



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 46 OF 2013

NGAO ELIJAH MVOYI

CLAIMANT

v

ATHI RIVER MINING LIMITED

RESPONDENT

RULING

1. Athi River Mining Ltd filed a Notice of Motion on 18 June 2013 seeking mainly that I do order stay of execution and also set aside the judgment/Decree entered on 31 May 2013.
2. I heard the application on 16 July 2013.
3. The grounds urged by the Respondent were briefly, that it was never served with Notice of Summons and Memorandum of Claim, there are triable issues and that the Respondent will suffer substantial loss and damage if attachment proceeds. Reliance was also placed on the supporting affidavit of one Kevin Macharia sworn on 17 June 2013. I will examine each of the grounds in turn.

Service of Notice of Summons/Memorandum of Claim

4. The Respondent argued that the Claimant never served it with Notice of Summons and Memorandum of Claim. It was submitted that the affidavit of service sworn by Michael Otieno and filed in Court on 12 April 2013 was a fabrication because it did not disclose the Respondent's offices or physical address, nor the full names of the Human Resources Manager who was served.
5. The Respondent further stated that it became aware of the Claim only when it was served with a Judgment notice on 5 June 2013.
6. This ground must fail. The affidavit of service indicates that one Mr. Josphat, Human Resources Manager of the Respondent was served. The Respondent has not denied that it has a Human Resources Manager or in any event an officer called Josphat.
7. Further, the affidavit of service exhibited a copy of the summons which was stamped and signed in acknowledgment by the said Josphat. The Respondent has not disowned the stamp affixed thereon.
8. It is equally not plausible that the Respondent became aware of this Cause only on 5 June 2013 when a judgment notice was served upon it. On 19 March 2013 the Deputy Registrar of this Court wrote to the Respondent using its acknowledged postal address of P.O. Box 157 Kaloleni, informing it that this Cause was coming up for mention on 12 April 2013. The address appears in the Respondent's stamp.
9. It is not only the Notice of Summons which was served upon the Respondent. On 22 April 2013 I

directed the Claimant to serve a hearing notice upon the Respondent. The hearing notice was served and an affidavit of service sworn by Michael Otieno on 8 May 2013 was filed in Court on 15 May 2013. The affidavit of service exhibited a copy of the hearing notice duly acknowledged by the Respondent through its rubber stamp and Human Resources Manager's signature.

Triable issues

10. The Respondent had notice of the Cause through service of Notice of Summons and Memorandum of Claim and was also notified of the hearing. It chose to ignore the summons and the hearing notice and it cannot be heard to suggest this late that there are triable issues. This ground must also fail.

Substantial loss or damage

11. Any loss or damage that the Respondent is likely or will incur is pursuant to a decision of the Court. It is now trite that loss pursuant to a judgment of the Court cannot qualify to be a loss necessitating stay of execution or setting aside.

12. In any event the Respondent did not seem to appreciate or seek to rely on the well known principles which govern applications for stay of execution as set out in the Order 42 rule 6 of the Civil Procedure Rules.

13. I dismiss the application filed in Court on 18 June 2013 with costs which I assess at Kshs 5000/- to the Claimant.

Delivered, dated and signed in open Court in Mombasa on this 19th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Claimant

in person

Ms. Mutua instructed by

Kiprop Cheruiyot & Co. Advocates

for Respondent