



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 47 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PAUL IRUNGU MWANGI & 32 OTHERS.....CLAIMANT

VERSUS

ORTHODOX ARCHBISHOPRIC OF KENYA

& IRINOUPOLIS.....RESPONDENT

AND

MILIKI SAVINGS AND

CREDIT SOCIETY LIMITED.....INTERESTED PARTY

RULING

Before me for determination is an application dated 6th February 2019. The Applicant seeks orders THAT:

1. Spent
2. This cause be reinstated for trial and it be set down for hearing and determination on merits.
3. Costs hereof be in the cause.

The application is supported by the affidavit of ARTHUR INGUTYA Advocate and the following grounds:

- a. That on 19th October 2020, the court ruled that there were no issues left in the matter for determination.
- b. That the ruling was made in the absence of Counsel on record for the Claimants and the 3rd Party
- c. That as a matter of fact, the following matters are yet to be determined:
 - i. For the 3rd party the issue of reinstatement of check off seeing as the employer stopped the check off payments thus occasioning loss and suffering to the 3rd Party.
 - ii. For the claimants the issue of withheld deductions and failure by the employer to remit NHIF, NSSF and KRA.
- d. By dint of the ruling of Nduma J. of 17th October 2014, the court ordered the suit to proceed to conclusion.
- e. The Claimant and the 3rd Party are entitled to determination of their causes on merit.
- f. The court has discretion to re-open the case for hearing based on the principle pronounced in *Evans v Bartlam (1937) 2 ALL ER 646@650*.

In the supporting affidavit of Arthur Ingutya, Counsel for the applicant herein sworn on the even date, he reiterated the grounds set out on the face of the Application.

The Applicant avers that the matter had come up for mention on 19th October 2020 when the Court found that there were no issues requiring determination by the court. That the court on 17th October 2020, directed that the claim proceeds to hearing in the normal way, a direction that would not have been given had there been no issues for determination.

That issues on whether the employer was justified to stop check off payments and the failure by the employer to remit deductions made on the Claimant's salaries to relevant authorities were not determined. As such, he avers that the Claimants and the 3rd party ought to be given an opportunity to be heard and they should not be driven from the judgment seat without hearing.

The Respondent opposes the application vide a Replying Affidavit sworn by Andreas Makarios Tillyrides, a Director of the Respondent. He avers that on 9th October 2019, the Respondent's advocates informed the court that there was no pending claim before the court, whereupon the court noted that if the only outstanding issue was that of statutory deductions, then they were relevant authorities capable of enforcing the same.

That on the said date, since the Advocate for the Applicant was absent, the court ordered his personal presence at the next mention date scheduled for 5th December 2019 for him to explain what matters were still pending for determination by the Court. On 5th December 2019, the said advocate did not appear before the court and instead had another Counsel holding his brief but without the relevant instructions which prompted the court to grant another order for his presence on the next mention date scheduled for 6th February 2020, failing which the case would be marked as settled. Counsel did not show up again on 6th February 2020. He yet again sent another Counsel to hold his brief who informed the court that he was held up in Wajir and could not attend court.

The Court granted Counsel a final chance to attend court on 14th May 2020 but on the said date, the courts had been closed due to the Covid-19 Pandemic. The Respondent avers that sometime in July 2020, the court issued a mention notice for 22nd July 2020 and there was no representation for the Applicants herein and the court gave a further mention date for 15th October 2020 but it was not sitting on the said date so the case was stood over to 19th October 2020.

On 19th, October 2020, Counsel for the Applicant was represented by one Ms. Luvai. The Affiant avers that this being a virtual hearing, it could only be assumed that Counsel had proper instructions. Ms. Luvai informed this Court that the only pending issues were with respect to statutory deductions upon which confirmation the court marked the matter as settled on the basis that the statutory bodies to whom the deductions were payable had statutory power for collection thereof.

The Respondent argues that given the chances accorded to the Applicant's Counsel to attend court in person which he failed to comply with, he is not deserving of the orders sought. That as an officer of the court he is aware of the consequences of disobedience of court orders. The Affiant avers that it is therefore in the best interest of justice and fairness that the Claimant's application be dismissed with costs and the matter be put to rest.

Applicant's Submissions

The Applicant submitted that this Court has unfettered discretion to set aside its earlier orders to allow the applicants to ventilate on the issues mentioned. Reliance was placed on the case of **Evans v Bartlam (1937) 2 ALL ER 646@650** where the court held that it has unfettered discretion to set aside any orders made without a hearing on merit.

The Applicant made reference to the ruling by Nduma J. on 17th October 2014 where the court had recognized that there were pending issues for determination and as a result directed the hearing and determination of the suit in the normal manner.

