



AON Hauliers Limited v Ngele (Suing as the Administrator of the Estate of Jason Mwachienda (Deceased)) & another (Miscellaneous Application E048 of 2024) [2024] KEELRC 2805 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2805 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E048 OF 2024
M MBARŪ, J
NOVEMBER 14, 2024

BETWEEN

AON HAULIERS LIMITED APPLICANT

AND

AIMAA HABIBA NGELE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JASON MWACHIENDA (DECEASED)) 1ST RESPONDENT

NDUTUMI AUCTIONEERS 2ND RESPONDENT

RULING

1. The applicant filed an application dated 26 September 2024 under the provisions of Order 22 Rule 25, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules seeking orders;
 1. Spent.
 2. Spent.
 3. Pending hearing and determination of the 1st respondent's application dated 17 May 2024 this court be pleased to issue an order of stay of execution of the decree issued on 16 August 2024 and the orders issued on 11 July 2024, the warrants of attachment and the consequential orders and further to stop the sale by auction, transfer and or disposing of the motor vehicle registration KBU 393Q.
 4. This court be pleased to grant the application leave to respond to the 1st respondent application dated 17 May 2024 and 27 July 2024.
 5. The court be pleased to order for the unconditional release of motor vehicle registration KBU 393Q to the applicant.



6. The court be pleased to issue orders setting aside the decree and orders of this court issued on 16 August 2024 and orders issued on 11 July 2024.
7. Costs of this application be awarded to the applicant.
2. The application is supported by the Affidavit of Farhan Rizzik Abeid, a director of the application who aver that through applications dated 17 May 2024 and 27 July 2024, the 1st respondent moved the court ex parte seeking for the adoption of the award of the Director made on 24 July 2023. The 1st respondent deliberately misled the court by concealing the fact that the parties herein had agreed to settle the matter amicably outside court and in fact, the application had facilitated and made payment of Ksh.972, 500 to the 1st respondent.
3. Abeid avers in his Affidavit that the applicant was not in court at the hearing of application dated 17 May 2024 and 27 July 2024. The applicant instructed advocates to file a response to the applications but they failed to attend. The hearing proceeded ex parte.
4. On 2 July 2024, the court allowed the application and warded the 1st applicant Ksh.1, 920,000 and through the 2nd respondent, the 1st respondent proceeded to proclaim against the applicant.
5. On 23 September 2024, the 2nd respondent took possession of motor vehicle registration KBU 393Q the property of the applicant and sought payment of a decree issued on 2 August 2024. The total claim was for ksh.1, 920,000.
6. The mistake of advocates to attend court and respond to the 1st respondent's applications should not be visited against the applicant. Before obtaining the award of the Director on 24 July 2023, the parties had agreed to settle the matter amicably. On 31st August 2020, the application paid the 1st respondent Ksh.250, 000 and on 27 October 2023 paid ksh.722, 500. It was agreed that the 1st respondent would not have any further claims against the applicant. Unless the orders sought are granted, the applicant will suffer loss and damage.
7. In reply, the 1st respondent filed his Replying Affidavit and aver that the instant application is an abuse of the court process and should be dismissed with costs. The applicant has no proper standing to bring this application under Order 9 rule (c) of the Civil Procedure Act. There is no letter of authority to attend produced by Mr. Abeid.
8. The 1st respondent aver that through his application dated 17 May 2024, he requested the court to adopt the award of the Director for Ksh.1, 920,000. The application was served but the applicant failed to attend court or file any response. The applicant has admitted service save to blame the advocates who failed to attend. Where the applicant instructed advocates who failed to attend, recourse is to the Advocates Complaints Commission. The applicant had a duty to attend court as directed but failed to do so and the court proceeded as necessary and adopted the Director's award.
9. The 1st respondent aver that the cause of action arose on 18 September 2019 following a fatal road accident. The deceased was ferried for burial to Busia and the applicant gave Ksh.250, 000. This was the applicant's contribution towards burial expenses and not an award for the death.
10. The applicant gave Ksh.722, 500 on 27 October 2023 and claimed it was from Fidelity Insurance after deducting Ksh.250, 000 which had been given as a contribution towards burial expenses. The discharge voucher was signed by force and was not in full payment of what the Director had awarded.
11. The applicant through coercion and undue influence forced the 1st respondent to sign an agreement on 27 October 2023 for Ksh.722, 500 instead of Ksh.1, 920,000. The applicant was well aware that this payment was less than what was lawfully due and should not be allowed by the court to evade full



settlement. The execution proceedings and attachment of Motor Vehicle KBU 393Q is proper and regular for payment of Ksh.1, 197,500 which the applicant has failed to pay in full.

