



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 156 OF 2017

CAROLINE NYAKERARIO.....CLAIMANT

VERSUS

SEO & SONS LIMITD.....RESPONDENT/APPLICANT

DIRECT 'O' AUCTIONEERS.....RESPONDENT

(CONSOLIDATED WITH ELRC CAUSE NOS. 149,150,151,152,153,154,155,157,158,158,162,163 AND 164)

RULING

1. The Claimants each instituted their suits against the Respondent which proceeded for formal proof and Judgment entered in favour of the Claimants as against the Respondent. The Respondent after judgment and with eminent execution by claimant through Direct 'O' Auctioneers, filed an application dated 27th May, 2021 seeking *inter alia* to stay further execution of the decrees issued in the matters and to set a side judgment and decree thereof alleging that it was not served with Notice of Summons, Memorandum of claims, hearing and judgment notices and Notice of Entry of Judgment.

2. In response to the Application, the Claimants filed a notice of Preliminary Objection dated 14th June, 2021 and filed in Court on even date and based on the following grounds;-

- 1) That the applications are obvious after thought and an abuse of Court process made to delay justice.**
- 2) That the applications disregarded the rules of service and consequences of nonappearance.**
- 3) That the applications herein are fatally defective as there is no draft response to the Memorandum of claim attached to the Application warranting a prayer to set a side judgment**
- 4) That the applications by Hashim and Lesaigor is incompetent as there is no notice of appointment of advocate or prayer to come on record as per order 9 Rule (7),(9) &(10).**
- 5) That the applications are time barred, unprocedural and an abuse of the Court process as they seek to restart a matter that already proceeded to conclusion.**
- 6) That the applications are marred with frivolity and vex as they intend to undermine execution proceedings.**
- 7) That the applications are inept, bad in law and a non- starter as the decretal amount is already partially paid denying the Curt jurisdiction to set aside the judgment.**
- 8) That the applications are fatally defective, lacks merit and mischievously crafted to mislead the Court and to flaunt due process and procedure.**

3. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned applications.

4. The Respondent (SEO & SONS) filed a replying Affidavit deposed upon by **Samow Edin Osman**, the director of the Respondent on the

15th June, 2021 on the basis that the preliminary objection raised does not raise a single question of law.

5. He stated that the Notice of Appointment was filed alongside their application of 27th May, 2021 and attached as annexure SEO-1 while a response to the claim is attached to the application as annexure SEO-2.

6. The preliminary objection was canvassed by way of written submissions with the Claimant filing on 30th June, 2021 and the Respondents filed on the 5th July, 2021.

Claimant's submissions

7. The Claimants submitted that preliminary objection are provided for under Order 2 Rule 9 of the Civil Procedure Rules and its rules are well settled in the celebrated case of **Mukisa Biscuits –v- West End Distributors and another [1969] eklr**.

8. The Claimants submitted that the Respondent was served with all pleadings in a local daily newspaper with leave of Court after personal service became futile. He argued that substituted service is a type of service which is recognized by this Court, however that the Respondent elected to forgo the opportunity to defend the suit and cited the case of **Mungai –v- Gachuhi and another [2005] eklr**

9. It is argued that the claimants were allowed by this Court (Lady Justice M. Mbaru) to proceed ex parte as the court was satisfied with the mode of service used which was in conformity with Order 10 of the Civil Procedure Rules. He reinforced its arguments by citing the case of **Board of management St Augustine secondary School –v- Chambalili Trading Co. Ltd [2021] eklr** where the Court faced with a similar application declined it.

10. The Claimants submitted that the Respondent though filed a Notice of Appointment and a draft defence the defence is based on mere denial with no basis raised that would convince this Court to exercise its discretion and set aside the judgment. He argued that the draft defence is a sham and cited the case of **James Wanyoike & 2 others -v- CMC Motors Group Limited & 4 others [2015] eklr**.

11. The claimant submitted that the Respondent/ Applicant on execution paid the Auctioneers herein a sum of Kshs.50,000/- being part payment of the decretal sum leaving a balance of Kshs 3,213,975/- which remained unpaid.

12. The claimant thus submitted that the preliminary objection raised is meritorious and urged the Court to allow it.

Respondent/ Applicant's Submissions.

13. The Respondent on the other hand submitted that the Claimants Preliminary Objection does not raise issue on pure points of law as was held in **Mukisa Biscuits case**. He argued that for the Court to ascertain that the issues raised in the preliminary objection is on pure point of law, the Court has to satisfy itself that there is no proper contest as to the facts, the facts are deemed agreed as presented in the pleadings.

14. He submitted that the preliminary objection is based on disputed facts and derived its information from factual information which stands to be tested by rules of evidence.

15. It is therefore submitted that the preliminary objection does not meet the threshold in **Mukisa Biscuits case** and ought to be dismissed with costs.

16. I have examined the averments of the parties herein. This ruling relates to the preliminary objection filed by the claimants herein opposing respondent's application to have Judgment entered against the respondent set aside and the respondents to be allowed to defend this claim.

17. I note that indeed the respondent's counsel came on record after Judgment had been entered against them and so they are basically on record irregularly as per Order 9 Rule 7, 9 & 10 of the CPA which states as follows;

“[Order 9, rule 7.] Notice of appointment of advocate.

7. Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.

[Order 9, rule 9.] Change to be effected by order of court or consent of parties.

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be. [Order 9, rule 10.] Procedure.

10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first”.

18. For the above reason, any application made by the respondent’s counsel without leave of court cannot be entertained.

19. I find this preliminary objection has merit and I allow it and dismiss the respondent’s application accordingly and order execution to proceed.

20. Costs to the claimants.

Ruling delivered virtually this 28TH day of **SEPTEMBER, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Lesaiyor for respondent present

Mwangi holding brief Owino for the claimant present

Court Assistant - Fred