



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nthiga v County Government of Embu & another (Employment and Labour Relations
Petition 15 of 2017) [2022] KEELRC 3914 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3914 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION 15 OF 2017
DKN MARETE, J
SEPTEMBER 16, 2022**

BETWEEN

THOMAS MUGAMBI NTHIGA PETITIONER

AND

COUNTY GOVERNMENT OF EMBU 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD, EMBU 2ND RESPONDENT

RULING

1. This is an application by way of notice of motion dated January 27, 2022 and comes out as follows;
 1. That this application be certified urgent and heard immediately and order (2) below be granted in the interim.
 2. That there be a stay of execution of this court's judgment and decree dated February 24, 2020 and all consequential orders pending hearing and determination of this application.
 3. That this court do review and set aside its judgment and decree dated February 24, 2020 and do order that the proceedings of October 29, 2019 and January 18, 2019 be vacated and hearing of this matter do start de novo.
 4. That the costs of the application be provided.
2. It is grounded as follows;
 1. That the respondents were not notified of the hearing dates of this matter (on October 29, 2019 and January 18, 2019).
 2. That the hearing of the matter was conducted in the absence of the respondents despite them having entered appearance and filed strong responses to the petition.



3. That the respondents' advocates abandoned them in the mid of the proceedings without notifying them of the position of the matter.
 4. That the respondents became aware of the judgment in this matter in October 2021 and moved fast in trying to establish the true position of the same.
 5. That the respondents have a strong defence to the claim and execution of the decree will be prejudicial not only to the respondents but the people of Embu County and the general public because the amount being demanded will be sourced from public coffers.
 6. That the claimant has commenced execution of the decree by applying for committal of the 2nd respondent's board members to civil jail despite the same being irregular and unconstitutional.
 7. That unless the application is heard urgently and orders granted, the 2nd respondent's board members will be committed to civil jail for acts not of their own making.
 8. That mistake of the respondents' counsel should not be visited upon them. Had the respondents known the true position of the matter, they would have acted appropriately and swiftly.
 9. That the respondents are ready to abide by the conditions this court may consider appropriate in granting the application.
3. The petitioner/respondent opposes the application through a statement of grounds of opposition which comes out thus;
1. That the application is incompetent and ought to be struck out.
 2. The application lacks merit and is bad in law.
 3. That the applicant's counsel is not properly on record as judgment in the matter was delivered on February 24, 2020.
 4. That there has been a change of advocate since judgment and the same has been done irregularly and not as per order 9 rule 9 of the *Civil Procedure Rules*.
 5. That there has been inordinate delay in filing the instant application and the applicant has failed to explain the delay satisfactorily.
 6. That the applicant were ordered to pay court adjournment fees of Kshs 1,000/- and advocate's attendance fee at Kshs 10,000/- on July 16, 2019 and the same has never been paid. That the applicant therefore has no right of audience.
 7. That the applicant and previous advocate on record were at all times served and/or aware of the hearing dates.
 8. That there has been non-disclosure of material facts to warrant a removal of the interim orders.
 9. That this application is only meant to further delay the execution proceedings.
 10. That the applicant was aware of the judgment and had given instructions to the previous counsel on record to file an appeal.
 11. That the application herein is utterly frivolous and vexatious.



4. The petitioner/respondent in a replying affidavit sworn on February 22, 2022 in which he narrates the sequence of events leading to the present situation in the matter.No sufficient grounds for review.Inordinate delay in filing the instant application.Falsification that they were not aware of the hearing date of October 29, 2019 and January 18, 2019.
5. Again, he avers as follows;
 9. That the record will show that on July 16, 2019, when parties appeared for the hearing, on our part we were ready to proceed with 3 witnesses. Counsel for the respondents, Ms Ndirangu who was holding brief for Mr Ashitiva, sought an adjournment. Respondents' counsel stated that they no longer have instructions and wish to cease acting. That the court considered the respondents' counsel prayer and made the following orders;
 - a) Prayer for adjournment allowed.
 - b) To pay counsel for claimant Kshs 10,000/- for attendance costs within 14 days.
 - c) To pay court adjournment fees at Kshs 1,000/- within 7 days.
 - d) Failure of the above, there will be no right of audience.
 - e) To file any necessary application to cease acting.
 11. That the respondents having failed to comply with the orders of July 16, 2019 they remain not to have court's audience, and I am informed by my counsel on record, information which I believe to be true, that any audience granted after disobedience of the court orders then the proceedings thereof ought to be set aside, the application herein struck out, and the matter proceeds for execution.
6. The petitioner/respondent further cite the following as weaknesses and pitfalls of this application;Lack of seriousness in prosecuting their case.No audience- matter cannot start afresh.
7. They further seek to buttress the opposition to the application on the following submissions;
 - a. That the respondents have no right of audience because they have not paid costs ordered on July 16, 2019.

the respondents have explained that their former advocates did not update them on the progress of the proceedings in the matter. They have also stated that they are ready to meet any conditions this court may impose on them as a condition for granting of the application. Had the respondents been made aware of the same, they would have paid the costs. They are ready to pay the same my lord if you make such orders even before you retreat to write your ruling. The element of knowledge is an integral part of this application and we urge your lordship to look at the wider interest of justice. Failure to pay costs is a condition that can be purged and the respondents are ready to do so. In our humble submissions, the order for locking out the respondents from audience was in relation to the main hearing.
 - b. That the respondents were aware of the hearing dates and progress of the matter.



we have been able to show that there was no communication between the respondents and their advocates. It is not true that the respondents were aware of the hearing dates. On July 16, 2019 the respondents were not in court. Only their advocate was present. There is no indication that the former advocates advised the respondents of the hearing of October 29, 2019. It is admitted that the advocates were absent on that date.

8. By the time the respondents' advocates had not made an application for leave to cease acting. If such had been made and served upon the respondents, they would have known that they were no longer represented and would have taken steps to follow up the matter. One of the reasons advocates are appointed is to keep the parties updated of the progress of their cases. It is advocates who make regular appearance with parties required to attend the necessary hearings. The parties depend on their advocates to appraise them of progress of their or cases. The respondents' case was not special and they would be expected to depend on their advocates to know the position of the matter.
9. This matter comes out in favour of the petitioner/respondent. He has demonstrated an overwhelming case in opposition to the application. It is his case that the application is grounded on falsehoods and half-truths in evidence. At all times, the respondent/applicant was served and aware of the proceedings in this matter but was indolent in approach and prosecution of the same. They have themselves to blame.
10. The respondent/applicant comes out as a belligerent prosecutor of her case. She does not answer the various allegations of dalliance and even undue delay in bringing out this application. She is unable to answer the issue of having all this time known of the goings on in the matter.
11. The application tilts in favour of the claimant/respondent on a balance of probabilities and preponderance of evidence. He has out shadowed the applicants in their efforts to sustain her case for the application.
12. I am therefore inclined to dismiss the application with costs to the petitioner/applicant.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

DK Njagi Marete

JUDGE

Appearances

- 1. BM Musyoki instructed by BM Musyoki & Company Advocates for the Respondent/Applicants.**
- 2. Mr Abubakar Ramadhan instructed by Magee Law LLP for the Claimant/Respondent**