12. In his Further Affidavit, Abeid aver that he is a director of the applicant and has full authority to attend herein.
13. The deceased, Jason Mwacheda was an employee of the applicant who suffered fatal injuries while on duty on 18 September 2019 at Malaba. At the time of the accident, the applicant was insured with Fidelity Shield Insurance. Following the death, to assist the family, the applicant agreed to pay the widow, 1st respondent the sum of Ksh.250, 000 and to take responsibility for all the burial expenses. To settle the matter, parties signed an agreement on 31st August 2020 but in June 2023, a man Daniel Kingwele contacted the applicant and stated he was the uncle of the deceased and was seeking compensation. Discussions were held between the widow, the mother and the uncle and the applicant wrote to the insurer and compensation was agreed upon at 50% of what the Director had assessed for Ksh.972, 500. On 27 October 2023, the applicant met with the deceased family who signed a discharge voucher and agreement for payment of Ksh.970, 500 less what had been received earlier at ksh.250, 000.
14. Despite the agreement, the respondents proceeded to file this suit. The applicant instructed advocates to attend and give a response, but the advocates failed to attend court.
15. The respondents have proceeded to proclaim motor vehicle KBU 393Q the property of the applicant without material disclosure of the payments received and the settlement agreement.
16. Both parties attended and made oral submissions in court.

Determination

17. The applicant has admitted that the applications dated 17 May 2024 and 27 July 2024 were served. They instructed advocates who failed to file any responses or attend court.
18. The applicant has also not denied that the deceased was an employee and upon death, the Director assessed compensation under the [Work Injury Benefits Act](#) at ksh.1, 920,000.
19. The 1st respondent has admitted that there was payment of Ksh.250, 000 for burial expenses and a further payment of Ksh.972, 500. The contest is that the payment and agreement in settlement were obtained through coercion and the applicant is yet to pay the full amount hence the execution proceedings by the 2nd respondent.
20. The non-attendance of the applicant's advocate to respond to applications dated 17 May 2024 and 27 July 2024 should not be blamed on the 1st respondent. There was proper service. The applicant as the cited respondent had a duty to ensure the instructed advocates attended court and if this was not addressed, ensure personal attendance to secure its rights. The averments that the mistake of the advocate should not be visited against the client is not a panacea for all ills and in every situation. The applicant had a duty to follow through with the instructed advocates on the appointed dates to find out the outcome of the expected court attendance.
21. The court in the case of Thomas Ratemo Onger, Paul Ondigi Onger & Charles Moriga Onger v Zachariah Isaboke Nyaata & Augustino Obaigwa Nyakundi [2014] KEHC 6773 (KLR) defined the non-attendance of an advocate in court as professional negligence. Upon instructions by a client, the advocate had a duty to attend. The court held that;

... Generally, in a case of this nature, the clients of such advocates should be directed to seek remedy from the advocates concerned instead of inconveniencing other parties and



the courts. If the courts continue entertaining applications of this nature, it would be encouraging professional negligence among advocates.

22. In the case of Jack K. Githae v Kenya Commercial Bank Limited & Watt Enterprises [2011] KLR the court held that where an advocate is given instructions by a client, there is a professional duty to attend. Failure to address this amounts to professional negligence. Such negligence should be addressed with the Advocates Complaints Commission.
23. The 1st respondent attended court and the award by the Director for the sum of Ksh.1, 920,000 was confirmed as due and payable by the application.
24. The purpose of Section 10 of the WIBA would be lost if the applicant is insured and where there is a work injury, such cover is not utilized. The gist of the assessment by the Director is to secure the rights of an employee injured at work. The award is payable by the employer upon notice. Where the employer is not satisfied with the assessment, objections are allowed or an appeal is held in the case of [*Law Society of Kenya v The Attorney General & COTU Petition No.4 of 2019*](#).
25. In this case, a consent agreement cannot be applied to negate the award by the Director. This undertaking must be audited vis-a-vis the provisions of Section 35(4) of the [*Employment Act*](#) even where this relates to work injuries.

Where parties agreed to settle the Director's award outside court, this should have been sanctioned by the Director.

26. In totality, the 1st respondent too should have disclosed the fact that there was a payment of Ksh.250, 000 which was acknowledged through an agreement dated 31st August 2020.
27. The 1st respondent only disclosed the payment of ksh.722, 500 under paragraph (7) of the Supporting Affidavit dated 17 May 2024.
28. Cumulatively, from the award by the Director of Ksh.1, 920,000, the total due is Ksh.947,500.
29. The application seeking payment of Ksh.1, 920,000 failed to disclose these full facts. This resulted in the Decree dated 16 August 2024 based on an erroneous figure of Ksh.1,920, 000 instead of Ksh.947, 500. The 1st respondent's failure to bring out the full facts of the matter cannot be sanctioned through the execution proceedings commenced by the 2nd respondent for the sum of Ksh.1,199,500 which fails to include the sum of Ksh.250,000 already paid and acknowledged by the 1st respondent.
30. Ultimately, the failure to attend court by the applicant resulted in the orders issued on 2 July 2024 on the facts presented in court. Equally, the erroneous figures submitted by the 1st respondent resulted in the higher award instead of the correct amounts. For costs due to the 2nd respondent, the applicant and the 1st respondent shall each pay 50%.
31. The application by the applicant dated 26 September 2024 is with merit to the extent that the payment due is Ksh.947, 500 to the 1st respondent. This amount is payable within the next 30 days.
32. The 2nd respondent shall unconditionally release the applicant's motor vehicle KBU 393Q.
33. Costs due to the 2nd respondent are to be taxed and paid by the applicant and 1st respondent each at 50%.

Orders accordingly.

DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14TH DAY OF NOVEMBER 2024.



M. MBARŪ
JUDGE

