conclusion of the matter.

5. In his brief reply, Mr. Were submitted that his colleague had submitted that it is not good to delay the fruits of judgment. He submitted that there had been no delay in the fruits of judgment by the Respondent. He submitted that indeed, the action by the Court was due to the inaction of the Claimant. He submitted that the mere fact that the address of the advocate is given in a letter is not proof of the fact of postage. He submitted that it was incumbent to show proof of service. He submitted that an order for the deposit of over 2 million shillings would place the Respondent in financial difficulty. He urged the Court to set aside the judgment and if agreeable to set a date for hearing before the Court.

6. In matters involving setting aside, there are a series of considerations. *In* ***Patel v EA Cargo Handling Services Ltd [1974] EA 75*** *at page 76 letters C and E, Duffus P stated thus:*

> *"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."*

7. *In* ***Shah v Mbogo [1967] EA 116*** *at page 123 letter B, Harris J said:*

> *"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."*

8. *The Court of Appeal approved the decision of Harris J. in the resulting appeal in* ***Mbogo v Shah [1968] EA 93*** *where Newbold P held at page 96 letter G as follows:-*

> *" … a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion*

and that as a result there has been misjustice."

9. The Respondent states that it was unaware of the hearing of the case because its advocates were not served. The Respondent asserts that if there was service there ought to have been proof of service. The Claimant states that the Respondent was served and that the address used was the correct address and therefore the Respondent cannot claim non-service. The Claimant asserts that the service week was well advertised online on the Judiciary website and on the LSK website as well as in print media being the Daily Nation and the Standard plus on the notice boards at the Court.

10. On the Kenya Law website, a notice was issued to all and sundry indicating that the service week would take place between 18th April 2016 and 22nd April 2016. The website contained a list of all the cases to be heard between the 18th of April 2016 and the 22nd of April 2016, both days inclusive. Advocates ordinarily peruse cause lists to ascertain what cases they are to attend to and which courts would be handling it. The Respondent therefore cannot be believed that in the plethora of information on the service week it could not discern from cause lists that this case was listed for hearing on 18th April 2016 before Ongaya J. There is no evidence placed before the Court that the letter dispatched to Rustam Hira & Co. Advocates by the Deputy Registrar of this Court was returned unclaimed from the post office. All we have is the word of the advocate who claims to have been very keen to conclude the matter but failed to ascertain if this particular case was in the list of cases to be heard during the service week. The upshot of the foregoing is that there is no merit in the application and it is dismissed with costs to the Claimant.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of June 2016

Nzioki wa Makau

JUDGE