

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NO. 6 OF 2012

MICHAEL JUMA OTIENO.....PETITIONER

VERSUS

EXECUTIVE DIRECTOR NON GOVERNMENTAL

ORGANIZATIONS CORDINATION BOARD.....RESPONDENT

R U L I N G

The amended notice of motion dated 10-4-2014 prays for the following orders:

1. **Stay of execution of the judgment dated 10-3-2014.**
2. **Setting aside the proceedings and judgment passed on the 10-3-2014 against the respondent and all the consequential orders.**

The respondent herein had filed this constitutional petition seeking among others documentary proof on how it had procured the legal services from the firm of Otieno, Yogo & Co. Advocates. The court proceeded to find judgment in his favour as the applicant herein failed to file any response after being served.

The affidavit of Mr. Yogo Advocate in support of the application herein does not deny that the applicant was served but he attributes the failure to respond to the petition on a “confusion in the offices of the respondent”. This was not explained at all.

The respondent filed a replying affidavit in opposition to the application. He argued that there was no good reason advanced by the applicant as to why it failed to counter the petition. He further contested the supporting affidavit of Mr. Geoffrey Yogo arguing that he, being the counsel for the applicant has contested on factual issues which goes contrary to the law. He stated that it was the applicant who ought to have filed the necessary response.

I have perused the application as well as the judgment of my brother Judge Muchelule delivered on 10-3-2014. There is no doubt that the applicants were served as truly found by the learned Judge. The issues raised borders on the right of a citizen pursuant to the provisions of Article 20, 23 (1), 35 (1), 73, 165 and 227 of the Constitution of Kenya 2010.

The reason for failing to respond are not plausible at all. Once a party is served, unless he intends not to oppose or even where he does not intend to oppose it is expected that he must enter appearance. Secondly, I do agree with Mr. Amondi’s submission that Mr. Yogo ideally cannot respond to factual issues as he has done in the supporting affidavit as he is not an employee of the applicant. How does he know that the respondent/applicant was served or not? How does he explain the “confusion” at the applicants offices unless he works there. It is unethical for counsel to descend into an arena of a client as he risks cross examination over the issues he may not answer.

Should the applicant be dismissed from the judgment seat? This is a constitutional petition. It is not an ordinary suit.

The issues raised are weighty and heavy in nature. It traverses the Constitution and above all the Public Procurement and Disposal Act, an Act which is developing at a very fast pace in our jurisprudence. In

Shah –VS- Mbogo, [19767] EA 116, this court is granted as was established in that authority, the discretion to allow such an application albeit conditionally if need be.

It is appreciated that the applicant has brought this application expeditiously and within a reasonable time. Equally, concerning the nature of the application I do not think that it would be farfetched to suggest that it is capable of meeting any costs that may be incurred by the respondent.

I shall therefore allow the application by setting aside the judgment delivered on 10-3-2014. The respondent shall have the costs of this application and further pay to the said respondent throw away costs of Kshs. 12,000/= within 14 days from the date herein.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

H.K. CHEMITEI

JUDGE