Respondent's Submissions

The Respondent submitted that the proper mechanisms for recovery of statutory dues are well established under the National Hospital Insurance Fund Act, National Social Security Fund Act and the Co-operatives Societies Act respectively.

It was further submitted that this Court's principal objectives as set out in Section 3 of the Employment and Labour Relations Court Act is to facilitate just and expeditious, efficient and proportionate resolution of disputes. The Respondent argued that the Claimant's Advocate has done all that is humanly possible to delay the course of justice in this matter as the record will bear the Respondent witness.

The Respondent contended that the Claimant's Counsel has not bothered to give any explanations in his submissions before this court. As such, it was argued that the application lacks merit and it would be in the interest of justice and fairness that the application be dismissed with costs.

Determination

I have considered the facts of this cause, evidence adduced by the parties hereto and their respective submissions. The issue for determination is whether the application dated 6th November 2020 is merited.

This Application has been brought by the claimants and the interested party in a bid to have the cause reinstated for determination on merit after the Court closed the case on grounds that there were no further issues between the Claimant and Interested Party on the one hand and

the Respondent on the other. The Applicant has argued that there are pending issues while the Respondent contends that the Claimants were afforded numerous opportunities to bring the said issues up before this court, which opportunities the Claimants squandered.

While every litigant should be heard on merit and should be granted every opportunity to present its case, I cannot ignore the fact that the applicant herein had been lax in prosecuting its case.

Although the reason for closing the case was that there are no further issues between the Claimants and Respondent for determination by the Court, the Claimants have in the instant application not attempted to clarify or set out what issues are still pending.

The prayers in the memorandum of claim as set out at paragraph 19 thereof are as follows –

- a. *Arrears in remittance of SACCO Members payment deductions Kenya shillings 17,430,268/=.*
- b. *Union dues owed.*
- c. *Standard contributions owed to NSSF Kenya Shillings 2,490,400/= including accumulated penalties of Kenya Shillings 1,755,220/= a previous penalty of Kenya Shillings 78,280/= which was not honoured.*
- d. *Outstanding levy duo plus accrued penalties amounting to Kenya shillings 3,310,580/=.*
- e. *Unpaid N.H.I.F contributions plus penalties amounting to Kenya Shillings 8,435,160/=.*
- f. *Amounts owed in taxes to the Kenya Revenue Authority amounting to Kenya Shillings 25,034,733/=.*

The remedies sought in the claim are the following –

- a. The sum of Kenya Shillings 58,534,673/=.
- b. Costs of the cause.
- c. Accrued penalties on (a), (c), (d) and (e) above until payment is in full.
- d. Payment of union deductions and taxes.
- e. Any other relief that this Court may deem fit to grant.

Counsel for the Respondent informed the court on 9th October 2019 that it had been compelled to pay Kshs.47,924,846. Further, that most of the Claimants including Paul Irungu Mwangi, the 1st Claimant, have left the employment of the Respondent. The Claimant's Counsel was given several opportunities to rebut these assertions but failed to do so.

As was observed by the Court, all the remedies sought in the claim are in respect of statutory deductions and all the entities to which the deductions were payable are capable of enforcing the payments thereof by the Respondent independently of the Claimants. There is no claim that is due to any of the Claimants personally. Further, Counsel for the Claimant was given many opportunities to come to Court personally and explain exactly what was pending for determination which he failed to do severally on 9th October 2019, 5th December 2019, 6th February 2020, 22nd July 2020 and 19th October 2020. On 19th October 2020 the Counsel holding brief for Applicant's Counsel informed the Court that all issues pending involved statutory deductions and the Court may mark the matter as settled. Having been given so many opportunities to articulate its issues and having failed, the Court must be fair to the Respondent who diligently attended court.

The court is guided by the Court of Appeal's holding in **David Ngugi Waweru v Attorney General & Another [2017] eKLR** where the court made reference to the **Boniface Inondi Otieno case** in which the court stated:

“As to the issue that courts must have human face, it is our view that the sword of justice cuts both ways. It applies to the appellant as well as to the Respondent. Being courts of justice, we cannot look at only one side and shut our eyes to the other side as there are always competing interests. As an Arbiter, we are called upon to take the interests of each of the parties and to dispense justice without fear or favour. We therefore cannot bend backwards to accommodate the appellant as this would be injustice to the Respondent.”

While I appreciate that this court has the jurisdiction to reinstate matters in a bid to serve justice, it will be an injustice to the Respondent who has, from the record of the proceedings, diligently attended court to defend itself.

Based on the foregoing, I find that this application lacks merit and dismiss it with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2021

MAUREEN ONYANGO

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 Civil 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.

MAUREEN ONYANGO

JUDGE