



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 427 OF 2018

EMILY CATHERINE MASINDE.....CLAIMANT

VERSUS

ALFAROOQ HOSPITAL also known as

ALFAROOQ HOSPITAL MANAGEMENT.....RESPONDENT

RULING

1. On 6th February 2020, I delivered judgment in favour of the Claimant as follows:

- a) 6 months' salary in compensation.....Kshs. 92,118
 - b) House allowance for 30 months @ Kshs. 2,003.....60,090
 - c) Leave pay for 2 years (15,353/30x21x2).....21,494
 - d) Prorata leave for 6 months (15,353/30x1.75x6).....5,373
- Total.....179,075**

2. Upon execution of the said judgment, the Applicant filed a Notice of Motion under Certificate of Urgency dated 29th January 2021.

3. By its application, the Applicant asks the Court to set aside the judgment and the attendant decree.

4. The application is supported by an affidavit sworn by Salahuddin Farooqi who describes himself as a Director of Alfarooq Hospital Limited, and is based on the following grounds:

- a) That the Claimant has obtained an irregular *ex parte* judgment against the Applicant, who was never served with Summons;
- b) That the Claimant has wrongly sued Alfarooq Hospital Limited, which is a separate and distinct legal entity with no relation to Alfarooq Hospital Management Limited;
- c) That Alfarooq Hospital Limited never employed the Claimant and is a total stranger to the Claimant's claim;
- d) That Alfarooq Hospital Limited was condemned unheard and the Claimant ought to direct her claim to the proper party;
- e) That the Claimant has commenced execution against Alfarooq Hospital Limited and has instructed Auctioneers to attach and sell its goods.

5. In his affidavit sworn in support of the application, Salahuddin Farooqi depones that on 29th September 2015, Alfarooq Hospital executed a Management Agreement with Miftah Construction and Supplies Limited T/A Alfarooq Hospital Management, allowing the latter to take over the running and operation of the Hospital.

6. Salahuddin Farooqi further depones that on 2nd July 2018, Alfarooq Hospital terminated the said Management Agreement and took over the management of the Hospital.

7. Farooqi maintains that the Claimant was never employed by Alfarooq Hospital Limited and the claim herein is misconceived and fatally defective.
8. The Claimant's response to the application is by way of a replying affidavit sworn on 10th February 2021.
9. The Claimant asks the Court to dismiss the application, which she terms as an abuse of the court process, on the ground that the Applicant claims to be separate from the Respondent sued herein and therefore has no *locus standi* to seek to set aside the judgment.
10. The Claimant states that the Applicant and the Respondent sued herein are the same person because they operate the same Hospital and the change of names is a ploy to escape judgment.
11. The Claimant further states that the Respondent as Judgement Debtor, does not escape from paying the decretal sum by change of names; the Claimant adds that liability arose out of her employment for the Hospital.
12. The issue for determination in this application is whether a case has been made for setting aside of the *ex parte* judgment entered in favour of the Claimant on 6th February 2020.
13. The discretion of the Court to set aside an *ex parte* judgement is granted by Order 10 Rule 11 of the Civil Procedure Rules, which provides:
- 11. Where Judgement has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.**
14. On the face of it, the present application is based on two grounds; first, that there was no proper service and second, that the wrong party has been sued.
15. In the submissions filed on behalf of the Applicant on 24th February 2021, reference was made to the decision in *National Bank of Kenya Limited v Kalka Flowers Limited & 2 others [2014] eKLR* where the High Court (Ogola J) stated the following:
- “The position in law is that where there is no proper service, the resulting judgment is irregular and must be set aside *ex debito justitiae*, that is, as a matter of right, on application by the Respondent.”**
16. A reading of the present application and the affidavit in support thereof, reveals that the assertion that there was no proper service is intertwined with the averment that the wrong party has been sued. In this regard, the Applicant submits that the Claimant was an employee of Alfarooq Hospital Management and therefore has no valid claim against Alfarooq Hospital Limited.
17. In pursuing its argument, the Applicant relies on a document titled ‘*Memorandum of Understanding*’ dated 29th September 2015 between Dr. Salahuddin Farooqi T/A Alfarooq Hospital as the Lessor and Miftah Construction and Supplies Limited T/A Alfarooq Hospital Management as the Lessee.
18. Having read the said document, the Court notes that although it is titled ‘*Memorandum of Understanding*’, its contents are in the nature of a lease agreement. Of particular interest are Clauses 3.3 and 4.1.1 of the ‘*Memorandum of Understanding*’ which provide that the Department of Imaging and Radiology as well as the 3rd and 4th Floors of the Hospital would remain under the ownership, management and occupation of Dr. Salahuddin Farooqi.
19. More significantly, under Clause 4.5 of the ‘*Memorandum of Understanding*’, the name of the facility would remain Alfarooq Hospital Ltd, although the lessee would be responsible for payment of all licences and permits. The Applicant did not bother to file any of the licences or permits to show the identity of the party who had been licensed to run the Hospital. A hospital is not an ordinary business to be shoved around from one entity to another.
20. As it is, the Court could not tell whether Miftah Construction and Supplies Limited, whose Memorandum and Articles of Association were not availed and whose name does not suggest a stake in the medical field, actually had the capacity to run the Hospital.
21. I have looked at the Claimant's letter of appointment dated 1st October 2015, which proudly bears the logo of Alfarooq Hospital. I have also looked at the Hospital Policies issued to the Claimant, clearly stating that she was a member of staff of Alfarooq Hospital.
22. What is clear to the Court is that the Claimant was employed to work for Alfarooq Hospital. Further, because the Applicant has not demonstrated any change of ownership or control of the Hospital, the argument that the Claimant was employed by some other entity has no basis in law or fact.
23. That said, I find and hold that service of summons was properly effected upon the Claimant's employer, who chose not to respond. There is therefore no reason to set aside the *ex parte* judgment entered in favour of the Claimant.
24. The application dated 29th January 2021 is consequently dismissed with costs to the Claimant. The interim orders granted on 1st February 2021 are vacated.
25. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF APRIL 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Muganda h/b Mr. Chebukaka for the Claimant

Mr. Mutubia for the Applicant