



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1018 OF 2011

JOSEPH MACHARIA MBUGUACLAIMANT

VERSUS

M/S YOUNG CLUB 7 & RESTAURANTRESPONDENT

RULING

The application before me for determination is the Notice of Motion dated 19th March, 2014 filed by the Respondent. The application seeks orders that there be a stay of execution of the judgment entered on 17th January 2014 and all consequential orders pending the hearing and determination of the application, and further that the ex-parte judgment entered on 17th January 2014 be set aside.

The application is supported by the affidavit of Francis Kirubi Gichanja and on the grounds that the Applicant was never served with summons, the pleadings or hearing notice. The Applicant further states the Respondent has a good defence to the claimant's claim and that execution would cripple his business.

In the affidavit supporting the application Mr. Gichanja depones that Young Club 7 & Restaurant is not a Limited company and is registered as a business name with the deponent as sole proprietor. He further depones that M/SD High Class Auctioneers proclaimed goods at his premises on 6th March 2014 and that is when he became aware that judgment had been entered against him in this case. That his Advocate perused the court file and confirmed that the court record shows the summons were served upon Mr. Bakari, the Manager of the Business who had authority to accept service. That Mr. Bakari was a Supervisor and not a Manager and did not have authority to accept any court process on his behalf. That Mr. Bakari left employment in December 2011. That another affidavit of service states the decree was served on a Director of the Respondent but the name of the Director is not disclosed and the Process Server does not state how he knew the Director.

The Applicant attached a statement of response to the application in which it is denied that the claimant was his employee within the meaning of the Employment Act. The Respondent further denies underpaying or dismissing the Claimant or that the Claimant is entitled to the sums claimed in the Memorandum of claim or awarded to the Claimant.

Francis Kirubi Gichanja filed a supplementary affidavit sworn on 4th April, 2014 and filed in court the same day in which he reiterated the facts deponed in his earlier affidavit.

The Claimant opposed the application and filed a replying affidavit sworn on 25th March 2014 and filed in court on 27th March 2014. The Claimant depones that the summons were served on Mr. Bakari who was the Manager at the Respondent's business premises. The Claimant further deponed that he approached Mr. Gichanja severally with a view to resolving the case out of court but Mr. Gichanja

referred him to Mr. Bakari who was in charge of the business. He further depones that he served mention and hearing notices on the Respondent through a registered Process Server and filed affidavits of service in court. He deponed that the application is intended to deny him the enjoyment of the fruits of his judgment. He urged the court to dismiss the application with costs.

The application was scheduled for hearing on 22nd May 2014 when Mr. Kimani instructed by Ndumu Kimani & Company Advocates appeared for the Respondent/Applicant while Mr. Mong'are instructed by Mang'are & Associates Advocates appeared for the Claimant. When the case was called out Mr. Mongare had stepped out and Mr. Kimani requested that the parties be allowed to canvass the application by way of written submissions. The application was granted and parties filed their respective submissions.

The Applicant in addition relied on the following cases:

1. Nairobi HCC No. 1774 of 1994 - John Kamau Icharia V. Paul Njiru & Another
2. Civil Appeal No. 38 of 1998 – Tree Shade Motors Limited V. D,T. Dobie & Company (K) Limited & Another
3. Maina V. Muriuki (1984) KLR 407

The Claimant too relied on the case of Omayi Okumu Kasiaka & 2 others V. Moses Okware Opari & Another (2013) eKLR

The claimant filed this suit alleging unfair termination and underpayment of wages. He prayed for payment of unpaid salary, notice, leave, severance pay, underpayments and compensation for unfair termination.

The court record shows that the Claimant's case was first mentioned in court on 13th September 2011 when both parties were absent. The case was thereafter mentioned on 21st September 2011 in the presence of the claimant and fixed for hearing on 19th January 2012. The Claimant was directed to serve hearing notice on the Respondent.

On 19th January 2012, the case was not heard as the Claimant had not filed an affidavit to prove that the Respondent, who was absent, had been served with the hearing notice. The case was then fixed for hearing on 17th May 2012 when the case was heard in the absence of the Respondent by Justice Isaac Mukunya (as he then was). Justice Mukunya referred the case to conciliation by Nairobi County Labour Officer at Nyayo House through the Labour Commissioner.

The Registrar of the Industrial Court was to communicate to the Labour Commissioner. The file was fixed for mention on 21st June 2012. There is no evidence in the file that the case was referred to conciliation as directed.

On 21st June 2012 the Claimant was present in Court but there was no appearance by the Respondent. The case was fixed for further mention on 24th July 2012 and the Claimant directed to serve the Respondent. When the case was mentioned on 24th July 2012 before Justice Rika he fixed it for hearing on 2nd November 2012 and directed that the Respondent, who was absent, be notified. The case was further mentioned on 2nd November and 9th November 2012, 12th February and 29th April 2013. On 29th April, 2013 the case was fixed for hearing on 29th April 2013 and the Claimant directed to serve hearing notice on Respondent.

The case was again heard on 29th April 2013 by Justice Rika after confirming that there was an affidavit of service on record with a copy of the hearing notice duly served on the Respondent. Judgment was delivered on 17th January 2014.

In the Judgment the Claimant was granted the following orders:

- a. The termination of the Claimant's contract of employment was unfair; and
- b. The Respondent shall pay to the Claimant one month salary in lieu of notice; salary arrears; underpayments; annual leave entitlement; three months salary in compensation for unfair termination – all at Kshs.304,847 within 30 days of the delivery of this Award.

