

REPUBLIC OF KENYA

THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 299 OF 2010

KENYA GAME HUNTING UNION.....CLAIMANT

VERSUS

GLORY CAR HIRE.....RESPONDENT

RULING

1. The Respondent herein seeks unconditional leave to defend on grounds that the Claimant never served process on the Respondent. For good measure the Respondent avers that the Claimant served someone who is unknown to the Respondent and also that the two stamps on the notice received on 2nd November 2010 were suspect.
2. The Claimant is opposed and sought the dismissal of the Respondent/Applicant's Application with costs.
3. The Notice of Motion Application seeks in the main the setting aside of the Judgment of the Court dated 22nd June 2011. The Grounds set out on the face of it are that the Respondent was not served with the Hearing Notice and that the matter proceeded *ex parte* and judgment entered against the Respondent. Mr. Johnson Mutara deposes in the Supporting Affidavit that the Respondent filed and served a Memorandum of Appearance and Response in November 2012. He swears that the Respondent was never served with the Hearing Notice by the Respondent.
4. Mr. Ndolo for the Claimant/Respondent stated in opposition that the Respondent was served. It was urged that the Application should not be allowed as the matter proceeded *ex parte* and the challenge is now at the stage of execution.
5. The Court can set aside or vary its judgment on terms that are just. This discretion is unfettered and wide. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75**, the Court of Appeal per Duffus President of the Court stated thus:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given it by the rules.....the principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of it’s coercive power where that has obtained only by a failure to follow any of the rules of procedure” (emphasis mine)

6. The case of the Respondent hinges on non-service of a Hearing Notice. The depositions and pleadings do not advert to the service of summons. Indeed paragraph 6 of the Affidavit of Johnson Matarara is clear. The Claimant filed affidavits of service on two occasions bearing stamps of the Respondent. The Respondent has not availed to Court the correct stamp in order to prove the stamps on the Notices were not from the Respondent. In the matter before me, there is no doubt that the Respondent was aware of the suit and failed due to inadvertence or willfully to participate in the suit and only seeks to do so now that the matter is at execution stage. I will decline to

exercise my discretion in favour of the Respondent. No grounds have been advanced to warrant this Court to disturb the decision of Madzayo J. (as he then was) made on 22nd June 2011.

7. I dismiss the Notice of Motion dated 28th October 2013 with costs to the Claimant.

It is so ordered.

Dated and delivered at Nairobi this 14th day of January 2014

Nzioki wa Makau

JUDGE