



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 533 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 29<sup>th</sup> April, 2015)**

JONATHAN M. MWANDIME .....CLAIMANT

VERSUS

BANBROS LIMITED .....RESPONDENT

**RULING**

1. The application before court is the one dated 8/12/2014 filed by the Respondent Applicants herein. The Applicants sought orders:
  1. ***THAT this matter be certified as urgent and service of this application be dispensed with in the first instance.***
  2. ***THAT there be a stay of all the execution proceedings in this matter pending the hearing and determination of this application.***
  3. ***THAT this Honourable Court do hereby set aside the judgment delivered on the 7<sup>th</sup> day of November 2014 and the Respondent be given liberty to defend the Claimant's claim.***
  4. ***THAT all consequential orders made and proceedings taken subsequent to the judgment delivered on the 7<sup>th</sup> day of November 2014 be hereby set aside.***
  5. ***THAT the costs of this application be provided for.***
2. The application was based on the grounds that:
  - a. ***The no Service of Summons has ever been effected on the Claimant.***
  - b. ***The Claimant has a good, solid and meritorious Defence against the Claimant's claim and ought to be allowed to be heard on the same.***
  - c. ***The Claimant has already commenced execution and unless a stay is granted then the Respondent shall suffer irreparable and irredeemable loss and damage.***
  - d. ***This application has been made without any unreasonable delay and this application will not occasion any prejudice to the Claimant for the reason that if the same is granted, the suit would proceed to a full blown hearing on its substantive merits.***
3. It is also supported by the supporting affidavit of Charanjit Singh Suri an officer of the Applicant herein. The Applicants contend that they received notice of the judgment entered herein on 20<sup>th</sup> November 2014 yet it was the 1<sup>st</sup> time they became aware of the existence of this suit. They aver that judgment was entered in this case after the matter was heard without any defence or attendance by the Respondent Company. They contend that they were not served with summons in respect of this matter and the averment in the affidavit of service is false as they always receive

and stamp all legal documents received by themselves.

4. They also deny receiving any hearing notices. The Applicant Respondent also requested this court to summon the process server to be cross-examined in court. This request was allowed. The process server attended and on cross-examination, he confirmed he served documents on Jasraj Singh who even stamped the documents.
5. The Claimant Respondents opposed this application. They filed their replying affidavit and also filed a Preliminary Objection stating that the attached defence did not disclose any triable issues and was therefore frivolous and intended to delay him realizing the fruits of his judgment. They want to be allowed to execute the judgment.
6. The application was brought under orders 12 Rule 7, Order 50 Rule 6 and 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all the enabling Powers and Provisions of the law.

### **The Law**

7. Under Order 12 Rule 7, of Civil Procedure Rules:

**“where under this order judgment has been entered or the suit has been dismissed, the court on application may set aside or vary the judgment or order upon such terms as may be just”.**

### **Determination**

8. The Applicants have argued that they were not served with summons and only learned of the judgment after they were served with notice for judgment already delivered. A perusal of the pleadings show that Respondent at one point however learned of the existence of this suit before judgment was delivered. In the affidavit of the Applicant sworn by Charanjit Singh Suri on 30/1/2015 at paragraph 12, he states that Jasraj Singh who may have received the hearing notice cannot recall the same. This is tantamount to stating that though they may have received the hearing notice, they didn't put any weight on it.

The hearing notice is however signed by the said Jassraj on 28/1/2014 and on 25/11/2013 an indication that the existence of the suit was known long before judgment was delivered. This Jassraj was served over and over again.

9. It is true that summons under 0.5 must be effected on the Defendant but the same can also be served on the Defendants agent. In this case Jassraj carried himself out as one responsible for receiving summons on behalf of the Applicant and did receive various documents on their behalf and at the Defendants premises- service where the Respondents ordinarily carries on business as a staff in the Defendants office would in my view be sufficient as in this case.
10. The next issue is whether the intended defence raises triable issues. I have had occasion to read the draft defence which has only one paragraph alluding to the facts raised and stating at paragraph 7 that they have been ready to settle any amounts rightly owing to Claimant as was being handled by the Ministry of Labour. Why they have not pursued the same through the Ministry of Labour is not clear. However, vide a letter dated 25/10/2012, the conciliator wrote that his efforts to resolve the dispute by conciliation had been unsuccessful showing that that route also seemed closed on the Claimant herein.
11. This cause was handled by Hon. Justice M. Onyango on 21/7/2014 and she indicated that she had confirmed from the affidavit of service that the Respondent was properly served and allowed the case to proceed exparte.

12.Nothing now seems to have happened and I find that the assertion by Respondent that they were not served is not true. The draft defence also raises no triable issues. I therefore find that application without merit and I dismiss it and allow the execution process to proceed.

**Dated in open court this 29<sup>th</sup> day of April, 2015.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent