



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC. APPLICATION NO.E131 OF 2021

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DR. JOSEPH MAINA MACHANGI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF

NYANDARUA & 2 OTHERS.....RESPONDENTS

RULING

1. The Applicant/Respondent first filed a notice of motion application dated 23rd July, 2021.

The application was ex-parte and sought to order the Respondent to deposit Kshs.641610/= at the applicant's account number 0150147192400 Standard Chartered Bank being salary of May, 2021, June and July.

2. The court persuaded by the pleadings and evidence on record and as the Respondent did not controvert the evidence having not filed their response proceeded to grant the prayers on 17th August, 2021.

3. The Applicant/Respondent came to court by way of their notice of motion in application dated 15th November, 2021 and prayed that the court set aside or review its orders issued on 17th August, 2021 in favour of the Respondent/Applicant pending the hearing and determination of this application interparties.

4. The respective parties appeared before the court on 7th December, 2021 and presented their oral submissions. They were given an opportunity to put in their respective responses and/or submissions within 14 days each.

5. The court did not receive any such responses from any of the parties apart from an application by the applicant of 12th January, 2022 seeking for summons to issue against members of County Government and a warrant of arrest to issue against the said persons **KEVIN IKIA the ATTORNEY GENERAL/COUNTY SECRETARY OF HEAD OF PUBLIC SERVICE, MR. STEPHEN NJOROGI** the County Executive Committee member of Finance and Economic.

Development and Dr. James N. Karit the County Executive Committee Member of Agriculture and Livestock.

The warrant of arrest was to issue against the above persons for failing to obey the court orders.

6. The matter was in court on 20th January, 2022 and Applicant/Respondent was ordered to serve the application and Respondent to respond within 7 days. Matter was placed before this court for further directions.

Meanwhile the Ruling for the application dated 15th November, 2021 was also to be delivered on 9th February, 2022.

7. The court will handle the Ruling for the application dated 15th November, 2021 as whatever the court rules will impact on the application of 12th January, 2022.

The Applicant/Respondent is praying for the following:-

(1) The court to set aside/review its orders issued on 19th August, 2021 (was actually 17th August, 2021) in favour of the

Respondent/Applicant against the Applicant/Respondent's in their entirety pending hearing and determination of this application interparties.

(2) That the Honourable court grant the Applicants/Respondents leave to file and serve their respective responses to the Notice of Motion dated 23rd July, 2021.

(3) Costs be borne by the Respondent.

8. The Applicant/Respondent averment is that the order was entered ex-parte pending arbitration proceedings in favour of Respondent/Applicant against Applicants/Respondents.

9. That the Respondent/Applicant failed to disclose to the court that his employment with the Applicant/Respondent had been terminated and misled the court to believe his salary had been stopped.

He says he failed to disclose to the court his last salary had been paid in April, 2021.

10. They pray that the case be heard interparties to allow the parties canvas their case with facts and evidence.

11. I have considered the application by the Applicant/Respondent of 15th November, 2021 and the verifying affidavits. Unfortunately the Respondent/Applicant did not put a response and the respective parties did not file their submissions.

The Applicants/Respondents pray for the review/or setting aside of the ex-parte Ruling of 17th August, 2021.

12. Section 33 of Employment and Labour Relations court Rules provide review is considered by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, within a reasonable time apply for review of a Judgment or Ruling.

The same is applicable among others where there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time the decree was passed or order made.

13. The Applicant/Respondent states that the Respondent/Applicant misled the court in that in his ex-parte application of 23rd July, 2021 he never informed the court his employment had terminated by April, 2021 and he had been asked to go back to his mother ministry.

14. The Applicant/Respondent did not see the application until his advocates were served with the court order on 19th August, 2021. The advocate says she did not see the email that served the application because of too many emails in her dockets and very busy schedules. She says the mistakes of an Attorney should not penalize the client.

15. The Ruling which I delivered was not challenged and this application is not premised on irregular or erroneous Ruling. The Application is made on the ground that for some reason the Applicant did not see the application of the Respondents/Applicants due to many emails in her docket as the Attorney of the County Government of Nyandarua. She therefore did not put in a response and the application proceeded ex-parte.

16. They claim that they have triable issues and pray for opportunity to be heard.

With the support of Section 33 of the Employment and Labour Relation Court Rules and other case laws power to set aside or review Judgment or Ruling is discretionary.

In the case of **GULF FABRICATORS VS COUNTY GOVERNMENT OF SIAYA NO.10 OF 2019** the court held that the principles upon which such discretion is to be exercised were set out by court of appeal in **PHILIP KIPTOO CHEMWOLO & MUMIAS SUGAR CO. LIMITED VS AUGUSTINE KIBENDE (1982 – 1988) KAR 1036** where it was held citing with approval English **CASE OF EVANS VS BARTAM (1993) Ac. 473** that the discretion is in terms of unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where judgment was entered regularly there is an affidavit of merits meaning the Applicant must produce to court evidence that he has a prima facie case.

17. In **SHAH V, MBOGO & ANOTHER (1967)E.A** it was held that “the court’s discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from incidents of inadvertence or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.

18. In the case of **GULF FABRICATORS VS COUNTY GOVERNMENT OF SIAYA** the court held that justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues unless it can be demonstrated that the party is merely delaying or obstructing the cause of justice.

19. In the **CASE OF WILLIAM NTOMAUTA M’ETHENYA VS BAIKIAMBA KIRIMAMA (2017) eKLR** the Court of Appeal held in setting judgment aside that was regular despite their being proper service held that.”

The main concern of court is to do justice to the parties and it ought not impose conditions on itself to fetter the wide discretion.”

20. The court also invoke Article 159 of the Constitution in order to render substantive justice.

21. In conclusion it is the court's decision that it is fair and reasonable to give all the parties an opportunity to be heard on merits. The court has painstakingly considered the various applications by the respective parties and is persuaded this is a case it can exercise its discretion to set aside its order delivered on 17th August, 2021 in their entirely pending hearing and determination of this application.

22. The Honorable court grants hereby the Applicant/Respondent leave to file and serve their respective responses to the notice of motion application dated 23rd July, 2021 within 14 days of this Ruling and Respondent/Applicant to respond within 14 days of service. Mention on 23rd March, 2022 for further directions for this application as well as the application dated 12th January, 2022 on 23rd March, 2022.

The Applicants/Respondents has been slothful in the matter and there has been unreasonable delay. They are to pay throw away costs to the Respondent/Applicant of these proceedings of Kshs.50,000/= to be paid before the next mention date.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE