



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 2320 OF 2012
MOSES OJANJI KHASAYA CLAIMANT
VERSUS
WASSO SECURITY SERVICES LIMITED RESPONDENT
RULING

Rakoro & Co. Advocates for the claimant

E K Mutua & Co. Advocates for the Respondent

1. On 25th March 2014, the Respondent herein filed their application through Notice of Motion under the provisions of section 12(3) of the Industrial Court Act, Rule 16 (1), 32(1)(b) and (e) of the Industrial Court Rules seeking;
 - a. *That this application be certified as urgent and be heard ex parte in the first instance*
 - b. *That the application herein be set down for hearing inter parties as a matter of urgency*
 - c. *That this honourable court be pleased to order stay of execution of the judgement and or decree by the honourable court pending the inter parties hearing an determination of this application*
 - d. *That this honourable court be pleased to order that the Court Process Server by the name Jackson Ngugi do appear in court on the date that will be fixed for inter-parties hearing of this application for the purposes of being cross examined on the question of service.*
 - e. *That this honourable court be pleased to review award delivered on 24th September 2013 and leave be granted to the Applicant to defend the suit and /or file a memorandum of defence*
 - f. *That the applicant be at liberty to apply for further orders and/or directions as the honourable court may deem just to grant.*
 - g. *That the costs of the application be borne by the claimant/respondent*

2. This application is supported by the annexed affidavit of Hussein Tene Dabasso and on the grounds that on 18th March 2014, the claimant instructed Fantasy auctioneers who proclaimed the Respondent's moveable property at its premises in execution of the judgement delivered on 24th September 2013, which judgement was not regular as the respondent disputes service of all court processes alleged to have been served upon the staff/employees as the respondent became aware of the suit herein on the date of the proclamation and wishes to defend the same as they will suffer irreparable loss and damage.

3. In the supporting affidavit, Hussein Tene Dabasso states that as the managing director of the respondent he was called and informed that there were auctioneers at his premises following a suit by the claimant and upon perusal of the documents he realised that proceeding had taken place in court and judgement delivered on 24th September 2013 yet not service had been effected of any summons. He

proceeded to instruct advocates and on perusal of court record noted that service of summons was effected by Jackson Ngugi on 30th January 2012 but there was no affidavit of service was filed as the open on record has no court stamp. When the claimant gave evidence he made misrepresentations and thus obtained judgement on unchallenged evidence. The claimant worked for the respondent but he was not unfairly terminated and the respondent wishes to put in a defence, have the orders set aside as the claimant has threatened to execute the decree.

4. The respondent also filed a Supplementary Affidavit and stated that no summons was served upon them and the affidavits of service are filed by different persons stating they are Jackson Ngugi and the signatures are different. Hussein Tene was served with the proclamation and that is how the respondent got to know of the court proceedings that were *ex parte*, there is a good defence and the respondent should not be locked out and in the interests of justice, the judgement herein should be set aside to give the respondent a chance to be heard.

5. In reply the claimant filed Replying Affidavit sworn by Daniel Rakoro on 2nd April 2014 and being the advocate of the claimant states that the matter proceeded for hearing upon the court ascertaining that the respondent was served. The Affidavit of service was assessed and paid for and the non-stamping of the same was an error on the part of the registrar clerk. The respondent was served on 11th December 2012 through secretary Roline and the respondent managing director gave out his phone number as 0721713660. Part from the lack of a stamp from the affidavit of service other issues have not been disputed. There was a demand letter before coming to court which is not disputed and upon undertaking all the necessary processes, the claimant fixed a hearing date when the court proceeded on the strength of the documents on record. A draft decree was served on the respondent but declined to sign, respondent was served with the bill of costs and declined to sign until the proclamation process when the respondent realised the adverse action about to take place. The application therefore lacks merit and should be dismissed.

6. Both parties filed their written submission. The respondent as the applicant reiterated the contents of their application and submitted that there was no proper service or any service at all and the judgement herein is irregular and affected the respondent who is entitled to set aside the same as held in **Southern Credit Banking Corporation limited versus Jonah Stephen Nganga [2006] eKLR**. That there is no Affidavit of Service on record to prove the respondent was served. Other documents said to have been served have affidavits of service by Jackson Ngugi but bear different signature which imply that they were done by a different person on different dates raising concern as to the truthfulness of the contents. The respondent did not ignore court summons and the judgement obtained as a result is irregular and should be set aside.

