



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
CAUSE NUMBER 1571 OF 2018

BETWEEN

ALFRED AGENGO.....CLAIMANT

VERSUS

1. CHILD FUND KENYA

2. THE TECHNICAL UNIVERSITY OF KENYA.....RESPONDENTS

RULING

1. The Claimant filed an Application dated 25th April 2019, asking that the Respondents are compelled to file and serve upon him certain documents within 21 days.

2. The Application was scheduled for hearing before Hon. Judge Stephen Radido, on 7th October 2019. The Claimant was represented by Mr. Ochola, 1st Respondent was unrepresented, and 2nd Respondent was represented by Mr. Okinyo, when the matter was first called out.

3. The Advocates confirmed they were ready to argue the Application.

4. The Court scheduled hearing for later that day, and at 10.11 a.m., it is indicated that the Claimant and 1st Respondent were absent, while Mr. Okinyo was present for the 2nd Respondent.

5. Mr Okinyo addressed the Court as follows: -

“ It is for the Claimant’s Application dated 25th April 2019. We oppose. It is a fishing expedition. Documents requested for, do not support the Claimant’s case.”

6. The Hon. Judge made the following Ruling: -

“Court finds no merit in the Application dated 25th April 2019. It is a fishing expedition. It is dismissed with costs to the 2nd Respondent.”

7. The Claimant filed an Application dated 23rd January 2021 asking the Court to reinstate the Application dated 25th April 2019.

8. The Claimant’s Advocate Mr. Agutu argued the Claimant’s Application, before a different Judge, the undersigned, on 12th March 2021. The Advocates for the Respondents were absent. They explain that the matter was listed for 11.30 a.m., but was called earlier than this, and prosecuted by the Claimant *ex parte*.

9. Mr. Agutu told the Court: -

“ We took today’s date in Court on 5th February 2021. It is for Application dated 23rd January 2021, seeking reinstatement of an Application dated 25th April 2019. The Application was dismissed on 7th October 2019. It was dismissed for non-attendance. Claimant’s Advocate sent a colleague to hold brief. The colleague, Mr. Ochola, indicates he was ready to proceed. However, when the matter was called later in the day, Mr. Ochola was absent. We are seeking production of certain documents. ”

10. The order for reinstatement of the Application dated 25th January 2019 was therefore granted, with an order that Parties take a suitable hearing date for the reinstated Application, at the Registry.

11. At 12.30 p.m. the same date, 12th March 2021, Mr. Maina appeared for the 1st Respondent. He informed the Court that the Respondents were ready to be heard, and that the Claimant had prosecuted his Application earlier than scheduled, and obtained *ex parte* orders of reinstatement.

12. The Court advised that in the absence of the other Advocates, the matter be mentioned on 10th June 2021.

13. The Claimant however appeared at the Registry on 24th March 2021, and fixed the reinstated Application for hearing, on 13th May 2021. Hearing took place before another Judge, Hon. Monica Mbaru, on 13th May 2021. The Respondents were absent. It is not clear why they were absent on this occasion. The Court heard the reinstated Application, and granted the orders for filing and service of documents by the Respondents, as sought by the Claimant.

14. The Respondents approached the Court on 22nd October 2021, asking the Court to set aside the orders issued on 12th March 2021 and 13th May 2021.

15. The Court ordered that the Respondents make a formal Application for review of orders they alleged issued irregularly, and the Court would, upon hearing such an Application, make an informed Ruling.

16. They filed the Application dated 17th November 2021, as advised by the Court. The Application is opposed through a Replying Affidavit sworn by the Claimant on 28th November 2021, which is accompanied by Grounds of Opposition.

17. Parties were directed to canvass the Application by way of Written Submissions, which they confirmed to have filed and exchanged, at the last mention on 17th December 2021.

18. The Affidavits and Submissions, restate the history of the matter, as reflected in the record, summarized by the Court from the outset.

The Court Finds: -

19. The orders obtained by the Claimant on 12th March 2021 and 13th May 2021, are inconsistent, with the orders made at the inception, on 7th October 2019.

20. The Claimant misled the Court on 12th March 2021, when he submitted that the Application dated 25th April 2019, was dismissed for non-attendance.

21. There was a merit ruling made, that the Claimant was on a fishing expedition. The Application was dismissed with costs to the 2nd Respondent. The Court did not say dismissal was for non-attendance; it was on the merit.

22. There was nothing therefore, to be reinstated on 12th March 2021, the Application having been dismissed for lack of merit.

23. It was open to the Claimant to appeal the Ruling, or perhaps seek review on any ground, falling within Rule 33 of the E&LRC [Procedure] Rules, 2016. Reinstatement was not available, because there was no dismissal for non-attendance. The orders of 12th March 2021 issued on the back of misrepresentation of the Ruling issued on 7th October 2019.

24. The orders allowing the reinstated Application are similarly infirm. The issue had been conclusively ruled upon on merit, on 7th October 2019.

25. Furthermore, the Court had fixed the matter for mention on 10th June 2021 after the Respondents' Advocates protested their non-participation in the earlier proceedings of 12th March 2021.

26. Should the Claimant have proceeded to fix the reinstated Application for hearing, before 10th June 2021, and before another Judge? Why not wait for mention on 10th June 2021 before the Judge who scheduled the matter for 10th June 2021?

27. Parties, and the Registry should avoid fixing different Applications before different Judges. There is always a possibility that conflictual or irregular orders result from handling of the same file, by different Judges. Proceedings appear to have been tainted by hearing of Applications before different Judges, while a single Judge would have sufficed, and also, by non-attendance by Advocates for whatever reasons, when Applications came up for hearing.

28. Ultimately, proceedings must be reverted to where they were, on 7th October 2019, when the Application by the Claimant, dated 25th April 2019, was declined upon a merit hearing, with costs to the 2nd Respondent.

IT IS ORDERED: -

a. The orders of this Court issued on 12th March 2021 and 13th May 2021, are reviewed and set aside.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 16TH DAY OF MARCH 2022.

JAMES RIKA

JUDGE