



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 112 OF 2016

(Before D. K. N. Marete)

ALOYS MATAYA MOSETI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....RESPONDENT

RULING

This is an application by the respondent/applicant dated 22nd January, 2018 seeking the following orders of court;

1. *THAT, the present application be certified urgent and initial service of the same be dispensed.*
2. *THAT, the Honourable court be pleased to grant orders to stay the execution of the decree against the respondent/Applicant by way of a Notice to show cause pending the final determination of the present application together with the respondent/applicant's application dated march 2017.*
3. *THAT, the respondent/applicant's interrogatory application by way of Notice of Motion dated 30th March, 2017 be accorded priority as to its hearing and final determination.*
4. *THAT, the respondent/applicant be granted liberty to defend the claimant/applicant's claim.*

It is grounded as follows;

1. ***THAT***, there is imminent threat of execution by the claimant/respondent against the respondent/applicant in a sum exceeding Kshs.1,700,00.00.
2. ***THAT***, the claimant/respondent neglected and/or failed to serve the relevant notices before the present claim was determined.
3. ***THAT***, the proceedings against the respondent/applicant went on ex-parte.
4. ***THAT***, the respondent/applicant had lodged a vital application dated 30th March, 2017 which application is yet to be determined and who possible outcome will tilt the balance of this claim in favour of the respondent/applicant.
5. ***THAT***, the principles of Natural justice do demand that a party be granted hearing in opposition or otherwise.
6. ***THAT***, the intended execution against the respondent/applicant will cause the county hardship and will render the present proceedings nugatory.
7. ***THAT***, the respondent/applicant will furnish adequate security as may be ordered and/or directed by the Honourable Court.
8. ***THAT***, the costs be provided for.

The claimant/respondent in a Replying Affidavit sworn on 26th January, 2018 opposes the application and prays that it be dismissed with costs.

The application came for hearing on 18th May, 2018 when the parties agreed on a determination on the basis of their pleadings on record.

The respondent/applicant bases this application on the ground that there is an imminent threat of execution by the claimant/respondent to the tune of a sum exceeding Kshs.1,700,000.00. This, she avers is a consequence of an ex-parte determination by court in which she was not served with the relevant notices.

The applicant further avers that she had lodged an application dated 30th March, 2017 which application is yet to be determined and whose outcome will tilt balance of the claim in favour of the respondent/applicant.

It is her penultimate averment that the intended execution against the respondent would cause hardship to the county and render the present proceedings nugatory. She undertakes to furnish adequate security as may be directed by this court.

The claimant/respondent's case is that from the onset, the respondent/applicant was served with a Notice of Summons dated 1st July, 2016. These summons were accompanied with mention date for 14th July, 2016 and a rider that unless the respondent filed a response within 14 days, the claim would be heard and determined in their absence. An affidavit of service sworn on 11th July, 2016 was filed to this extent.

It is the claimant/respondent's further case that the respondent/applicant was subsequently served with all motions and notices but did not yield. This is as follows;

- By 14th July, 2016 the date the matter was fixed for mention the respondent had not filed any response whatsoever.
- On 14th July, 2016 the matter was fixed for hearing on 9th December, 2016. This is the time when the respondent filed a Notice of Appointment of Advocate through counsel holding her brief. No response had been had in the matter.

Again, counsel submitted that he had just received instructions and prayed for time to seek an out of court settlement in the matter. This was granted. The respondent however did not pursue this course or at all.

- On 16th December, 2016 the matter came for mention before court but the respondent was absent. This is despite the date having been taken in court *inter partes*.
- On 26th January, 2017 the respondent's advocate submitted that negotiations were in progress despite the fact that the claimant was not so involved. No report on negotiations, or at all was adduced.
- On 21st March, 2017 a date taken by the parties counsel for the respondent was absent but had requested a Mr. Rugut to hold his brief with a request for a further date as he was unwell. We objected to this and the court upheld our objection with directions that the matter proceeds to hearing.
- The respondent filed an application dated 30th March, 2017 with a view to hoodwinking the court and also delaying the determination and finalization of this claim. This was fixed for hearing on 28th September, 2017 and in the absence of counsel for the respondent, the application was dismissed for want of prosecution.

It is the claimant/respondent's averment that the issues raised in this application are a consequence of the laxity and belligerence of the respondent/applicant in the prosecution of the claim the causative of this application. She has been indolent through and through and this should not be rewarded. She avers that this application is not meritorious and should be dismissed with costs.

I agree with the sentiments of the claimant/respondent. This is not an application deserving of consideration. The respondent has been overtly negligent in the prosecution of her defence of the claim. She cannot on the eleventh hour be heard to plead for mercy or indulgence. Equity aids the vigilant and not the indolent. This is a long time warning to careless litigants and others who seek recourse on equity.

This application cannot stand the test of the day. It fails *in toto*. It is not deserving of any positive attention. Let the applicant reap the fruits of her own indolence. This would be an everlasting reminder of the requisitions of justice and equity under all (such) circumstances.

I am therefore inclined to dismiss the application with costs to the claimant/ respondent.

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Thomas N. Maosa instructed Maosa & Company Advocates for the respondent/applicant.
2. Mr. Onchwang'i instructed by Ogutu-Mboya & Company Advocates for the Claimant/respondent.