7. The claimant on their part submitted that the respondent has failed to address the court on the orders sought and opted to address the Court on why the judgement should be set aside hence abandon the same. Rule 32(1) (b) of the Industrial Court Rules address reviews of court orders on account of mistake or error on the record and nothing has been outlined with regard to these provisions. The respondent has opted to rely on Order 10 of the civil procedure Rules. The respondent has also failed to apply under form 6 of the first Schedule in pursuance to Rule 32(4) of the Court Rules thus the application is defective.

8. The claimant also state in submissions that the respondent is a corporate body and under Rule 12 service can be on any of its officer. Summons was duly served upon the respondent on 22/11/12 and this is outlined by Jackson Ngugi in his affidavit sworn on 30/1/13. The respondent has not denied the physical location where the summonses were issued and also the other names staff/officers have not denied service for an on behalf of the respondent. the affidavit of service though not stamped, the error was not of the claimant but the court registrar and the different signatures are not an issue as the respondent has opted not to cross-examine Jackson Ngugi. The claimant relied on the case of **Miruka versus Abok et al [1990] eKLR** that there is presumption of service as stated in the process server's report and the burden lies on the party questioning it to show that the return is incorrect.

8. On 12th June 2012, the court having been satisfied that there was proper service proceeded to direct the hearing of the claimant's case on the strength of the Affidavit of Service of Jackson Ngugi sworn and

dated 30th January 2013. This affidavit is assessed and court fees paid for on 22nd March 2012. There is a disparity in both documents where fees was paid for a document way in advance on **22nd march 2012** for a matter that took place on **30th January 2013**. The matter went for hearing and a hearing notice was served on the respondent as depones by Jackson Ngugi in his affidavit sworn on 10th June 2013 and filed on 12th June 2013. A naked look of the signatures to both documents sworn by Jackson Ngugi sworn before Richard Odenyo, Commissioner for Oaths, even without an expert opinion, there is a remarkable difference. Such matters do not ordinarily concern a presiding Judge unless these are brought to the attention of the Judge by an aggrieved party. But who is aggrieved in this case?

9. The respondent have filed their application under the provisions of section 12(3) of the Industrial Court Act which relate to the powers of the Court and also under the provisions of Rule 16(1) and 32(1) (b) of the Court Rules which relate to interlocutory proceedings and review of court orders respectively. The substantive orders sought by the respondent under prayer (3), (4) and (5) have thus not been articulated and or supported by any of the cited provisions for purposes of a stay of execution of the judgement of the Court, the call for cross-examination of Jackson Ngugi as the process server and the orders sought to be reviewed have not been attached. The orders sought and the outline in the application and supporting affidavit speak to two different issues. This is not permissible under any legal system, even in the applicant's best application of Article 159 of the Constitution or section 20 of the Industrial Court Act.

10. The mistake in the assessment and lack of a court stamp on the affidavit of service of Jackson Ngugi is of the court making where the responsible officer failed to do his duties professionally and ensure that all document filed and paid for have an authentic court stamp. This cannot be visited upon the claimant or the respondent. However, as noted above, the documents bear signature that can genuinely be said by a reasonable person to belong to different hands. That aside and despite the fact of the wrong dates, the non-stamp by the court officer and the different signatures, the respondent fails in a fundamental way to state as to why even despite the court failing to stamp a document that they did not file, once served why they failed to enter appearance and defence in this matter. There is good reason to believe that the claimant is aware of the respondent premises hence the directions given to Fantasy Auctioneers who have proclaimed against their movable property. There are various officers cited to have been served and technicalities of the filed documents aside; these are no denial that these officers are the employees of the respondent.

11. That outlined, justice cuts both ways, there are faulty records of the claimant and the I find the respondent was properly served and opted not to come to court as and when they were required. 12. The practice of this court is to ensure peaceful industrial relations and give any party who comes before this court a fair chance to be heard. In the interests of justice and expeditious disposal of matters before this court and as under the powers of the Court under section 12 of the industrial Court Act, I will set aside the Judgement entered on 24th September 2013 and make the following directions;

- a. **The respondent will pay the claimant all the costs incurred herein to date within the next fourteen (14) days;**
- b. **Simultaneous to the orders above (a), the respondent will file their defence within seven (7) days from this date;**
- c. **The claimant will have a right of reply upon service as (b), within seven (7) days;**
- d. **A hearing date will be allocated in court noting the orders (a), (b) and (c) above.**
- e. **Costs herein awarded to the claimant.**

Delivered in open Court at Nairobi and dated this 4th Day of June 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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