



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 256 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS AND ALLIED

WORKERS UNION.....CLAIMANT

VERSUS

ANOOP GARG.....1ST RESPONDENT/APPLICANT

UMAKANT J. DAVE.....2ND RESPONDENT

DAVES CATERING.....3RD RESPONDENT

RULING

1. By its application dated 29th September 2020, the Applicant/1st Respondent seeks the following orders

a) Spent.

b) That this Honourable Court be pleased to stay the execution of the decree and warrants of attachment and any consequential orders thereto against the 1st Respondent/Applicant pending the hearing and determination of this Application.

c) That this Honourable Court be pleased to stay the execution of the decree and warrants of attachment and any consequential orders thereto against the 1st Respondent/Applicant pending the bearing and determination of the cause de novo.

d) That the judgment delivered on the 17th July 2020 be set aside.

e) That leave be granted to the 1st Respondent/Applicant to unconditionally defend the cause.

f) That the costs of this application be provided for.

2. The grounds in support of the application as set out on the face thereof and in the supporting affidavit of ANOOP GARG, the 1st Respondent are that he was never served with summons and was surprised when he received copies of decree and warrants of attachment on 25th September 2020 at his house in Parklands Estate from a person alleging to be from Mbusera Auctioneers.

3. It is his averment that he was not a partner, but an employee of Daves Catering, the 3rd Respondent, earning a monthly salary. He avers that the Grievants were employed by the 3rd Respondent, a partnership duly registered under Registration Certificate No. 369069 and whose partners are Dave Umakant Jaidev, the 2nd Respondent herein and Dave Samirkumar Umakant.

4. That he was an employee who is also still owed unpaid employment dues, like the grievants. He avers that he stands to suffer substantial loss in the event the prayers sought in his application are not granted.

5. The Applicant has attached a copy of his bank statement from Bank of India – Kenya, Westlands Branch wherein he has highlighted entries of payments by cheque which he avers are his salary cheques.

6. The Claimant/Decree holder opposes the application and filed a replying affidavit of Paul M. Kamanzyu sworn on 12th October 2020. The

replying affidavit is referred to in the submissions by both parties but no copy is on the Court Portal or file.

7. The ruling was deferred from 2nd February to 17th February 2022 and the Court directed the Respondent to provide a copy of the replying affidavit but none has been submitted to the Court as at the date of delivery of this ruling.

8. I have considered the application, the grounds and affidavit and further affidavit of the Applicant. I have further considered the submissions filed by both parties. The issues for determination are whether or not the Applicant was a director or employee of the Respondent and whether he is entitled to the orders sight.

9. The certificate of registration of Dave's Catering, the 3rd Respondent annexed as appendix "AG4" to the affidavit of the Applicant shows that the same is registered under the Registration of Business Names Act and the proprietors thereof are Dave Umakant Jaidev and Dave Samirkumar Umakant. The 1st Respondent's name does not appear in the registration certificate.

10. The Applicant further produced his bank statements which has entries of cheques clearances and cash deposits which the Applicant states were his salary.

11. The Applicant further produced a copy of the lease agreement between Dave's Catering is referred to as the Caterer and Nairobi Gymkhana (referred to as the Club) which is signed for Daves Catering by Umakant J. Dave in his capacity as a partner.

12. From the foregoing, I am satisfied that the Applicant was wrongly joined as a Respondent in this suit as he is not a partner in the business by the name Dave's Catering, the 3rd Respondent herein.

13. The Court has wide powers to set aside its judgments and orders as was stated in the case of **Philip Keptoo Chemwolo & another v Augustine Kubende [1986] eKLR** where it was held citing with approval the English Case **of Evans v Bartlam, [1937] AC 473: -**

"The discretion is in terms unconditional. The courts however

have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence.

The reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of the coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

14. In **Shah v Mbogo & another [1967] E.A.** it was held that:

"The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused."

15. In this case the Applicant states that he was never served with summons to enter appearance and only learned about the judgment when he was served with the proclamation and decree by the auctioneer. That he had been aware of the suit he would have filed a defence. He has annexed a draft memorandum of reply, which however, I would consider to be mere denials of the averments in the amended memorandum of claim.

16. From the totality of the evidence on record, I am satisfied that the Applicant was an employee of the 3rd Respondent and therefore was wrongly joined to this suit.

17. I am further satisfied that the Applicant was never served with summons to enter appearance and that the judgment against him was irregular.

18. It is for these reasons that I find merit in the application and make the following orders: -

(i) The judgment herein in respect of the 1st Respondent ANOP GARG who is the Applicant herein is set aside and his name is struck out of the proceedings herein.

(ii) The judgment in respect of Umakant J. Dave and Dave's Catering, the 2nd and 3rd Respondents is not affected by these orders.

(iii) There shall be no orders for costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE