



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 1290 OF 2012

JOHN MWANIKI KILUMOCLAIMANT/RESPONDENT

VERSUS

K.A.K ENTERPRISESRESPONDENT/APPLICANT

Mr. Kibunja for Respondent/Applicant.

Mr. Okioma for Claimant/Respondent.

RULING

The court awarded the Claimant/Respondent Kshs.1,072,275/= being payment of various terminal benefits and ten (10) months salary as compensation for unlawful termination of his employment.

The claim was not defended, the court having been satisfied that the Respondent was served with a Memorandum of claim on 8th August, 2012 but did not enter appearance nor file a Statement of defence.

That notwithstanding the matter was set down for hearing *ex parte* on 12th November, 2012 and the Respondent was served with a hearing notice on 6th November, 2012. Affidavits of service were filed accordingly.

The Respondent has brought his application to set aside the award of the court on the grounds that;

- i. *Respondent was never served with the Statement of claim and the return of service filed in court was false;*
- ii. *Respondent has a good defence to the matter as the Claimant was not its employee but the Respondent had sub-contracted him as a mason.*

As at the time the application was brought attachment of the Respondents goods had taken place to satisfy the decretal amount. An interim order was granted to stop the auction from taking place.

The Claimant/Respondent filed a Replying affidavit on 16th July, 2013 in which he deposes that the Respondent was served with the Memorandum of claim on 8th August, 2012 and was again served with a hearing notice on 6th November, 2012.

The Claimant states that the return of service filed in court are genuine and the allegations by the Respondent that the affidavits of service are false is without foundation whatsoever.

The Claimant urges the court to allow him the fruits of his judgment as the Respondent has not given any genuine reason why he did not defend the claim.

That no draft Statement of defence has been attached to the application to set aside to show good faith on the part of the Respondent and the application should be dismissed with costs.

The court has again perused the affidavits of service filed by duly authorised Process Server of the High Court of Kenya and has no reason whatsoever to doubt the authenticity of the same.

It is clear that the summons with the Statement of claim was duly served at the residence of the Respondent at Westland's Shopping Centre, along Ring Road but the Respondent who is a sole proprietor declined to acknowledge service. It is noteworthy that the same Process Server, served the decree and award on 14th March, 2013 at the same address and same were received by the Respondent.

The Respondent did not apply for the Process Server **Mr. Jackson Agira Yanna** to be called and cross-examined to test the veracity of his affidavit of service.

The court finds that there is no good reason advanced by the Respondent/Applicant to set aside its award and the application dated 5th July, 2013 and filed on the same date is dismissed with costs to the Claimant/Respondent.

Dated and delivered at Nairobi this 28th day of January, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE