



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2126 OF 2014

GORDON OTIENO OMATCH.....DECREE HOLDER/ APPLICANT

-VERSUS-

ISMAEL ELISHA ESHIKOTE T/A HIGH CLASS AUCTIONEERS.....RESPONDENT

-AND-

WEST HOOD HOTEL.....JUDGMENT DEBTOR

AND

WINNIE WAMBUI KARIYU.....1ST OBJECTOR

MERCY MUTHONI KARIYU.....2ND OBJECTOR

TERRY WAMBUKU KARIYU.....3RD OBJECTOR

JEFFERSON MUNGAI KARIYU.....4TH OBJECTOR

RAHAB MWIHAKI KAROKI.....5TH OBJECTOR

(ALL OBJECTORS T/A WEST WOOD HOTEL)

(Before Hon. Justice Byram Ongaya on Friday 28th August, 2020)

RULING

The decree holder Gordon Otieno Omatch has filed on 23.04.2020 an application by way of a notice of motion dated 23.04.2020 and through learned counsel Mr. Cavin Anyour Advocate. The application was under Articles 47, 48, 50 & 159 of the Constitution of Kenya, 2010; Section 3A of the Civil Procedure Act and Order 12 rule 7 of the Civil Procedure Rules and all enabling provisions of the law. The applicant prayed for orders:

- 1) That the application be certified urgent and heard ex-parte in the first instance.
- 2) That the Honourable Court be pleased to vacate or set aside the proceedings and orders issued on 04.03.2020.
- 3) That the Honourable Court be pleased to grant the decree holder an opportunity to respond to the objector's application dated 24.02.2020.

The application was based on the annexed supporting affidavit of Cavin Anyour Advocate and upon the following grounds:

- 1) The objectors' application was set for inter partes hearing on 04.03.2020. On that date the case was not listed on the Court's daily cause list. It was therefore difficult for Counsel to trace the Court at which the matter had been listed for hearing.
- 2) On 11.03.2020 Counsel for the applicant traced the Court file at the registry and discovered that the application by the objectors had proceeded in his absence on 04.03.2020 and allowed in its entirety as unopposed.

- 3) The failure to attend Court on 04.03.2020 was due to failure of the matter appearing on the day's cause list. The inadvertent mistake should not be visited upon the applicant. The applicant craves for an opportunity to be heard on the objectors' application.
- 4) Thus it is in the interest of justice that the proceedings and orders given on 04.03.2020 are set aside and the applicant granted leave to be heard on the objectors' application.
- 5) The decree holder has filed its response to the objectors' application and is ready to submit in opposition to that application and the objectors will not suffer prejudice in that regard.
- 6) The application is in line with provisions of Articles 47, 48, 50, and 159 of the Constitution.

The objectors opposed the application by filing submissions on 28.07.2020 through Kimandu & Ndegwa Company Advocates. The objectors admit that on 04.03.2020 the case was not listed but that was a normal occurrence as courts often overlook listing all matters. The objectors' further case is that their application dated 24.02.2020 was allowed on 04.03.2020 because the decree holder was absent despite due service upon his advocates and further in view of the objectors' evidence as per exhibits MMK4 and MMK5 showing that the objector West Wood Hotel was a completely different entity from the judgment debtor.

The objectors rely on Gachuhi JA in Haji Ahmed Sheikh t/a Hasa Hauliers –Versus- Highway Carriers Ltd (1982 - 88)1 KAR 1184 thus, **“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just.... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”** It is further submitted for the objectors that Mumbi Ngugi J in Peter Kiplagat Rono Versus- Family Bank Limited (2018) eKLR held that justice must cut both sides. It is submitted that if orders given on 04.03.2020 are set aside as prayed for, then injustice against the objectors will occur because as seen from the objectors' application of 24.02.2020 and objectors' replying affidavit of 26.05.2020 the claimant's claim against the objector is misguided as the objectors are not the judgment debtor as per exhibits MMK4 and MMK5 in the objector's application dated 24.02.2020. The objectors should not be made liable in place of the judgment debtor. Further, in The Council, Jomo Kenyatta University of Science and Technology –Versus- Joseph Mutuura Mbeere & Three Others [2015]eKLR Waki JA held that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were not meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. The objectors not being the judgment debtor, the applicant has not properly invoked the said Article 159 because the applicant was required to sue the right party. There is nothing as a good reason to reopen the application already allowed if the judgment debtor is not the objectors and the objectors have indeed demonstrated that the objectors and judgment debtor are indeed different persons. The application therefore lacks merits.

The Court has considered the parties' respective positions, the material on record and the submissions filed. As submitted for the applicant, Mativo J in Wachira Karani –Versus- Bildad Wachira [2016] eKLR held that if the reason offered by the applicant is found reasonable and excusable, it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. In the present case, it is not in dispute that the applicant's counsel failed to attend court on 04.03.2020 because the matter had not been listed. The Court considers that to be a genuine reason for allowing the prayer for setting aside. There is no doubt that the applicant is opposing the application by the objectors which had been allowed on 04.03.2020. The objectors' case is that the grounds of opposition are not merited at all because the objectors and the judgment debtor are different persons. In the Court's opinion, the applicant has demonstrated triable issues in opposition to the objectors' application as per the decree holder's replying affidavit on record and the proper stage to determine the issues on merits is after the hearing of the application by the objectors. However, as submitted for the objectors, justice cuts both ways and to balance justice for the parties, there shall be stay of execution of the decree herein as already initiated for the applicant (decree holder) pending the hearing and determination of the application by the objectors.

In conclusion, the application dated and filed on 23,04.2020 for the decree holder or claimant (applicant) is hereby determined with orders:

- 1) The proceedings and orders given by the Court on 04.03.2020 and all proceedings flowing therefrom are hereby set aside or vacated.
- 2) The decree holder's replying affidavit filed herein on 11.03.2020 is deemed duly filed and served.
- 3) Pending the hearing and determination of the application by the notice of motion dated 24.02.2020 filed for the objectors or further orders by the Court, there be stay of the execution process herein as initiated against the objectors.
- 4) The parties to forthwith take steps for directions on the expeditious hearing and determination of the objectors' application dated 24.02.2020.
- 5) The costs of the application now determined to abide the outcome of the objectors' application.

Signed, dated and delivered by the court at Nairobi by video link this Friday, 28th August, 2020.

BYRAM ONGAYA

JUDGE