



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.212 OF 2015

(Before D. K. N. Marete)

JOHN BUNDE OIRO.....CLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 23rd August, 2016 brought in by the respondent/applicant. It seeks the following orders of court;

- 1. This Application be certified urgent and service thereof be dispensed with in the first instance;*
- 2. Pending hearing and determination of this application, there be a stay of execution of the award herein.*
- 3. This Honourable Court be pleased to set aside the ex parte proceedings and award herein.*
- 4. The Applicant be granted leave to defend the matter on the merits.*
- 5. Costs of this Application.*

The application is based on the following grounds;

- a) The hearing of this matter proceeded ex parte and judgment entered against the Applicant herein on 16th June, 2016 in the Applicant's absence;*
- b) Failure by the Applicant to attend the said hearing was not intentional as no Hearing Notice was ever served upon it.*
- c) It is the interest of justice that the said proceedings be set aside and the Applicant be granted to leave to defend the matter on the merits.*

The claimant/respondent in a Replying Affidavit sworn on 20th September, 2016 opposes the application and prays that the same be dismissed with costs.

When the application came for hearing on 10th October, 2016 Mr. Omindo, counsel for the respondent/applicant submitted that the issue in contention was whether or not proper service was made to the respondent. It was his further submission that the claimant/respondent has annexed an affidavit of service sworn on 11th September, 2016 in which service thereof is defined. This included various other documents served on the respondent's receptionist, Dorcas Arwa. It is his submission that this was improper and offensive to rule 12 of the Industrial Court (Procedure) Rules, 2010 then applicable.

The applicant further submits and annexes in her Further Supporting Affidavit a letter and mention notice dated 25th May, 2016 that informs them of a mention date for filing of submissions. It is her submission that this was received on 10th June, 2016 after the date of mention. She therefore prayed that the application be allowed.

The claimant/respondent in his submissions seeks to rely entirely on his Replying Affidavit sworn on 20th September, 2016. It is his further submission that proper service was made at the respondent's company's officer at Eldoret. This officer introduced herself as a manager of the respondent. Subsequently, hearing notices were made through registered service.

The claimant/respondent further submits that the respondent/applicant filed a Notice of Appointment of Advocate and entered appearance and thereon went silent. They were also served with a judgment notice. It is his submission that this matter was neglected from day one and is now not salvable. The conduct of the respondent/applicant in the prosecution of her case has always been wanting. This application should therefore be dismissed with costs to himself.

I agree with the submissions of the claimant/respondent. From a very initial stage in the litigation of this cause, the respondent/applicant was always aware of the suit. She filed a Notice of Appointment of Advocates and entered appearance in the matter. The issue of initial service to the wrong party or lack and or delayed of service in subsequent proceedings of court is therefore lame and not entirely substantiated.

I am therefore inclined to dismiss this application with costs to the claimant/respondent.

Delivered, dated and signed this **8th day of November 2016**.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Omindo instructed by Walker Kontos Advocates for the Respondent/Applicant.
2. Ms Soita instructed by Mwakio, Kirwa & Company Advocates for the Claimant/Respondent.