



REPUBLIC OF KENYA

THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 808 OF 2013

CORNELIUS KHAVOKOI SIAHI.....CLAIMANT/OBJECTOR

VERSUS

CHRISTIAN FOUNDATION FELLOWSHIP CHURCH.....RESPONDENT

RULING

1. What is presently before me for determination is the Claimant/Objector's Preliminary Objection. In the objection the Claimant raises the spectre of the Industrial Court (Procedure) Rules 2010. The Claimant raises an objection against the Respondent for infringement of Rules 11(3), 13(1) and 13(4) of the Industrial Court (Procedure) Rules 2010. The Claimant argues that the Respondent has failed to adhere to the Rules which are mandatory in nature. These Rules are as follows:-

11. (3) Where a respondent files pleadings in response to any pleading filed by a claimant or an appellant, the respondent shall have the pleadings served on the claimant or the appellant by a qualified process server within fourteen days of filing.

13. (1) If a party served with a with a statement of claim or a memorandum of appeal intends to respond to the claim or appeal, the party shall, within fourteen days from the date of service file and serve a response to the claim or appeal.

(4) The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading.

2. The Claimant sets out in detail the delays between the date of entering appearance after 'service', the delay in filing a response. The Claimant relies on the definition of the word '**shall**' and asserts that the Respondent was in breach of the rules and therefore the Response should be struck out and the cause proceeds as an undefended cause.

3. **Mukisa Biscuits v. West End Distributors [1969] EA 696** has set out what qualifies as a Preliminary Objection as a point of law which has been pleaded or arises out of clear implication out of pleadings and if argued as a Preliminary Objection may dispose of the suit. The Preliminary Objection should raise a pure point of law and the assumption is that all the facts pleaded by the other side are correct. What has been raised is indeed a preliminary objection because if the Court was to uphold the objection the suit would proceed undefended. In the Claim before the Court, the Claimant filed the case on 28th May 2013. The Claimant then served the Respondent through the G4S Courier Services.

4. Rule 11 on service of summons is as follows:-

11. (1) The Court shall issue summons in Form 2 set out in the First Schedule.

(2) A claimant shall serve the summons issued under paragraph (1) to the respondent together with the statement of claim or the appeal.

(3) Where a respondent files pleadings in response to any pleading filed by a claimant or an appellant, the respondent shall have the pleadings served on the claimant or the appellant by a qualified process server within fourteen days of filing.

(4) A party shall, upon effecting service of pleadings on any other party, prepare and file in Court an affidavit of service in Form 3 set out in the First Schedule.

(5) An affidavit of service shall be accompanied by evidence of acknowledgement of receipt of the served document signed by the recipient, respondent, claimant or appellant as the case may be or the persons accepting service on their behalf.

(6) If for any reason the signature of the recipient cannot be secured, the process server shall state so in the affidavit of service.

(7) Where service of pleadings under these Rules is effected through the post, the affidavit of service shall be accompanied by the certificate of mailing.

(8) The Court may effect service on behalf of any party upon, request in writing, made by the party in Form 4 as set out in the First Schedule and upon payment of a prescribed fee.

5. The Claimant did not comply with the mandatory provisions of Rules 10(7), 11 (4), 11(5) and Form 3 of the First Schedule. The Rules contemplate first and foremost personal service hence the requirement to engage a qualified process server under Rule 10(7). Rule 10(7) is couched in mandatory terms. It provides that the claimant shall, after filing a statement of claim or an appeal as the case may be, cause the statement of claim or appeal to be served on the respondent by a qualified process server.

6. The Claimant is NOT a qualified process server in terms of the law. He thus could not effect service as he did and claim the Respondent is in breach of the Rules. It is akin to the person who attempts to remove a speck in someone else's eye whilst ignoring the log in their own eye. The preliminary objection is thus not fit for grant and I dismiss it with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 11th day of June 2014

Nzioki wa Makau

JUDGE