



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 505 OF 2014
WAIRIMU KAGUNYA.....CLAIMANT
VERSUS
THREE DEE ENTERPRISES LIMITED.....RESPONDENT
RULING

1. Respondent/applicant brought a notice of motion application dated 24th May 2016 seeking for stay of warrant of attachment issued on 19th May 2016 and the subsequent proclamation of attachment issued dated 20th May 2016 and that the court be pleased to set aside the judgment delivered on 23rd October 2016 and allow the respondent/applicant to defend the claim.
2. The application is based on grounds set out on the face of the notice of motion and in the supporting affidavit of Mr. Francis Aremo Odero a director of the respondent/applicant.
3. The grounds are as follows;

The claimant has proclaimed the goods and issued a seven (7) days' notice. The proceedings were conducted ex parte without the involvement of the respondent/applicant at all.
4. That the respondent's right to a fair hearing and to be accorded an opportunity to defend the claim will be violated unless this application is granted. The respondent had no notice either of the filing of these proceedings or the hearing of the claim herein.
5. The application has been brought without any undue delay. The respondent shall suffer great prejudice and substantial loss unless this application is granted. The respondent is ready to abide by such terms and conditions as may be imposed by the court on stay, in the interest of justice.
6. The deponent Francis Aremo Odero denounces the affidavit of service sworn by a Mr. George Nyaora which alleges that he served on the deponent summons and memorandum of claim on 2nd July 2014. The deponent denies having been served any court papers in this matter by the said George Nyaora or at all on the 2nd July 2014 or any other day prior to 20th May 2016 when the auctioneers served the warrants of attachment.
7. The respondent admits however having received from county labour officer a letter dated 6th February 2014 summoning the respondent's director to attend a meeting at Nyayo House on 21st February 2014 at 10 a.m. to discuss a labour complaint lodged by the claimant but the meeting did not proceed.

8. That, that is the last time the deponent heard on the matter. He prays that the application be allowed with costs.

Response

9. Mr. Job Nyasimi Momanyi, advocate for the claimant filed a replying affidavit sworn on 30th May 2016 in opposition to the application. Mr. Momanyi deposes that he issued a demand letter to the respondent dated 24th February 2014, and he is informed by his court clerk Mr. George Nyaora, that when he went to serve the demand letter on the respondent the respondent declined to receive the same and the same was served by registered courier.

10. The claim was filed on 20th March 2014 and the Deputy Registrar of the court issued the claimant with notices of summons dated 28th March 2014 for service on the respondent.

11. That counsel, instructed his clerk to serve the notice of summons and the memorandum of claim on the respondent on 20th June 2014 and the respondent's manager, as informed by the said clerk Mr. Nyaora refused to sign on the copies of the notice of summons and memorandum of claim and that one of the Directors, Francis Aremo Odero was very rough and hostile to him and was very abusive at the material time. A copy of the return of service marked 'JNM 2' is attached to the reply. It was filed in court on 20th August 2014 and is dated 17th February 2014.

12. On 20th November 2014, the deponent wrote invitation for taking a hearing date and considering the past experience, counsel advised the licensed court clerk to send the invitation by registered mail, P. O. Box 71504 – 00508 Nairobi the postal address of the Director, Francis Aremo Odero as sworn as his and respondent's postal address. In addition a copy of the invitation letter was taken to the physical address of the respondent but the respondent refused to acknowledge receipt. The copy of the invitation and certificate of posting letter is attached and marked 'JNM 3'.

13. That the matter eventually proceeded for hearing *ex parte* on the 21st June 2015 after the Judge found that service was proper. Judgment was thereafter issued on the 23rd October 2015.

14. On 19th December 2014, the claimant was issued with a mention dated 17th February 2015 for directions *ex parte* after the respondent or its representative failed to turn up. Subsequently, counsel issued the respondent a mention notice dated 7th January 2015 for the 17th February 2015 through registered post and the certificate of posting and mention notice and return of service are marked 'JNM 4'.

15. On 10th November 2015, a party and party bill of cost dated 28th October 2015 was filed. When the party bill of costs came for taxation on 2nd February 2016 the Deputy Registrar ordered that the same be served on the respondent and the taxation be heard on the 1st March 2016. The taxation notice was served on the respondent who again declined to sign a copy of the same. On 9th May 2016 party to party bill of costs was issued in the absence of the respondent.

16. The claimant instructed Messrs Mbusera Auctioneers to commence execution proceedings against the respondent after which they issued the proclamation on 20th May 2016.

17. The claimant submits therefore that, it is patently false and lack of good faith and perjury on the part of the respondent to swear that it was never given an opportunity to be heard and that it was never served with a notice of summons, memorandum of claim or mention notices, hearing notices or taxation and ruling on taxation notices and that it was not aware of the court proceedings herein. That the respondent has come to court with dirty hands and does not deserve the court's discretion to be exercised in its favour.

Determination

18. Upon a careful analysis of the facts of this application, it is very clear that the respondent was served with notice of summons and memorandum of claim. That at every stage of the proceedings, the claimant made every effort to notify the respondent of mentions and hearing dates. That returns of service were filed after every service on the respondent.

19. The respondent has not sought to have the process server cross-examined on the various returns of service filed by him. It is without a doubt that the respondent was aware of this suit from the beginning to the end but was reckless in failing to file a defence or attend any of the mentions and hearings of the matter.

20. The respondent is not candid about the various notifications and service made upon it by the claimant and in fact, tells untruth about the matter. He who comes to equity must have clean hands. The respondent seeks the court to exercise its discretion in its favour to set aside the judgment and injunct the proclamation.

21. It is the court's finding that the respondent has failed to show on a balance of probability that it was not aware of the filing of this suit and subsequent proceedings culminating in the proclamation which jolted the respondent to action.

22. This suit was filed in 2014, and an order by the court to start the proceedings *denovo* would occasion great injustice to the claimant. The claimant deserves the fruits of the judgment of the court delivered on 23rd October 2015.

23. Accordingly, the application is dismissed with costs to the claimant.

Dated and delivered at Nairobi this 27th day of July, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE