



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 181 OF 2016**

**STEPHEN KABURIA RUTERE.....CLAIMANT**

**- VERSUS -**

**KENYATTA NATIONAL HOSPITAL BOARD.....1<sup>ST</sup> RESPONDENT AND 1<sup>ST</sup> CONTEMNOR**

**MR. JUSTUS KIMATHI MBUI.....2<sup>ND</sup> RESPONDENT**

**DR. EVANSON KAMURI.....2<sup>ND</sup> CONTEMNOR**

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> October, 2020)

**RULING**

There are two applications for determination. The first application is by the respondents being the notice of motion dated 04.05.2020 filed through Lubulellah & Associates. The application is under rules 11(3), 13(5), 17, 26 (2) & 33 (1) (b) & (d) of the Employment & Labour Relations Court (Procedure) Rules 2016, order 12 rule 7, and order 51 rule 1 of the Civil Procedure Act, Article 159 of the Constitution of Kenya and all other enabling provisions of the law. The substantive prayers subject of this ruling are as follows:

- 1) That the Honourable Court does set aside the ex-parte proceedings of 17<sup>th</sup> December 2019 and the resultant judgment delivered on the 09.04.2020 on such terms including costs as it may deem just and reasonable and set the suit down for hearing inter-partes on its merits.
- 2) That the Court does issue summons or extend the validity of summons which may have been previously issued herein and give leave to the claimant to serve the respondent with the same.
- 3) That the Court thereafter grant leave to the respondents to file their memorandum of appearance. Their annexed statement of response to the claimant's statement of claim as well as any witness statement or list and bundle of documents to be relied on in proving their case and that the same be deemed to be properly on record.
- 4) That in alternative the Court does review its judgment and find that summons was not issued or served upon the respondents and make appropriate orders or directions pursuant thereto.
- 5) That costs of the application be provided for.

The application is based on the annexed supporting affidavits by Edwin Simiyu Wabuge, Eugene lubale Lubulellah, and Calvin Nyachoti and upon the following grounds:

- 1) It was mandatory but no summons to enter appearance were issued per rule 11(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 and the failure went to jurisdiction of the Court and could not be cured under Article 159 of the Constitution.
- 2) As at the time of judgment there were two contempt applications filed for the claimant on 01.09.2017 and on 23.03.2018. The 1<sup>st</sup> one is pending and the 2<sup>nd</sup> one was withdrawn.
- 3) As at hearing on 17.12.2019 the claimant had not served a list and copies of documents per rule 14(10) of the Court's rules. Thus the claimant never provided evidence per section 11(a) of the Labour Relations Act, 2007 and sections 107, 108, and 109 of the Evidence Act.

4) On 15.12.2019 to 15.01.2020 the respondent's counsel had closed their office and the claimant's advocates were aware of that closure.

5) There was no notice of delivery of judgment, no coram and absence of consent by 1<sup>st</sup> respondent for online delivery of the said judgment contrary to the Chief Justice's guidelines for proceedings during Covid -19 pandemic.

6) The respondent's advocates were not aware of the hearing of the suit on 17.12.2019 because Edwin Simiyu Wabuge who had been handling the matter in the firm of Lubulellah & Associates Advocates for the 1<sup>st</sup> respondent left the firm in December 2019 and there was erroneous assumption that the client had been informed of the hearing date, the pre-trial requirements had been complied with and that the hearing would go on as expected. The respondent failed to attend the hearing and in circumstances whereby summons had not been served at all.

7) On 03.03.2020 Eugene Lubale Lubulellah Advocate attended Court to confirm filing of submissions and proceeded upon the sincerely imprudent but truly mistaken assumption that his colleague Edwin Simiyu Wabuge Advocate had attended court for the hearing on 17.12.2019 and filed pleadings when in fact it was not true. It is on 30.04.2019 that the proper hand over by Simiyu Advocate was done and the true position in the matter was discovered. The 1<sup>st</sup> respondent's failure to attend Court on 17.12.2019 was not deliberate and the same was due to mistakes or oversight by counsel which should not be visited upon the applicant, the 1<sup>st</sup> respondent in the suit. The public and the 1<sup>st</sup> respondent will suffer immensely if the ex-parte judgment is not set aside.

The claimant opposed the application by filing on 03.06.2019 the replying affidavit by Haggai Chimei Advocate. The claimant's grounds of opposition are urged as follows:

1) The applicants are in contempt of orders given on 09.04.2020 and the applicants have approached the Court with unclean hands.

2) The claimant reported at work on 02.05.2020 and the CEO of the 1<sup>st</sup> respondent acknowledged the same, sent him away indicating that he was to wait for further communication. On 19.05.2020 the claimant filed for contempt in that regard.

3) The Court is *functus officio* after delivering the judgment on 09.04.2020 and the 1<sup>st</sup> respondent is at liberty to move to the Court of Appeal. Indeed, the respondents have filed a notice of appeal on 04.05.2020 and the application for review is incurably incompetent. The application is an abuse of Court process.

4) Parties attended Court and the respondents were given chance to comply with pre-trial requirements. The respondents failed to comply and did not attend the pre-trial directions despite the date having been taken by consent. The claimant's counsel applied and the claimant was allowed to rely on documents attached on the affidavit supporting the application of 11.02.2016. The applicants deliberately refused to file a response to the claim together with their documents. The hearing proceeded ex-parte despite service of a hearing notice. Counsel for respondent was granted chance to file and serve submissions and judgment was delivered in the suit on 09.04.2020.

5) Counsel Eugene Lubale Lubulellah signed a letter in the matter on 22.08.2019 and is misleading to say he came to discover about the status of the suit in 2020.

6) The claim was served on 12.02.2016 and a response ought to have been filed and served 21 days thereafter per rule 13 of the Employment and Labour Relations Court (Procedure) Rules 2016 which provide that if a party served with a statement of claim intends to respond, the party shall, within twenty-one days from the date of service, enter appearance and file and serve a response to the claim.

7) Counsel asked for time and was granted to file submissions and cannot turn around and allege the mistakenly failed to file a defence.

8) The application should therefore fail.

Parties filed their respective submissions on the application. The Court has considered the material on record for and against the application.

The Court returns that the application must fail because of the following reasons.

**First**, under rule 33 of the Court's rules of procedure, review is available only where an appeal has not been preferred. There is no dispute that the applicants seek a review in circumstances whereby they have filed a notice of appeal against the judgment. As submitted for the claimant the application is an abuse of Court process.

**Second**, in the judgment the Court found thus, "**The respondent appointed Lubulellah & Company Advocates to act in the matter. Despite the Court's directions and leave for the respondent to file and serve a statement of response, witness statement and the list and copies of documents, the respondent failed to comply. Despite service of a hearing notice, the respondent failed to attend the hearing which was fixed for 17.12.2019. Upon application by the claimant's Counsel on 17.12.2019, the documents filed for the claimant were admitted in evidence to be relied upon in determining the suit. The hearing proceeded ex-parte.**" The Court finds that the respondents were given an opportunity to file and serve a response and documents but failed to do so. They now turn around and urge that they did not know about the proceedings in the suit while at the same time their advocates had instructions and decided to file submissions. It is trite law that a preliminary objection must be raised earliest possible and the respondents have belatedly alleged that summons were never taken out. The Court finds that the material on record show that the respondents knew about the case, they attended

court, participated and appointed advocates on 18.02.2020 and the same advocates acted for them to-date. The belated lamentation is found to be an afterthought and is the kind of technicality the Court finds to have been cured by Article 159 of the Constitution especially that nothing before the Court suggests that the respondents were not aware of the suit.

**Third**, the Court finds that the respondents were required to comply with the various directions given by the Court and cooperate towards the just, expeditious, and proportionate determination of the suit per section 3 of the Employment and Labour Relations Act, 2011. The respondents failed to do so and the Court will not allow them to derail the path of justice and to benefit from their apparent unexplained failures. While alleging that the mistake was by counsel, nothing has been placed before the Court to show when the instructions to file the defence were given. The Court takes it that the instructions were given by or on the date the notice of appointment of advocate was filed and the Court returns that no good reason has been established for the failure to comply with the rules and directions by the Court in the matter.

**Fourth**, proceedings of 19.06.2019 show that Chimei Advocate appeared for the claimant and Simiyu Advocate appeared for the respondent and upon application and listening to the parties' advocates, the application for contempt was marked withdrawn with costs in the cause.

The second application is the one by the claimant by the notice of motion filed on 20.05.2020 and dated 19.05.2020 through Chimei & Company Advocates. The application is under section 12 and 13 of the Employment and Labour Relations Court Act and all the enabling provisions of the law. The substantive prayers are for orders that:

- 1) That the Court be pleased to issue summons to Dr. Evanson Kamuri – CEO of the Kenyatta National Hospital, to show cause why he should not be punished for contempt.
- 2) That Dr. Evanson Kamuri – CEO of the Kenyatta National Hospital be committed to civil jail for a period of six months for contempt of Court.
- 3) That the Court be pleased to award costs of the application to the applicant.

The application is based on the annexed affidavit by the claimant and upon the following grounds:

- 1) The contemnors have defied the Court order given on 09.04.2020. they have vowed not to implement the Court orders given on 09.04.2020.
- 2) The orders were served per the exhibited affidavit of service. The affidavit of service is by Haggai Chimei Advocate sworn on 19.05.2020. He states that on 28.04.2020 together with his process server went to Kenyatta National Hospital with a purpose of serving upon the Hospital Board the letter dated 28.04.2020 and the judgment of the Court delivered on 09.04.2020. Further, a lady whose name is not disclosed and who is said to have identified herself as as the Corporation Secretary and authorised to receive service received the letter and the judgment at 2.55 pm by stamping on the face of the documents as annexed on the affidavit of service. The stamp shows it was for Kenyatta National Hospital, Office of the Corporation Secretary and is signed and dated 28.04.2020 at 2.55pm. it appears on both the judgment and letter. The letter conveys that the judgment ordered the claimant to report on 01.05.2020 and the same being a public holiday the client had been advised to report on 30.04.2020 and compliance with the said order was the purpose of the letter.
- 3) The claimant states that he reported on 02.05.2020 and the 2<sup>nd</sup> contemnor acknowledged the same and sent him away indicating that the claimant was to await further communication. The claimant says he has not so far received further communication. Such behaviour by the contemnors undermines the authority of the Court.
- 4) The dignity of the Court is now under peril. The order of the Court is binding and unless is set aside must be implemented.

The application was opposed by the replying affidavit of Calvin Nyachoti, the Corporation Secretary for Kenyatta National Hospital, filed on 04.06.2020 through Lubulellah & Associates. The grounds of opposition are urged as follows:

- 1) The 2<sup>nd</sup> named contemnor is the CEO of the 1<sup>st</sup> named contemnor.
- 2) As corporation secretary he learned about the Court judgment of 09.04.2020 on 04.05.2020 although the claimant's advocates had by letter of 28.04.2020 intimated that they had advised the claimant to report on duty on 30.04.2020.
- 3) The hearing of the suit and the judgment were held in absence of the 2<sup>nd</sup> respondent's advocates.
- 4) The respondents' Advocates closed their office in mid-March 2020 due to the Covid 19 situation and they did not receive the letter dated 28.04.2020. The advocates had no notice of delivery of the judgment on 09.04.2020 as their office had closed due to the Covid 19 situation.
- 5) The respondents have applied to set aside the judgment by the (in the application the Court has already found earlier in this ruling to be liable for dismissal.)
- 6) The named 1<sup>st</sup> and 2<sup>nd</sup> contemnors are not in contempt of the Court orders in the judgment and they have no reason to disobey the orders despite the fact that they have filed a notice of appeal on 04.05.2020.
- 7) The claimant never reported at work on 01.05.2020 as alleged (but court observes the claimant stated he reported on 02.05.2020.)

