



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO.1166 OF 2012**

**MUTUNE MASUA ..... CLAIMANT**

**-VERSUS-**

**DESIGNWEAR .....RESPONDENT**

**RULING**

This case was heard ex-parte on 23<sup>rd</sup> November 2013 and judgement delivered on 21<sup>st</sup> February 2013. On 20<sup>th</sup> March 2013 the Respondent filed a Notice of Motion under Certificate of Urgency seeking the following orders:-

- a. **THAT** the Exparte judgement herein was entered in the Claimant's favour against the Respondent/Applicant, who was never served with the Notice of Summons, statement of claim, bundle of documents or any hearing or mention notice in the matter and the Respondent/Applicant had no knowledge whatsoever of the claim prior to the service of a copy of the said judgement by the Claimant herein on 27.02.13.
- b. **THAT** the Respondent/Applicant, having not had any knowledge of the existence of the claim against it did not instruct an Advocate to act on its behalf in this matter, and/or enter appearance nor file a Memorandum of Response to the Claimant's claim.
- c. **THAT**, it is only fair and just that this Honourable Court do unconditionally set aside the judgment herein entered against the Respondent/Applicant in the circumstances.
- d. **THAT**, unless stay of execution of the decree herein is granted and the Exparte judgement entered herein is set aside *ex debito justitiae*, the Respondent/Applicant stands to suffer loss and an injustice will be occasioned upon them.
- e. **THAT**, the Respondent/Applicant has a good defence for the Claimant's claim and it is only fair and in the interest of justice that it be given an opportunity to defend the claim.
- f. **THAT**, the Application has been brought without unreasonable delay.
- g. **THAT**, the Respondent is willing to abide with whatever condition that this Honourable Court may it set as condition for granting, the prayers ought.

Temporary stay of Execution was granted on 21<sup>st</sup> March 2013 after hearing the Respondent ex-parte and the application was fixed inter parties hearing on for 2<sup>nd</sup> April 2013. On 2<sup>nd</sup> April the application was

rescheduled for hearing on 18<sup>th</sup> April 2013 to enable the Claimant file a Replying Affidavit. The application was eventually heard on 17<sup>th</sup> May 2013.

Mr. Mungai appeared for the Respondent/Applicant while the Claimant was in person. The Respondent relied on the affidavit of **FAZLEABBAS A TAJBHAI** sworn on 20<sup>th</sup> March 2013 in which he deposes that he was never served with summons or any mention or hearing notice as alleged in the affidavits of service filed in Court dated 12<sup>th</sup> June 2012, 17<sup>th</sup> August 2012, 26<sup>th</sup> September 2012 and 6<sup>th</sup> November 2012. He further deposes that he is not the Chief Executive Officer of the Respondent or a Director thereof. That the Chief Executive Officer Adarsh Rajnikant Shah is always in the office and that if any process server came to serve any documents he would have been referred by the Askari to the receptionist who would in turn have referred him to the Chief Executive Officer. He further deposes that the allegation in the affidavit of service that the security guard pressed a door bell to call a Manager is untrue as the door bell is not connected to any Manager's Office. The Respondent prays for orders on the face of the Notice of Motion.

The Claimant replied to the application through a Replying Affidavit deposed on 16<sup>th</sup> April 2013 and filed in Court on 18<sup>th</sup> April 2013 in which he opposes the application by the Respondent. He deposes that service of summons, mention and hearing notices were served upon Mr. Tajibhai as deposed in the affidavits of service, that he accompanied the process server on 24<sup>th</sup> July 2012 and subsequently the process server went alone to the premises as he already knew the location and Mr. Tajibhai upon whom service was effected. He deposed that the Respondents motive in filing the application is to delay justice and deny him the enjoyment of the fruits of the judgement, that it is in the interest of justice and fairness that the application be dismissed with costs.

I have considered the application and the supporting affidavit, the replying affidavit, the submissions of the parties, the law and the authorities referred to.

The Courts have wide discretion in setting aside its ex-parte judgment. That discretion must however be exercised judiciously. The position of the law is that where there is no proper service, the resulting default judgment is irregular and must be set aside *ex debito justitiae*, that is, as a matter of right, on application by the Respondent. On the other hand where there is a regular judgement entered in default, the Court still has wide discretion to set aside the judgement and consequential decree or order upon such terms as are just. This was the position of *Ringera J (as he then was) in Milimani H.C. Civil Suit No.171 of 2001 between REMCO LIMITED vs MISTRY JADUA PARBAT & CO. LTD & 2 OTHERS*.

In the present case the Applicant alleges there was no service or no proper service while the Claimant on the other hand alleges that there was proper service. Before I allowed the Claimant to proceed with the hearing of his claim ex-parte I examined the record and satisfied myself that there was proper service based on the affidavits on record. However, the matters deposed in the affidavit of Mr. Tajbhai raise sufficient doubt as to which of the two affidavits, that of Mr. Tajbhai and that of Onesmus Kasyoka Musau, is not telling the truth. None of the 2 deponents were called to be cross examined on the contents of the affidavits.

In such a case I must consider the balance of convenience. Setting aside the ex-parte judgment will only delay the Claimant's enjoyment of the fruits of this judgement while failure to set aside the judgment will completely lock out the Respondent from defending the claim against it. The scale thus tilts in favour of granting the prayers of the Respondent. The Respondent has attached draft Memorandum of Response to their application. Since the ex-parte judgment is being set aside *ex debito justitiae*, I need not look at the merit or otherwise of the Memorandum of Response.

The up-short is that the Respondents application is allowed, the ex-parte judgment entered against the Respondent on 21<sup>st</sup> February 2013 and all consequential orders are set aside. The Respondent is directed to file the Memorandum of Response within 14 days from today.

There shall be no orders for costs. Since the Claimant is acting in person, the parties are directed to take a

hearing date in Court.

Orders accordingly.

**Read in open Court and Signed on this 24<sup>th</sup> day of June 2013.**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:-**

**Mukune Musau for.....Claimant**

**Catherine Mungai for .....Respondent/Applicant**