In the court record there are affidavits of service by Jackson Agire Yanana who served summons upon Mr. Bakari on 28th June 2011 and several hearing and mention notices. Specifically there is an affidavit of service for the hearing notice for 17th June 2013 filed in court on 10th May, 2013 stating that the Respondent's Manager was served with hearing notice on 7th May 2013. It states that the Manager accepted service but declined to endorse on the hearing notice saying that he has to call his boss and the boss informed him to accept service but not endorse on the documents.

The principles for setting aside ex-parte judgments are provided for in legislation and have been restated severally in judicial authorities.

Order 12 Rule 7 of the Civil Procedure Rules 2010 as read with rule 2 provide that where judgment has been entered the court may set aside or vary the judgment or order upon such terms as may be just.

In the case of *Kimani Kigano and Company Advocates V. Jimba Credit Corporation Limited Justice Bosire* (as he then was) summarized the powers of the court to set aside ex-parte orders as follows:

1. The power to set aside is discretionary;
2. The discretion is unlimited provided it is properly exercised;
3. It being a Judicial discretion must be exercised on the basis of evidence and sound legal principles;
4. The court has power under Order 14 A Rule 10 of the Civil Procedure Rules to set aside on terms as are just;
5. The court is obliged to look at the defence the Applicant/Defendant may be having to the claim;
6. If a party establishes that he has a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the court ought to be inclined towards setting aside.

Another factor that the court ought to consider is that the Applicant is not guilty of obstructing the course of justice.

In the Respondents submissions, it is contended that there was no service. The claimant on the other hand states that there was proper service and has referred to the affidavits of service filed in court.

According to precedents, where there is no service the court has no discretion but to set aside the judgment. This was the decision of the court in *Nairobi HCCC No. 171 of 2001 Remco Ltd V. Mistry Javda Parbat & Co. Ltd & 2 others* where he stated as follows:

“First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgment is a regular one, the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the court is to do justice between the parties”.

However, where there is proper service the court has to inquire about the reasons for failure to attend court and also look at the defence to ascertain whether or not there are triable issues raised in the defence.

In the present case only two services are important; the service of summons and the service of the hearing notice for 17th June, 2013 when the case was heard.

On service of summons, Mr. Francis Kirubi Gichanja does not contest service. The only issue he raised is that the person served was a supervisor without authority to accept service, and that the Respondent as sued is not a limited liability company as it has been described.

On the issue of whether or not Mr. Bakari was authorized to accept service, the Employment Act defines an employer as **“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”**.

From this definition both Mr. Bakari and the business name that has been sued in this case qualify as employer to the Claimant. The Respondent was sued in its capacity as a firm and Mr. Bakari was served as a foreman or manager of the Respondent.

I therefore find that there was proper service of summons on the Respondent through Mr. Bakari and that the Respondent has been sued in its capacity as a firm.

The second issue for determination is whether the service of the hearing notice for 17th June 2013 was proper. As I have already pointed out above, there is an affidavit of service to the effect that the hearing notice was served on 17th May 2013 upon the manager who called the boss (whom I presume is Mr. Gichanja) and obtained permission to accept service but not endorse the documents.

The Respondent alleges that the name of the manager is not stated. The affidavit of service states that **“I introduced myself to the manager and he did the same to me and my purpose of the visit. He accepted service but declined to endorse the Hearing Notice....”**. The Respondent has not denied that there was a manager in business premises or that the manager accepted service of the hearing notice. The only issue raised by the Respondent is that the manager’s name is not disclosed.

The Respondent further alleges Mr. Bakari left employment in December 2011. As submitted by the Claimant’s Counsel, there is no proof that Mr. Bakari left employment of the Respondent in December 2012. The Respondent has also not applied to cross examine the Process Server even after the Claimant deposed in his replying affidavit that the Process Server is available to be cross examined.

In the case of **Amayi Okymu Kasiaka & 22 Others V. Moses Okware Opari & another (2013) eKLR** the court held that the Applicant having failed to apply for cross examination of the Process Server, the court would scrutinize the affidavit of the Process Server against the evidence of the parties contained in the affidavits.

I find that the Respondent has not convinced me that there was no proper or any service of the Hearing Notice. For this reason the authorities relied upon by the Respondent all of which are based on lack of service are not applicable in this case.

Since the court has wide discretion to set aside ex-parte judgment where a party establishes that it has a reasonable defence even where service was proper and which appears on the face of the pleadings to contain considerable merit (refer to **Kimani Kigano and Company Advocates V. Jimba Credit Corporation Limited** referred to above), I will now consider the draft defence filed by the Respondent.

I have already summarized the defence. However, I must point out that the Respondent has in its application not applied for leave to file a defence to the Memorandum of Claim out of time. That notwithstanding, the draft defence filed with the application under consideration in my opinion is a mere denial. Rule 13(2) of the Industrial Court (Procedure) Rules, 2010 provides that:

13(2) A Respondent’s statement of response shall contain:

- i. The Respondent’s name and address for purposes of service of process;
- ii. A reply on issues raised in the statement of claim or appeal;

- iii. Any admission of statement of facts set out in the statement of claim or appeal as the respondent admits, and a denial of any statements made in the statement of facts or appeal that the respondent does not admit;
- iv. Any additional statements of facts which the Respondent may wish to make in support of its reply;
- v. Grounds upon which the Respondent may wish to reply;
- vi. Any principle or policy, convention, law or industrial relations or management practice to be relied upon;
- vii. A counterclaim; or
- viii. Relief that might be sought by the Respondent against the Claimant or the Appellant

From the foregoing I find that the Respondent has not applied to file a response to the Memorandum of Claim out of time and secondly, that the draft Statement of Response does not raise any triable issues.

The result is that I find the application by the Respondent to be without merit and dismiss it with costs to the claimant.

Orders accordingly.

Read in open Court this 10th day of October, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the present of:

No appearance for Claimant

No appearance for Respondent