



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. E096 OF 2021

NORAH MBITHE JOSEPH..... CLAIMANT

VERSUS

NAIROBI AVIATION1ST APPLICANT

AVIATION FM LIMITED..... 2ND APPLICANT

JESUS TEACHING MINISTRY.....3RD APPLICANT

RULING

1. Application dated 23rd August, 2021 seeks for orders that:-

1. Spent
2. Spent

3. That the interim orders entered against the 1st, 2nd and 3rd Applicants in this matter on 15th July, 2021 and all consequential orders be set aside and the 1st, 2nd and 3rd Applicants be granted leave to file its Response to the Respondent's application dated 22nd June, 2021 within fourteen (14) days of the Order hereto.

4. That the costs of the Applications be awarded to the 1st, 2nd and 3rd Applicants.

2. The Application is premised on grounds set out on the face of the Notice of Motion to wit that the applicants were not aware of the exparte proceedings that took place on 12th July, 2021 since the advocates on record M/s Wangui Kuria & Co. Advocates had not been served with the application dated 22nd June, 2021 nor a hearing date for the same.

3. That it is in the interest of justice that the interim orders issued on 15th July, 2021 be set aside and the applicants be granted leave to file its response to the Respondent's application dated 22nd June, 2021.

4. The application is further supported by affidavit of Benedictor Mambili, the Manager for the 3rd respondent who deposes that the firm of Wangui Kuria and Co. Advocates filed Memorandum of Appeal in the matter for the applicant's on 7th July, 2021. That the applicants and the firm of Wangui Kuria & Co. Advocates were never served with the application dated 22nd June, 2021. That matter was heard exparte on 12th July, 2021 and orders granted on 15th July, 2021.

5. That the applicants have a good response to the application and they be granted leave to file their responses and application be heard interpartes.

6. The respondent filed a replying affidavit sworn on 17th September, 2021 by one Norah Mbithe Joseph, for the 1st respondent who deposes that applicants were served with the Notice of Motion dated 22nd June, 2021 together with the petition with a hearing date of 12th July, 2021 at their registered office by one Joel Munyao Kisilu, a duly authorized process server. The process server filed an Affidavit of Service sworn to on 8th July, 2021 in which he deposes that on 29th June, 2021, he proceeded to the office of Nairobi Aviation College located along Moi Avenue and on arrival he was directed to the school principal's office on the 4th floor by the name Nancy where he served a copy of the proceedings on her but she refused to acknowledge receipt of the process. That he then returned a copy of the Notice of Motion and the petition to the Court duly served.

7. That the Court upon hearing the advocates for the respondent in the absence of the applicants who had been duly served, granted the orders on 12th July, 2021 which order was signed by the Deputy Registrar on the 15th July, 2021.

8. That it is alarming how the applicants managed to enter appearance via a Memorandum of appearance dated 7th July, 2021 five days before the hearing date if at all, it is true, they had not been served. That the applicants are clearly not candid with the Court as they were aware of the hearing date but failed without any reasonable explanation to attend Court.

9. That the application lacks basis, especially because the applicants have to-date failed to comply with the Court orders which have been duly served on them and are in contempt of the Court.

10. The applicants filed a Supplementary affidavit in response to the replying affidavit in which the applicants admit that the applicants were served with the application dated 22nd June, 2021 and instructed their advocates on record who entered appearance in the matter on 7th July, 2021 but were not aware that the matter had already been given a hearing date of 12th July, 2021. That the Application served did not have a hearing date neither was it served together with a hearing notice.

11. That the Respondent intentionally withheld the hearing date of the application in order to deceitfully get ex parte orders as against the Applicants.

12. That the applicants have a triable case and in particular whether the respondent is an employee of the 3rd applicant and if so whether the 3rd Applicant can exercise disciplinary action against her.

13. That it is in the interest of justice and fair play that the impugned orders be set aside and the application be heard inter partes.

Determination

14. The Court has carefully considered the depositions by the parties and the written submissions filed by the parties. The Court may in terms of the Rules of the Court set aside ex parte orders. This is a discretion exercised by the Court judiciously on good grounds advanced by the applicant.

15. In the present case, the applicants are not candid with the Court in that in the supporting affidavit of Benedictor Mambili sworn to on 23th August, 2021 at paragraph 6, the applicants stated:-

“ That, both the 1st, 2nd and 3rd Applicants and the firm of Wangui Kuria & Co. Advocates were neither served with the Application dated 22nd June, 2021 nor the hearing date of the same.”

16. In the same breath and in the Supplementary Affidavit of the said Benedictor Mambili sworn to on 5th October, 2021 she deposes under oath as follows at paragraph 2 thereof:-

“That in response to paragraphs 3, 4, 5, 6 and 7 of the Respondent’s Replying Affidavit, I wish to state and clarify that the Applicants were served with the Respondent’s Application dated 22nd June, 2021 and instructed its Advocates on record to enter appearance in the matter.”

17. The contradictory contents of the two affidavits by the same deponent on behalf of the applicants is clearly aimed at misleading the Court and the applicants lack clean hands to come to equity for the discretionary reliefs sought.

18. The applicants have not applied to cross examine the process server who has clearly stated in the affidavit of service that he served the applicants with the Certificate and application bearing the hearing date of 12th July, 2021, which date from the Court record was granted by the duty Judge ex parte on 25th June, 2021.

19. The Court has considered the authorities by the parties including the case of **Gideon Mose Onchwati –vs- Kenya Oil Co. Limited & Another [2017] eKLR** on the principles that must guide the Court in setting aside ex parte orders or not.

20. In the final analysis, the application lacks merit and is dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 10TH DAY OF FEBRUARY, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Wangui for Applicants

Mr. Ngome for Respondent

Ekale – Court Assistant