



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 159 OF 2011

PETER ONGANGO OCHUOGAPETITIONER

VERSUS

PAYLESS CAR HIRE & TOURS..... RESPONDENT

Mr.Nyagoro for the Respondent/Applicant

M/S Gakoi for the Claimant/Respondent

RULING

1. Respondent I Applicant filed a Notice of Motion Application on 12th August 2013 seeking orders *inter alia* that;

3. the Award I Judgment made in this case on 24th May 2013, the proceedings conducted and all consequential orders emanating from the said Award be set aside.

4. that the Court be pleased to hear afresh the matter inter partes.

2. The Application is based on grounds set out on the Notice of Motion to wit;

(i) the case was heard *ex parte* and the Respondent lost the opportunity to defend itself.

(ii) the Respondent was never served with summons or hearing notices.

(iii) the Respondent only discovered the existence of the Claim when a stranger threw a notification of judgment at a shop in town not affiliated with them and left.

(iv) that the Respondent has a good defence to this Claim in that it can prove that the employee deserted his work without notice amounting to misconduct thus necessitating the summary dismissal.

(v) the Claimant misrepresented and failed to disclose crucial material facts in the case.

3. The Claimant I Respondent filed a Replying Affidavit on 22nd August 2013, in which he states that; the Advocates for the Claimant served a demand letter on the Respondent who responded to it on 16th August 2010. The letter is attached to the Replying Affidavit and marked "POO 1". The letter

reads;

"I refer to your letter of 15th July 2010 addressed to Budget Rent a Car of Kenya. I am instructed that my said client have never employed a person of your client's description and could therefore not have terminated his employment.

If you have copies of payslips and I or letter of appointment, kindly let me have it to verify."

4. The letter is written by Kelvin Mogeni Advocate on behalf of the Respondent, the same Advocate who has filed this Application. The Application contradicts in material respects the contents of the aforesaid letter in that it is now admitted that the Claimant was an employee of the Respondent Payless Car Hire and Tours TIA Budget Rent a Car of Kenya and was summarily dismissed vide a letter dated 16th January 2009 '**JR3**' for deserting work?.

His payslip for January 2008 is also attached showing a gross pay of Kshs.11,395.00 per month.

5. The Claimant/Respondent restates that the Respondent/Applicant was served with the Memorandum of Claim together with the Notice of Summons in their offices on Mombasa Road and they duly stamped and accepted service of the Claimant's copies which are attached to the Replying Affidavit.

6. That the Respondent I Applicant failed and I or neglected to put in any response to the claim.

7. The Affidavits of service are attached and marked "POO 3".

8. That the Court had no otherwise but to proceed with the matter exparte.

9. That the Respondent/Applicant has not given any proper reason warranting the Court to set aside the proceedings and judgment delivered.

10. That this Application if granted will curtail the Claimant's right to justice since justice delayed is justice denied.

11. The Respondent I Applicant slept on its rights and equity does no aid the indolent. That allowing this Application will defeat the overriding objective of this case.

12. That the Application be dismissed with costs.

Determination

13. The Court has perused the Notice of Summons dated 23rd February 2011 and the Affidavits of service filed on record and is satisfied that the Respondent I Applicant was served with the Memorandum of claim and summons but did not file a response to the claim.

14. The Respondent also received hearing notices on 17th September 2012 and 13th March 2013 served by Mr. Michael K. Rotich, a duly authorized Process Server at their offices along Mombasa Road but did not attend any of the set hearing dates.

15. That the response to the letter of demand contradicts in material respects, the purported defence intended to be raised against the Claimant in that the Respondent initially denied knowledge and having ever employed the Claimant, while in this Application, it is admitted that they not only know the Claimant but he was their employee.

16. The Court is in the circumstances not satisfied that sufficient grounds have been put forth to justify the setting aside of the judgment of Justice Rika delivered on 24th May 2013.

17. The Application to set aside the Judgment of Hon. Rika, J. delivered on 12th May 2013 is dismissed with costs.

Dated and Delivered at Nairobi this 3rd day of July 2015

MATHEW NDERI NDUMA

PRINCIPAL JUDGE