The claimant's advocates' letter says that the claimant was advised to report on 30.04.2020 adding to confusion in the matter.

8) The 2<sup>nd</sup> named contemnor never met the claimant on 30.04.2020 or on 01.05.2020 or on 02.05.2020.

9) The claimant disobeyed the Court order when he failed to report as was ordered in the judgment, by 01.05.2020.

10) The judgment and order (decree) given on 09.04.2020 has not been served upon the 2<sup>nd</sup> named contemnor at all. No penal notice was issued in that regard.

11) The Court should bear into consideration the sensitive functions of the Hospital and the public interest and convenience in deciding the application.

The Court has considered the parties' respective positions and the submissions and makes findings as follows:

1) It is clear that the Corporation Secretary's Office received the letter by the claimant's advocates dated 28.04.2020 together with the judgment herein as per the affidavit of service on record. The Court also considers that in view of the prevailing Covid 19 situation, there is no reason to doubt that the Corporation Secretary learned about the order personally on 04.05.2020. Taking all that into account, the Court finds that the Hospital as the employer has become aware of the judgment and the orders therein.

2) The Court considers that there is no reason to doubt the claimant's evidence that on 02.05.2020 he met the 2<sup>nd</sup> named contemnor, the CEO. The CEO has not sworn an affidavit to deny that fact and the word of the Corporation Secretary that the meeting never took place amounts to hearsay. The Court finds that the 2<sup>nd</sup> named contemnor became aware of the judgment and the orders therein on 02.05.2020 and 01.05.2020 being an excluded day under the Interpretation and General Provisions Act, the Court returns that the claimant was entitled to report on 02.05.2020. The Court returns that he did not thereby disobey the orders in the judgment and the timelines thereof.

3) It is true that the claimant failed to extract the decree with a penal notice endorsed and there was a mix-up in communicating the orders in the judgment when the claimant's advocates issued the letter of 28.04.2020 that the claimant would report on 30.04.2020 but he in fact reported on 02.05.2020. The Court has also considered that the judgment was delivered in absence of the parties due to the Covid 19 situation. The Court therefore considers that to balance justice for the parties in the unique circumstances of the case, the named contemnors are found not to be in contempt and the timelines in orders (e) (v), (f) and (g) in the judgment are varied to payment by 31.12.2020 instead of the timelines therein and further, in order (b) by deleting 02.05.2020 and inserting 02.11.2020; and further to avoid disputes in that regard, the claimant to initially report accompanied by his advocates on record.

In view of the parties' margins of success in the two applications in issue, each party shall bear own costs of the applications. While making that finding the Court is alert that contemporary jurisprudence is that it is sufficient in a contempt application for the cited person to have been aware of the order alleged to have been disobeyed and in the instant case, while the cited persons were aware of the order, the stated mitigating circumstances favour a return of innocence.

In conclusion, the applications in issue are hereby dismissed with orders:

1) Each party to bear own costs of the two applications.

2) The named contemnors are found not to be in contempt and the timelines in orders (e) (v), (f) and (g) in the judgment are varied to payment by 31.12.2020 instead of the timelines therein and further, in order (b) by deleting 02.05.2020 and inserting 02.11.2020; and further to avoid further disputes in that regard, the claimant to initially report accompanied by his advocates on record.

**Signed, dated and delivered** by the court at **Nairobi** by video-link this **Friday 23<sup>rd</sup> October, 2020**.

**BYRAM ONGAYA**

**JUDGE**