



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 271 OF 2013

JOSEPH TAMA NDUU.....1ST CLAIMANT
ELIJAH MASHA THOYA.....2ND CLAIMANT
SAMUEL MWANGI KIAMBATI.....3RD CLAIMANT
DAVID KIMONDIU.....4TH CLAIMANT
CATHERINE K. MUNGANIA.....5TH CLAIMANT
GETRUDE ANGWENYI NYANTARO.....6TH CLAIMANT
RONGOMA BERNARD JAMBO.....7TH CLAIMANT
CONSTANTINE ODHIAMBO BALA.....8TH CLAIMANT
CAROLINE WAMBUI NJURUBA.....9TH CLAIMANT
PETER KIARIL.....10TH CLAIMANT
ALBER ABEDI MAGOMERE.....11TH CLAIMANT
FRANCIS TUMUTI.....12TH CLAIMANT

- VERSUS -

JACARANDA HOTELS (MBS)

LIMITED T/A JACARANDA INDIAN OCEAN BEACH RESORT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd December, 2021)

RULING

The claimants filed a notice of motion on 16.04.2021 through Sherman Nyongesa & Mutubia Advocates. The application was under sections 1A, 3 and 3A of the Civil Procedure Act, and section 12(3) (viii) of the Employment and Labour Relations Court Act, 2014. The claimants prayed for orders:

- a) That this Honourable Court be pleased to set aside, vary or discharge the orders of stay of execution issued by the Court on 25.06.2016.
- b) That costs of the application be provided for.

The application was based on the annexed supporting affidavit of Godfrey Mutubia and upon the following grounds:

a) On 02.04.2014 parties filed a consent dated 02.04.2014 which was adopted as judgment of the Court.

b) The respondent failed to satisfy the judgment and the claimants instituted execution proceedings.

c) On 25.06.2016 the Court allowed the respondent's application for stay of execution dated 18.08.2015 and directed parties to meet and review the consent. The respondents thereafter failed to take any further steps. The applicants are prejudiced as they are unable to enjoy the fruits of the judgment and it is just and fair to set aside the stay orders.

The respondent has opposed the application by filing on 24.08.2021 the replying affidavit of Peter Nyale, the respondent's Human Resource Manager and through the Federation of Kenya Employers. It was stated and urged as follows:

a) Parties filed a consent and partial judgment entered as relates to terminal dues relating to the redundancy.

b) The amount computed by parties and due to the claimants amounted to Kshs.11, 520, 117.53. The respondent then computed the net payments less bank loans claimants took based on their employment; and less statutory deductions per section 49(2) of the Employment Act.

c) The claimants sought to execute the partial decree without taking into account the due deductions. The respondent drew cheques in favour of the claimants less the due deductions. The claimants do not deny they received the money as paid less the deductions. They also did not deny they owed the banks.

Parties filed the respective submissions. There is no dispute that parties filed a consent on the redundancy final dues per consent dated 02.04.2014. Claimants' dues were computed on the headings of severance pay, pay in lieu of notice, gratuity, leave days, and travel. Further there is no dispute that the claimants sought to execute and on 27.06.2016 the Court ordered:

1) That there be stay of execution proceedings initiated by the claimants.

2) That parties do meet and review their partial consent, taking into account all the matters arising after the consent was filed.

3) That parties to be at liberty to file a further consent, or to move the Court in any other way that assists them in achieving a full and binding settlement.

The claimants' lamentation in the present application appears to be that after the stay of execution order the respondent has refused or become reluctant to meet the claimants in terms of order (2) and (3) of 27.06.2016.

The material before the Court shows that after the order of 27.06.2016 parties never met to reconcile the accounts of satisfaction of the consent judgment. The respondent has not denied the claimant's case that there has not been a meeting. The Court finds that there has not been any challenge to the consent dated 02.04.2014. The Court finds that since orders (2) and (3) of 27.06.2016 appear not satisfied because the respondent has been reluctant, compliance with the orders within a set time frame will serve justice failing, the claimant may be at liberty to execute. The Court's opinion is that at the meeting it should be possible for the respondent to raise the reconciliation issues arising from deduction of PAYE and bank loans in issue and the claimants to reconsider the consent in good faith.

As submitted for the respondent there was no order issued on 25.06.2016 but the order of stay of execution had been given on 27.06.2016 and issued 26.03.2018. To that extent, the prayer in the instant application was misconceived.

The application is therefore determined with orders:

1) In view of Order (2) of 27.06.2016 the respondent to convene a meeting with the claimants and for each claimant, the amount due under the consent, the PAYE due, and any bank loan deducted be computed and the one-page tabulated computation be filed in Court by 01.02.2022 – and parties to reconcile issues in good faith.

2) In view of Order (3) of 27.06.2016, parties may file the further consent in Court by 01.02.2022.

3) Parties to agree on a mention date to confirm compliance.

4) No orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 3RD DECEMBER, 2021.

BYRAM ONGAYA

JUDGE