



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 90 OF 2012

BETWEEN

JACINTA MUTHINI KASIVI CLAIMANT

VERSUS

MARK MACHARIA RESPONDENT

Rika J

CC. Mr. Kidemi

Claimant Jacinta Muthini Kasivi in Person

Ms. Manegene instructed by Manegene and Partners, Advocates for the Respondent

RULING

1. An *ex parte* Award was made in favour of the Claimant Jacinta Muthoni Kasivi for the sum of Kshs. 70, 044 comprising terminal benefits and compensation for unfair termination. The Respondent Mark Macharia previously employed the Claimant as a Domestic Help.
2. The Respondent filed an application to set aside the Award, on the grounds: that he was served with the Memorandum of Claim without the Summons; he was never served with any Notice to attend Court, and did not therefore attend Court for the hearing; he was condemned unheard; was served with the warrants of attachment on 31st May 2013; was not informed on the date the Award was delivered; execution of the warrants had been initiated; the Court confirmed the Respondent was not heard; and it is in the interest of justice that this application is allowed. Macharia has sworn two affidavits in support of the application.
3. The application was heard on 31st July 2013. The Claimant swore an affidavit in reply to the application. The Process Server Charles Mwanzi, who effected service of the Court Processes at various turns in the proceedings, also filed an affidavit in reply to the application.
4. Upon careful consideration of the record, the Court is persuaded to disallow the application. Among the reasons upon which the Court has reached this conclusion are as follows:-
 - a. The Claimant acknowledges he was served with the Memorandum of Claim. He disputes service of the Notice of Summons, but the affidavit of the Process-Server, sworn on 30th January 2012 is

clear he was served at the Equity Bank Head Office, at Upper Hill Nairobi, on 30th January 2012. He does not dispute service of the Memorandum of Claim; he did not suggest to the Court when or where he was served with the Memorandum of Claim, or what he did with it upon receipt.

- b. The matter was mentioned in Court on 2nd March 2012 on procedural directions. There is evidence from the Process-Server that Mention Notice was served on the Respondent, alongside the Memorandum of Claim. Hearing date was fixed for 4th May 2012. The Respondent was served at his residential place within Valley Arcade in Nairobi. The Process-Server was even able to identify the Respondent's Vehicles, House Number and Security Guard on service. The Respondent did not attend Court on 4th May 2012, and the dispute was rescheduled to 16th July 2012, on the ground that the trial Court was not in session.
- c. Further hearings were scheduled for 9th November 2012 and 9th January 2013. On the latter date the Respondent was not in Court. He had been notified of this hearing date at his Valley Arcade home, on 29th November 2012. The Process-Server even called the Respondent through his cell-phone number [particulars withheld], who directed that the Hearing Notice be left with the Respondent's Security Guard.
- d. The Court did not sit on 9th January 2013, and the Claimant rescheduled hearing for 16th January 2013. The affidavit of service shows the Hearing Notice was served upon the Respondent once again at his Home. He did not attend Court on 16th January 2013. The Court ordered the hearing be stood over to 22nd February 2013, on the ground that the Notice for the hearing on 16th January 2013, was not served a clear 7 days before the hearing, and was insufficient to the Respondent. There is evidence the Respondent was notified of the rescheduled hearing, but opted not to participate in the hearing. The Court allowed the Claimant, finally, to proceed *ex parte*, on 22nd February 2013.
- e. The Respondent wrote a letter to the Deputy Registrar of the Industrial Court on 4th June 2013, complaining about the proceedings. He stated in this letter that he was aware of hearing on 7th November 2012, but that at the time, Judges were being vetted, and so the matter was not heard. He wrote that '*I visited the Courts.*' He suggests in this letter that he was at some point aware of the matter being heard, but does not say who notified him of this hearing date, which he states was on 7th November 2012.
- f. He also complained he was not informed when the Award was read. There is no obligation under the Industrial Court [Procedure] Rules 2010, to notify a Party who has not bothered to as much as enter an appearance, about the outcome of the *ex parte* proceedings.
- g. The Respondent confirms his cell-phone number, in the letter to the Deputy Registrar, as [particulars withheld], the precise number cited in one of the Process Server's affidavits of service, as having been the contact used to reach the Respondent.
- h. The Court is satisfied that the Claimant served the Respondent at the various times and places indicated in the affidavits of service. The Respondent did not deem it necessary to cross-examine the Process-Server on any of the numerous affidavits of service, or the affidavit sworn in reply to the application by the Process-Server. Macharia has been aware of the Claim filed against him from the outset, and has even visited the Court, at some point for hearing. The Court has ensured he is not denied the opportunity to be heard, but he did not accept the opportunity.
- i. The application to set aside raises no grounds that would merit the Court interfering with the Award on record. ***The application dated 9th June 2013 is dismissed with costs to the Claimant.***

Dated and delivered at Nairobi this 30th day of September 2013

James Rika

Judge