



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 253 OF 2016

(Consolidated with Cause No. 254 of 2016 and Cause No. 255 of 2016)

JEREMIAH MAKORE WETENDE.....1<sup>st</sup> CLAIMANT

MICHAEL KARANI GAKUYA.....2<sup>nd</sup> CLAIMANT

JAMES MWANGI MUCHIRI.....3<sup>rd</sup> CLAIMANT

v

POPULATION SERVICES KENYA.....1<sup>st</sup> RESPONDENT

SENIOR MANAGER, TRADE

DEVELOPMENTS, POPULATION

SERVICES KENYA.....2<sup>nd</sup> RESPONDENT

**RULING**

1. In a Judgment delivered on 4 November 2019, the Court found that the termination of the employment of the Claimants was unfair and awarded them compensation together with interest thereon.
2. On 2 November 2020, the Respondents filed a Motion under a certificate of urgency seeking orders
  1. ...spent
  2. **THAT** all consequential orders of this Honourable Court do apply *mutatis mutandis* ELRC Causes Nos. 254 and 255 of 2016 which were consolidated by orders of this Honourable Court.
  3. ... spent
  4. **THAT** this Honourable Court be pleased to grant a temporary injunction restraining the Claimants/Decree holders and/or Dominion Yard Auctioneers whether by themselves, their representatives, employees, agents, servants or other persons acting on their behalf or claiming through them, from executing, attaching, carrying away or in any way dealing with the goods proclaimed on 29 October 2019 pending the hearing and determination of this application.
  5. **THAT** this Honourable Court be pleased to grant an injunction restraining the Claimants/Decree holders and/or Dominion Yard Auctioneers whether by themselves, their representatives, employees, agents, servants or other persons acting on their behalf or claiming through them, from executing, attaching, carrying away or in any way dealing with the goods proclaimed on 29 October 2019 pending the hearing and determination of the Appeal.
  6. **THAT** the proclamations dated 29 October 2020 and/or any attachment issued herein by Dominion Yard Auctioneers be declared irregular and/or otherwise an unlawful and illegal execution and the same be raised and/or lifted and that the Claimants/decreed-holders do bear the costs of the attachment.
  7. **THAT** this Honourable Court declares the proclamations by Dominion Yard Auctioneers dated 29 October 2020 for the consolidated sum of Kshs 4,579,404 a nullity since the entire process is replete with irregularity for want of extraction of a regular

decree.

8. **THAT** the Honourable Court to issue such further and other orders as it deems fit under the circumstances to meet the ends of justice.

9. **THAT** the costs of this application be borne by the Claimants/decree holders.

3. Pursuant to Court directives issued on 3 November 2020, the parties filed the following documents

(i) Respondents' submissions on 6 November 2020.

(ii) Claimants' Notice of Preliminary Objection and replying affidavit on 12 November 2020.

(iii) Claimants' submissions on 12 November 2020.

(iv) Respondent's supplementary submissions on 20 November 2020.

### **Respondents' stand**

4. Challenging the execution and in support of the Motion, the Respondents asserted that after the delivery of the Judgment on 4 November 2019, they filed a Notice of Appeal and requested for certified copies of the proceedings; the Claimants had not extracted a decree, a prerequisite to execution; the Claimants had confirmed not to be in gainful employment, and therefore it would be impossible to recover the decretal sums if the Appeal succeeded and that the Respondents were ready to provide security in the form of a bank guarantee.

5. In their submissions, the Respondents submitted that since a copy of a draft decree was not sent to them to endorse/approve, any decree extracted by the Claimants was irregular and further would not align with section 49 of the Employment Act, 2007 on the deduction of statutory dues.

6. On the effect of an irregular decree, the Respondents urged the Court to follow Nakuru Cause No. 316 of 2016, *Ernest Kibet Tonui v Kenya Farmers Association Ltd* and nullify the execution.

7. Explaining why it took nearly 1-year to apply for a stay, the Respondents contended that the Court file was either in the typing pool, with the Deputy Registrar and therefore they had made the application within a reasonable time after the file became available in the registry.

8. The Respondents also lamented that the Claimants had not sent a formal notification of execution before sending in auctioneers.

9. Citing the threat posed by COVID19 public health pandemic and loss of donor funding, the Respondents asserted that its operations, a non-profit entity, would be crippled leading to substantial loss incapable of being remedied if a stay order was not granted.

### **Claimants' take**

10. In their Preliminary Objection, the Claimants were of the view that the Motion was incompetent and a non-starter as the supporting affidavit had not been sworn before a Commissioner for Oaths, nor the exhibits sealed in compliance with section 5 of Oaths and Statutory Declarations Act and Rule 9 of the Oaths and Statutory Declarations Rules.

11. The Claimants also took exception to the supporting affidavit on the ground that different fonts were used.

12. On the merits of the application, the Claimants contended that there was no valid appeal as leave of Court had not been sought nor granted before filing the Notice of Appeal and that the advocate indicated as acting for them did not represent them during the trial. It was also argued that there was no evidence the Notice of Appeal had been served.

13. The Claimants also challenged the application on the ground that it had been brought over 1-year after judgment and no plausible explanation had been offered.

14. Responding to the contentions on the validity of the decree, the Claimants drew the attention of the Court to the fact that the decree and warrants were paid for and therefore were regular.

15. In conclusion, the Claimants took the position that the Respondents had not met the threshold of showing substantial loss that would be visited upon them if execution proceeded.

### **The Preliminary objection**

#### ***Deficient supporting affidavit***

16. The Claimant challenged the competency of the supporting affidavit on the ground that the deponent did not appear before a Commissioner for Oaths and also based on differences in font between the last page of the affidavit and the other pages.

