



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1958 OF 2012
ROBERT MUGIRA FABIAN.....CLAIMANT/RESPONDENT
VS
ATHI RIVER MINING LIMITED.....RESPONDENT/APPLICANT

RULING

Introduction

1. The Claimant's claim against the Respondent/Applicant proceeded *ex parte* on 12th July 2013 and on 19th September 2013, I made an award in favour of the Claimant for the sum of Kshs. 600,500. The Respondent then came to Court by way of Notice of Motion dated 22nd October 2013 seeking stay of execution of the award and its setting aside to pave way for an *inter partes* hearing. The parties agreed to prosecute the application by way of written submissions.

The Applicant/Respondent's Submissions

2. Mr. Manthi Masika for the Applicant submitted that upon service of the Claimant's Statement of Claim, the Applicant instructed the firm of Rakoro & Company Advocates who filed a Notice of Appointment on 8th November 2012. Rakoro & Company were however not served with the hearing notice. According to Counsel, even though Rakoro & Company Advocates did not file a Reply on behalf of the Respondent, they ought to have been served with the hearing notice.

3. Further, the affidavit of service sworn by Hannah Waruguru on 9th July 2013, indicated that service of the hearing notice was effected upon an unidentified lady. The service was therefore not in accordance with Rule 12 of the Industrial Court (Procedure) Rules, 2010. Counsel referred the Court to the case of **Remco Limited Vs Mistry Jadva Parbat & 2 Others (HCCC No. 171 of 2001)** where Ringera J (as he then was) held that service upon an employee who is not a Director, Secretary or Principal Officer of a body corporate without evidence that the process server is unable to find any of the named officers is irregular.

4. Moreover, there was no reason why the Claimant chose not to serve Rakoro & Company, the Applicant's Advocates on record at the time. Counsel for the Applicant provided a draft Statement of Defence which he submitted raises triable issues to be canvassed at an *inter partes* hearing.

The Claimant's Opposition

5. The Claimant filed Grounds of Opposition on 4th November 2013 stating that the Applicant's application lacks merit since the Applicant, having been duly served, failed to attend Court for the hearing. Further in a Replying Affidavit sworn on even date, the Claimant deponed that neither he

nor his Advocate had been served with a Notice of Appointment of Rakoro & Company as Advocates for the Applicant.

6. The Claimant further deponed that prior to the hearing of the case, the Applicant was duly served and the Court having satisfied itself of this fact proceeded to hear the case *ex parte*. Additionally, the Applicant had not shown any reason why it did not file its Defence upon being served with the Claimant's claim on 16th October 2012.

7. In the written submissions filed on 27th November 2013, Mr. Nyaga Kamundi submitted that under Rule 12 of the Industrial Court (Procedure) Rules, 2010 service on a Principal Officer of a body corporate is only one of the methods of effecting service upon a body corporate.

8. Counsel further submitted that no reason had been advanced by the Applicant for its failure to file a Defence and that even in the current application, no leave to file the Defence out of time had been sought.

9. With regard to the proceedings of 12th July 2013, Counsel submitted that prior to fixing an *ex parte* hearing date, the Claimant's Advocates had invited the Applicant for fixing of a mutually convenient date and upon the Applicant's failure to attend, the Claimant's Advocates took an *ex parte* date and a hearing notice was duly served on the Applicant. The provisions of Rule 22 of the Industrial Court (Procedure) Rules, 2010 were therefore fully complied with.

Ruling by the Court

10. The issue for determination in this application is whether the Applicant has established a case to move the Court to set aside its award issued on 19th September 2013 and to order a re-trial *inter partes*. The issue in contention is whether the Applicant was duly notified of the hearing of the case on 12th July 2013.

11. According to the Claimant, the Notice of Appointment of Rakoro & Company as Advocates for the Applicant was not served on either the Claimant or his Advocates. While the Court took notice of a copy of the Notice of Appointment in the court file, there was no evidence that the Notice was ever served on the Claimant or his Advocate. In the absence of such evidence, I find that the Claimant was well within his right to serve the Applicant directly. I will therefore examine the mode of service as effected on the Applicant in that light.

12. Rule 12 of the Industrial Court (Procedure) Rules, 2010 provides that:

(1) Service on a corporate body may be effected—

(a) on the secretary, the director or any other principal officer of the corporate body;

(b) where the process server is unable to find any of the officers of the corporate body mentioned in subparagraph (a), by—

(i) leaving the pleadings with an employee of the corporate body to be identified by the process server; or

(ii) leaving the pleadings at the registered office of the corporate body; or

(iii) sending the pleadings by prepaid registered post to the registered postal address of the corporate body; or

(iv) leaving the pleadings at the place where the corporate body carries out business; or

(v) sending the pleadings by registered post to the last known postal address of the corporate body if the corporate body does not have a registered office or postal address.

(2) Notwithstanding anything contained in this rule, a party may, with leave of the Court, effect service of process by any other method of service.

13. In her Affidavit of Service sworn on 9th July 2013, Hannah Waruguru deponed that she served the hearing notice upon a lady at the Respondent's Head Office who informed her that she was duly authorised to receive documents on behalf of the Respondent. The proper reading of Rule 12 is that as a matter of course, service on a corporate body is to be effected on the Secretary, Director or any other Principal Officer of the body corporate.

14. Only in cases where the process server is unable to find any of these officers would service on another member of staff or use of any of the other modes of service be permissible. It is not for the process server to choose the mode of service that is convenient to them; they must exercise the first option of service before resorting to any other mode.

15. In the Affidavit of Service sworn by Hannah Waruguru, there was no mention of any effort made to find any of the officers named in Rule 12(1)(a). Further, even assuming that Waruguru had actually made some effort in tracing these officers, she does not seem to have identified the lady upon whom she served the hearing notice as required under Rule 12(1)(b)(i).

16. In view of the foregoing, the Court finds that service of the hearing notice effected by Hannah Waruguru on 13th May 2013 was not in accordance with Rule 12 of the Industrial Court (Procedure) Rules, 2010. The award of the Court delivered on 19th September 2013 is therefore set aside.

17. In my view, the draft Memorandum of Defence submitted by the Applicant raises substantive issues meriting inquiry in an *inter partes* hearing. I therefore admit it as duly filed and direct that the case will be heard *inter partes* at a date to be mutually agreed upon by the parties.

The costs of this application will be in the cause.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2014

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF FEBRUARY 2014

MATHEWS NDERI NDUMA

JUDGE

In the Presence of:

.....*Claimants*

.....*Respondent*