



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**CAUSE NO. 1360 OF 2014**

**JAMES OPERE OTIENO.....CLAIMANT**

**VERSUS**

**MAJI NA UFANISI (WATER & DEVELOPMENT).....RESPONDENT**

**Mr Obok for Respondent/Applicant**

**Ms Otieno for Claimant/Respondent**

**RULING**

1. On 28<sup>th</sup> August, 2014, this court issued orders;
  - a. That the Respondent bears the cost of the Claimant's air travel at Kshs 16,730 and court adjournment fees of Kshs 400 on or before the next hearing date.
  - b. That the Respondent pays the Claimant his July 2014, salary amounting to Kshs 139,500 on or before 9<sup>th</sup> October, 2014.
  - c. That the Respondent to file a response to the main claim within 14 days.
2. The Respondent now seeks review of the order on grounds that new and important evidence has been discovered which was not within the knowledge of the Respondent as at the date the order was issued.
3. The Respondent argues that the court order was obtained by Claimant's Advocate through non - disclosure of a material fact known to her at the time.
4. That the amount was arrived at by adding Kshs 9,730 for Claimant's air travel from Malindi to Nairobi allegedly on flight 540 and Kshs 7,000 for her air travel from Nairobi to Malindi allegedly on Kenya Airways.
5. That the Advocate allegedly came to Nairobi on 28<sup>th</sup> August, 2014 purposely for the hearing of Claimant's chamber summons application dated 14<sup>th</sup> August, 2014.
6. That despite the readiness of the Respondent to proceed with the hearing of Claimant's led application, Claimant's Advocate on record insisted she was not ready to proceed because she had been served with the Respondents Replying Affidavit on the morning of 28<sup>th</sup> August, 2014 and needed to file a further affidavit.
7. That the matter was adjourned to 2<sup>nd</sup> October, 2014, and Claimant's Advocate provided Respondent's Advocate with copy of booking ticket Number 540 2301233160/01 ostensibly for air travel from Malindi

to Nairobi for hearing of the application.

8. That Respondent expected that the Claimant's Advocate would provide the Respondent booking ticket and receipts of payment for the return trip by close of business on 28<sup>th</sup> August, 2014 or at least the next day.

9. That it was not until 12<sup>th</sup> September, 2014 that Claimant's Advocate furnished what she termed as booking ticket number 7005447500368C1 allegedly for Air travel from Nairobi back to Malindi. This was supposed to evidence a flight that took place on 2<sup>nd</sup> September, 2014 from Nairobi to Malindi.

10. That 2<sup>nd</sup> September, 2014 is 5 days from 28<sup>th</sup> August, 2014 when Claimant's application came for hearing.

11. That this new evidence is proof that Claimant's Advocate did not travel to Nairobi purposely to attend the hearing of Claimant's application and therefore it is not true, but for this application she would not have been in Nairobi.

12. That there was a deliberate concealment by the Claimant's Advocate of the full purpose of the Nairobi tour which lasted five days.

13. That it is oppressive for the Respondent to be condemned to pay for Claimant's Advocate's trip which clearly was not solely for purpose of attending court.

14. That the documents provided were for a sum of Kshs 17,400 which is more than the court ordered.

15. For the aforesaid reasons the order of the court awarded on 28<sup>th</sup> August, 2014 be reviewed and set aside.

16. The court further granted Claimant prayer 3 without hearing the Respondent ostensibly, because the Respondent had not paid court adjournment fees of Kshs 400 inspite that the Respondent went and paid the amount while the file had been put aside.

17. The order for payment of Claimant's July salary ought not be granted at interlocutory stage in view of the Replied Affidavit filed on 27<sup>th</sup> August, 2014 contesting the same.

## **Response**

18. Claimant/Respondent submits that the order for payment of the return air ticket and court adjournment fees was premised on late filing of the Respondent's pleading and service at 9.30. a.m. on the day of the hearing yet the Respondent had been served on 15<sup>th</sup> August, 2014.

19. The orders were made in the presence of counsel for the Respondent and he did not contest or protest such orders being issued.

20. That it is a knee jerk reaction to try and circumvent disobedience of court orders by filing this present application.

21. The counsel for Claimant insists that she came by air on 28<sup>th</sup> August, 2014 to Nairobi to conduct this matter and returned by air on 2<sup>nd</sup> September, 2014. Boarding passes and air ticket invoice marked (J003) were provided to the Respondent.

22. That the order of the court ought not to be vacated simply because counsel for the claimant delayed her return to Malindi. The flights back to Malindi over weekend and month end are difficult to get and counsel obtained the nearest possible flight back. That the allegations by counsel for Respondent that

counsel came to Nairobi for holiday is malicious and without basis.

23. The Claimant submits that counsel for the Respondent admitted on 2<sup>nd</sup> October, 2014 that the Respondent had not complied with the order of the court issued on 28<sup>th</sup> August, 2014 and the court was right to deny the Respondent audience for failure to comply with the Court order.

24. The Claimant sought interim orders to be paid July 2014, salary pending the hearing of the main suit. The Respondent has admitted in the replying affidavit dated 27<sup>th</sup> August, 2014 that the Respondent had not paid the Claimant the July 2014 salary and other terminal dues.

25. The Respondent does not show the prejudice it would suffer in paying the Claimant his July 2014 salary.

### **Determination**

26. In the Replying Affidavit of Prof. Edward Kairu at paragraph 6 of the Replying Affidavit deposes as follows:

*“the Claimant’s services were lawfully and procedurally terminated with effect from 1<sup>st</sup> August, 2014 vide letter dated 1<sup>st</sup> July, 2014 and so he was entitled to one month salary in lieu of notice and terminal dues which amount he has not collected because he has not completed the handing over process”*

27. Professor Edward Kairu is the Executive Director of the Respondent and has admitted that the Respondent owes the Claimant salary for July, 2014 which was the notice period. It is therefore not correct that the court over looked the contents of the Replying Affidavit in making the orders on 2<sup>nd</sup> October, 2014.

### **Non Compliance with Court Order**

28. It is not in dispute that the Respondent as of 2<sup>nd</sup> October, 2014 had not complied with the court order to pay wasted costs and court adjournment fees as a result of the late filing and service of the Replying Affidavit which was done in the morning of 28<sup>th</sup> August, 2014 when the Application was set for hearing interpartes.

29. The court was justified to deny the Respondent audience until it complied with the court order fully.

30. Unsubstantiated allegations which hinge on the character of the counsel for the Claimant that she had not come to Nairobi on 28<sup>th</sup> August, 2014 solely to conduct this suit cannot constitute new evidence in terms of Rule 32(1) of the Industrial Court (procedure) Rules 2010, to warrant a review of the orders granted on 28<sup>th</sup> August, 2014.

31. The facts of the matter speak for themselves and are not in dispute. Counsel travelled from Malindi to Nairobi to attend to this case. The Respondent did not file the Replying Affidavit timeously and in fact served the Claimant’s counsel in court and counsel for the claimant was forced to seek an adjournment of the matter. Wasted costs arising from the late filing of the replying affidavit by counsel for the Respondent were well deserved.

32. The issues raised by Counsel for the Respondent to avoid compliance with the court order are extraneous and not material to warrant vacation of the court orders dated 28<sup>th</sup> August, 2014. The Application is dismissed with costs in the cause.

33. The main suit be heard by any other Judge.

**Dated and Delivered at Nairobi this 27<sup>th</sup> Day of May 2015**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**