



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1492 OF 2015**

**KENYA CONCRETE STRUCTURAL CERAMICS**

**TILES WOODPLY & INTERIORS**

**DESIGNS WORKERS UNION.....CLAIMANT**

**- VERSUS -**

**LANDMARK HOLDINGS.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22<sup>nd</sup> March, 2019)

**RULING**

The Court delivered judgment on 31.07.2018 for the claimant against the respondent for:

- 1) The respondent to deduct union dues and remit the same to the claimant union into its bank account No. 0112016295\*\*\*\*, Co-operative Bank, Kusco Building Branch, Kilimanjaro Road, Nairobi effective end of April 2018 and to continue doing so on monthly basis with respect to all unionisable employees being the claimant's members.
- 2) The declaration that the respondent shall comply with the statutory minimum wages prevailing from time to time and as applicable to its employees.
- 3) The respondent to enter into recognition agreement with the claimant by 01.09.2018 in order to commence negotiations of collective bargaining agreement (CBA) immediately and to negotiate in good faith to conclude a collective agreement by 01.12.2018 towards safeguarding the rights of claimant's members in the respondent's employment.
- 4) The respondent to pay the claimant's partial costs of the suit fixed at **Kshs.100, 000.00** by 01.09.2018 failing interest to be payable thereon from the date of this judgment till full payment.

The claimant filed a notice of motion on 15.11.2018 and on 27.11.2018 the application came up for hearing and the Court ordered that the deputy registrar be and is hereby authorised to adopt the computation of non-remitted union dues for July, August, September, October, November, and December, 2018 and underpayment as attached herewith and to permit the claimant union to proceed with the execution following its judgment and orders issued on 31<sup>st</sup> July 2018 which to date they have ignored or failed to do; and costs in the cause.

The respondent in the suit, now the applicant, being dissatisfied with the order filed on 07.12.2018 the Notice of motion under section 1A & 1B, section 34(1) of the Civil Procedure Act, Order 21 rule 52, Order 51 rule 15 of the Civil Procedure Rules and all other enabling provisions of law. The application was filed through Nyaanga & Mugisha Advocates and served upon Edwin Maina & Associates for the claimants. The applicant prayed for orders:

- a) That the application be certified urgent and be heard on priority basis and ex parte in the first instance.
- b) That pending the hearing and determination of the application inter partes, the warrants of attachment and execution issued herein and dated 5<sup>th</sup> December 2018 be and are hereby stayed.
- c) That the order given on 27.11.2018 and issued on 28.11.2018 be set aside in its entirety.
- d) That the costs of the application be borne by the claimant.

The application was based on the supporting affidavit of Manjit Singh Sethi and it was urged as follows:

- a) The judgment entered for the claimant on 31.07.2018 never awarded the claimant a sum of Kshs. 117, 784, 660.85 as proclaimed by the claimant's auctioneers.
- b) The claimant was awarded Kshs. 100,000.00 which the applicant had already settled. The warrants of attachment for Kshs. 117, 784, 660.85 contradict the decree given on 31.07.2018.
- c) The respondent was neither served nor heard regarding the notice of motion dated 15.11.2018.

The claimant opposed the application by filing the replying affidavit of Dishon Angoya, the Secretary General of the claimant trade union. The affidavit at paragraph 17 states that the claimant union is executing for the orders of payment of underpayments to the union members which the Court has ordered for tabulation on various occasions and the same was served upon the respondent but was not responded to but confirmed that the applicant was underpaying the employees. The amount as tabulated should therefore be paid as the underpayment due to the employees. The affidavit was drawn by Edwin Maina & Associates who also filed the submissions on behalf of the claimant, the respondent in the present application.

The parties filed their respective submissions. The Court has considered the material on record and the matter in dispute and makes findings as follows:

- a) The claimants have failed to exhibit orders upon which the computation in issue amounting to Kshs. 117, 784, 660.85 was ordered or the computation thereof ordered.
- b) As submitted for the applicant, the orders given on 27.11.2018 were based upon gross miscarriage of justice because the respondent was not given an opportunity to be heard. Further, the orders, as submitted for the applicant, were given based on material non-disclosure that the judgment as entered on 31.07.2018 did not award the claimants the monies as computed and subject of the execution herein. As was held in **Gotv Kenya Limited –Versus- Royal Media Services [2015]eKLR**, one of the known grounds for discharging an ex parte order is concealment of material facts or material non-disclosure. That was the case in the present application and the ex parte orders are liable to being set aside.
- c) As the application has succeeded, the claimant will pay costs of the application.

In conclusion the application by the notice of motion dated 07.12.2018 and filed on the same date for the applicant Landmark Holdings is hereby allowed with orders that: (a) the order given on 27.11.2018 issued on 28.11.2018 and all consequential processes flowing from that order including the warrants of attachment and execution issued herein and dated 05.12.2018 are hereby set aside; and (b) the claimant to pay the applicant's costs of the application.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 22<sup>nd</sup> March, 2019**.

**BYRAM ONGAYA**

**JUDGE**