17. The Court has looked at the supporting affidavit. On its face, it appears to have been commissioned by a Commissioner for Oaths.

18. Without further depositions and interrogation, the Court is of the view that on the basis of the material before it, it does not have sufficient facts to reject the supporting affidavit on the reason that the deponent did not appear before a Commissioner for Oaths or that it is defective because of different fonts.

#### **Sealing of the exhibits attached to the supporting affidavit**

19. The exhibits attached to the supporting affidavit were not sealed.

20. Rule 9 of the Oaths and Statutory Declaration Rules require exhibits to be marked and sealed.

21. In *Francis A. Mbalanya v Cecilia N. Waema* (2017) eKLR, the High Court held that the requirement was mandatory and that exhibits that did not conform were for expunging from the record.

22. There is a long chain of authorities (see *Solomon Omwenga Omache and Another v Zachary O. Ayieko & 2 Ors* (2016) eKLR; **H.C.C.C. No. 1511 of 2002, Abraham Mwangi v S. O. Omboo & Others, and Musikari Nazi Kombo v Moses Masika Wetangula & 2 Ors (2013) eKLR** to the effect that Rule 9 of the Oaths and Statutory Declarations Rules is mandatory, and the failure to comply leads to expunging the non-compliant exhibits from the record.

23. The exhibits in support of the Respondents application were not in conformity with the Rule and are for expunging from the record. The effect being that the application is left bare.

#### **Merits of the application**

##### **The validity of Notice of Appeal**

24. The Judgment of the Court was delivered on 4 November 2019, and the Respondents filed a Notice of Appeal on 6 November 2019 within the prescribed timelines.

25. The Claimants challenged the validity of the Notice of Appeal arguing that the advocate it was supposed to be served upon had ceased acting for them.

26. It is correct that the Notice of Appeal indicated that it would be served upon the firm of Situma & Co. Advocates whilst the advocate on record was Hammerton Maloba & Co. Advocates.

27. Whether the error or mistake made the Notice of Appeal legally incompetent is not for this Court to determine as that falls within the jurisdiction of the Court of Appeal.

##### **Inordinate delay**

28. The Respondents brought the application over 1-year after Judgment. The explanation given was that the file was inaccessible either because it was in the typing pool or before the Deputy Registrar for taxation of costs.

29. The record shows that the Claimants filed a Bill of Costs on 2 December 2019 and the parties filed submissions thereto 1 October 2020.

30. However, there is no single letter from the Respondents to the Deputy Registrar complaining about the non-availability of the file for purposes of filing an application of any nature.

31. In the circumstances, the Court finds the explanation by the Respondents that the file was not available as unconvincing.

##### **Substantial loss**

32. Urging the substantial loss ingredient, the Respondents decried that the Claimants would not be able to refund the decretal sum were the Appeal to succeed allegedly because the Claimants had admitted that they were not in gainful employment.

33. Resisting the allegation, one of the Claimants exhibited a copy of a title deed to show that he was not a pauper who would be unable to refund the decretal sum were the Appeal to succeed.

34. The High Court addressed the issue of substantial loss in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, thus, the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit....it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

35. It is correct the 1<sup>st</sup> Claimant admitted that he was not in gainful employment at the time of trial but he has now filed evidenced that he owns a property. The 2<sup>nd</sup> Claimant testified that he was a farmer while the 3<sup>rd</sup> Claimant stated that he was a small scale farmer in Nakuru.

36. Taking the Claimants words during the trial, the Respondents were of the view that they would suffer a substantial loss if the decretal sums were paid out to the impecunious Claimants.

37. Employment is just one of the lawful avenues for earning a living. Two of the Claimants testified that they were in business while one exhibited a title deed to show he owned landed property. It cannot be that without gainful employment they are persons of straw.

38. Apart from the fact that the Claimants were not in gainful employment, the Respondents did not demonstrate that they stood to suffer a substantial loss if a stay order was not granted.

39. In the view of the Court, the Respondents did not meet the threshold of showing they stood to suffer a substantial loss.

#### **Invalid/Irregular decree**

40. The decree herein was issued and sealed by the Deputy Registrar on 29 October 2020.

41. Order 21 Rule 8 of the Civil Procedure Rules provides that a party may prepare a draft decree and send it to the other party(ies) for approval within 7-days.

42. The Respondents challenged the validity or regularity of the decree on two fronts.

43. First, that a draft decree was not submitted to them for approval and second, that it did not conform to the provisions of section 49 of the Employment Act, 2007 by setting the net (statutory deductions) award due to the Claimants

44. Good practice and the Rules indeed envisage that a party drafting the draft decree will seek the approval of the other side.

45. The Responsibility, however, of ensuring that the decree reflects the judgment of the Court is placed on the Registrar/Deputy Registrar.

46. The Court has looked at the decree issued by the Deputy Registrar. It reflects and complies with the judgment of the Court.

47. On the question of statutory dues, it is the view of this Court that the deductions being a statutory requirement need not be included in the decree but should be implemented and/or enforced by the Judgment debtor when making out payment with the relevant returns being made to the tax authorities.

48. In the circumstances, the Court finds no irregularity in the decree that would affect its validity or regularity of the execution which ensued therefrom.

49. Any irregularities would be easily remedied by denying the benefiting party from further costs or directing the party to meet the auctioneer's fees.

#### **Conclusion and Orders**

50. From the foregoing, the Court has no other option but to dismiss the Motion filed in Court on 2 November 2020 with costs to the Claimants.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 4<sup>th</sup> day of December 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants Hammerton Maloba & Co. Advocates

For Respondents Mr. Dickens Ouma instructed by Federation of Kenya Employers

Court Assistant Chrispo Aura