



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 528 OF 2016

BETWEEN

PETER MUTUNE.....CLAIMANT

VERSUS

YALFA CARGO LOGISTICS LTD.....RESPONDENT

RULING

1. The Court delivered Judgment in favour of the Claimant, on 6th July 2018. The Respondent was ordered to pay the Claimant a total sum of Kshs. 1,647,000 comprising terminal benefits and compensation for unfair termination. The Claim was undefended.

2. At paragraph 2 of the Judgment, the Court states:-

“The Respondent was granted by the Court, 21 days, on 7th February 2017, to file and serve its Response. There was no Response on record by the time the dispute was next mentioned on 23rd February 2017. Respondent was granted another 14 days to file Response. The matter was mentioned on 14th March 2017. There was no Response filed. Further mention was made on 8th September 2017. Still no Response had been placed on the record. The dispute was set down for formal proof, on 13th November 2017. Counsel for the Respondent appeared in Court on the date of formal proof. She told the Court she had just received documents from her Client, and was ready to file [Response] and participate in the proceedings. The Court bent backwards and granted the Respondent 14 days to file its papers, with costs of Kshs. 15,000 awarded to the Claimant. Parties agreed to mention the matter on 14th December 2017, to confirm compliance on the part of the Respondent. Come 14th December 2017, there was no compliance in any form, on the part of the Respondent. The Court set aside the order granting the Respondent leave to file its Response, and once again scheduled the matter for formal proof.”

3. On 8th August 2018, the Claimant filed an Application for execution of decree.

4. On 23rd August 2018, more than a month after delivery of Judgment, 2 weeks after the Claimant commenced execution proceedings, and while the Law Firm of J.A. Abuodha was still on record for the Respondent, the Respondent filed what is described as a *Memorandum of Appearance*, through a different Law Firm, Hezron Gekonde & Company Advocates.

5. On the same date, the new Law Firm filed an Application seeking to set aside what is repeatedly described as the *Expert Judgment*. The Application seeks also, to have the Respondent allowed to file its Response out of time, and the Claimant restrained from proceeding with execution. The Application is based on the Affidavit of Macklean Mkenye, Human Resource Manager of the Respondent, sworn on 22nd August 2017. The deponent mainly blames the Law Firm initially on record for the Respondent, for failing to respond to the Claim. Temporary stay of execution was allowed on 23rd August 2018.

6. The Claimant filed a Replying Affidavit which he swore on 6th September 2018. He states that the Law Firm of Hezron Gekonde is not properly on record. No leave has been obtained by this Law Firm, to act in the place of the previous Law Firm. There is no reason shown why the Court should set aside Judgment and allow the Respondent to file its Response.

7. The Application was heard on 6th December 2018.

The Court Finds:-

8. The Law Firm of Hezron Gekonde is not properly on record. This Law Firm filed an Application on 23rd August 2018, asking for leave to come on record. The Application was not prosecuted. There is no order made in this Application. It is not indicated 'to be served upon J.A. Abuodha & Company Advocates.' It was not served upon J.A. Abuodha & Company Advocates. The Respondent presented its Application for *ex parte* stay of execution order, before the Court, sitting at Sarova Whitesands Hotel during the Judges' Colloquium on 23rd August 2018, and obtained the order for temporary stay. There is nothing said about the Application for leave to come on record.

9. The Application to set aside Judgment is incompetent, and clearly an abuse of the process of the Court.

10. It is not contemplated under the Employment and Labour Relations Court [Procedure] Rules 2016, that a Respondent files a Memorandum of Appearance long after Judgment has been delivered. The Memorandum of Appearance filed by the Respondent is likewise incompetent.

11. Paragraph 2 of this Ruling, captures in pellucid details, the sustained default by the Respondent, which culminated in *ex parte* Judgment. The Respondent has only itself to blame. The Court correctly describes its latitude to the Respondent, as ridiculous. The Court bent backwards to bring the Respondent to participate in the proceedings. The Respondent rejected every opportunity, and when execution proceedings commenced, set out to stop the process, adopting a glaringly irregular procedure. **IT IS ORDERED:-**

a. The Application is rejected.

b. Execution to proceed.

c. Costs to the Claimant.

Dated and delivered at Mombasa this 22nd day of February 2019.

James Rika

Judge