



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 3'A' OF 2013

(Before Hon. Justice Hellen Wasilwa on 2nd July, 2013)

JOSEPHINE SERAPHINE WADEGU CLAIMANT

=VERSUS=

KENYA POWER & LIGHTING CO.

LIMITED RESPONDENTS

R U L I N G

The application before court is the one dated 17/6/2013, it was filed under a certificate of urgency through a notice of motion filed by the respondents herein through Raimond Molenje, Advocate of the Federation of Kenya Employers. The application is brought under S. 12 of the Industrial Court Act 2011 and Rules 16, 22, 27 of the Industrial Court Procedure Rules 2010, Article 159(2) of the Constitution and all enabling provisions of the law. They seek orders that this court sets aside the *ex parte* judgment delivered in favour of the claimants on 30.4.2013 and all consequential proceedings and orders thereof pending the hearing and determination of this application. They also seek orders to have the respondents' defence on record admitted and set down the claim for hearing inter – parties.

The application is based on the annexed affidavit of Raimond Molenje Advocate and on the grounds that;

1. The claimant proceeded *ex parte* with the hearing of the claim on 23.4.2013 without serving the respondents Advocates on record who had filed a notice of appointment on 11.3.2013 and served it upon the claimant on 25th March, 2013 by registered post through the claimant's address of service being P. O Box 437 – 30200 Kitale.
2. The claimant proceeded to file a bill of taxation after judgment was delivered on 30.4.2013. That the Deputy Registrar served the respondents Advocates with the bill of taxation on 31.5.2013 confirming the fact that the respondents representation in this claim was duly known to the court when the matter proceeded *ex parte* without proper service being effected on the respondents advocates.

The respondents argue that they have an arguable defence raising credible legal issues that can only be canvassed at the inter parties hearing before final determination is made by the court. The respondents argue that their advocate had prepared a memo of defence due for filing and while awaiting to be invited for fixing the claim for hearing they were served with notice of taxation hearing by the court's Deputy Registrar. The respondents argue that they ought not to be prejudiced for no fault of its own because the circumstances leading to the *ex parte* hearing and the judgment were well beyond the respondent's control who had instructed it's advocates and a notice of appointment had been duly filed and served upon the

claimant. They argue that the orders they seek will not prejudice the claimants as the claimant would still have the opportunity to present her case during the inter parties hearing. They submit that it is in the interest of justice, equity and good industrial relations that this claim be heard on merit *inter partes*.

The respondents have attached appendix 1 – copy of Notice of Appointment of Advocate and Appendix 2 a copy of the court's filing receipt. The respondents however confirm that on 5.6.2013 the letter forwarding the notice of appointment was returned undelivered and the claimant should have provided reliable contacts including mobile telephone contacts to the court and the respondents advocates facilitating communication and service of process in this matter.

The respondent claimant opposed this application. She filed her replying affidavit on 24.6.2013. She contents that the matter proceeded for hearing *ex parte* on 23.4.2013. The respondent was served with a hearing notice at their North Rift Sub-Region office in Kitale and they acknowledged receipt. The affidavit of service was annexed thereof as proof of the said service. That prior to this, the respondent applicants had been served with summons to enter appearance but failed to do so as per App. **JSW 2** – a copy of the affidavit of service. That upon the respondent applicants failing to enter any appearance, the court fixed the matter for hearing as per **JSW 3** – a copy of the affidavit of service. The respondents were given ample time to respond and enter appearance but they failed to do so. She avers that she was never served with the notice of appointment and the one finally in court and was not dated. The respondent claimant avers that the applicant respondents continued to accept service at their offices in North Rift Sub-Region Kitale office yet they had appointed an advocate to act for them. They aver that this application is meant to delay and deny her the fruit of her judgment and that the respondents have no defence to this claim. She asked court to dismiss the application accordingly with costs.

Having considered the submissions of both parties, the issues for determination is whether the application has merit. From the court record, to applicants filed this claim on 4.2.2013. The respondents were served with summons to enter appearance, plaint, verifying affidavit and list of documents and witnesses on 5.2.2013. According to the Industrial Court procedure rules the respondents were therefore expected to file their response within 14 days from the time of service and this comes to the end of February 2013. However as at 8.3.2013, they had neither entered appearance nor filed their response. The suit was therefore fixed for hearing on 23.4.2013. The respondents were duly served again with a hearing notice for this date.

The respondent applicants contend that their advocates filed their notice of appointment of advocates in 11.3.2013. This was after pleadings had closed and they did not bother to come to court to seek leave to file their pleadings after time. In any case, they also never served the claimant respondent as expected. According to their exhibit 4, the certificate of posting, this was actually done on 30.3.2013 as the letter forwarding the notice of appointment is dated 25.3.2013. In any case, their letter was never received by the respondent claimant and was returned to them as they have stated. When the respondents were served with a hearing notice, the prudent thing would have been for their counsel to come to court and seek to be allowed to file their reply after time. This, they failed to do to their own detriment. The notice of appointment even if it was filed, was filed after pleadings closed and is irregularly on record. The respondents content that they have an arguable defence which defence they have not annexed.

To grant this application is to deny the claimant the fruits of her judgment which results from the respondents own neglect. I find the application has no merit and I dismiss it accordingly.

HELLEN WASILWA

JUDGE

2/07/2013

Appearances:-

Muasya for the respondent applicant

Claimant respondent – present in person

CC. Sammy Wamache