



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.379 OF 2017

FRANCIS KIMANI KINUTHIA.....CLAIMANT

VERSUS

FLAMINGO HILL CAMP LIMITEDRESPONDENT

RULING

By application and Notice of Motion dated 6th February, 2019 the respondent, Flamingo Hill Camp Ltd is seeking for orders that;

The firm of Kipruto Gitau & Company Advocates herein be granted leave to come on record for the respondent in place of S.M. Omae & Company Advocates.

There be stay of execution of the judgement entered herein against the respondent and all consequential orders pending the inter-parties hearing and determination of this application.

The proceedings of 11th December 2018 and judgement delivered on 21st January 2019 against the respondent be set aside.

Costs of the application be provided for.

The application is supported by the affidavits of Bernard Obutu, Job Leboo and Vivian A Awino and on the grounds that there is an arguable defence and stay of execution should be allowed as where not the defence will be negated and the claimant shall not be able to refund the judgment amount if paid. The respondent is willing to deposit security for the due performance of court orders. Application has been filed without undue delay.

Job Leboo avers that he is the manager of the respondent and in August, 2017 the claimant filed suit and the respondent appointed the firm of S.M Omae & Company Advocates to represent them in these proceedings. the advocate who had the personal conduct in the matter Bernard Obutu has since left and on 21st January, 2019 he called the deponent with information that there was judgement against the respondent in the sum of Ksh.363, 798.00 with cost. There was also communication that when the matter came up for hearing on 11th December, 2018 only the claimant attended court as Mr Obutu was attending training at Nairobi.

Mr leboo also avers that he was not aware that Mr Obutu had left the firm of S. M Omae Advocates and when the hearing proceed the advocate had left the law firm and there was no communication to the respondent and had this information been given in time a new advocate would have been appointed to attend at the hearing. By allowing the defence to urge its case there shall be no prejudice upon the claimant.

Bernard Obutu avers in his affidavit that he is now Prosecution Counsel and previously practiced with S.M Omae Advocates and had personal conduct of the matters herein for the respondent. On 21st September, 2018 he was called for training by the ODPP and offered employment and attended a mandatory training from 30th September, 2018 and induction training from 1st to 24th October, 2018. He then proceeded for a teambuilding seminar. He asked the firm of S.M. Omae Advocates to inform the clients he was personally working for of his departure. The secretary was then asked to relay the communication to the clients but by error omitted to attend.

Mr Obutu also avers that on 11th December, 2018 when the matter came up for hearing there was no attendance by the respondent through an inadvertent mistake of counsel and the respondent should not be punished for such mistake. He learnt that judgement had been delivered and informed the respondent.

Vivian owino avers that she is a secretary in the firm of S.M. Omae & Company Advocates where Mr Obutu was practicing before he left for the ODPP. She was asked to inform the respondent that the advocate had left the law firm but inadvertently forgot to issue the communication.

In reply the claimant filed his Replying Affidavit and avers that the firm of S.M. Omae & Company Advocates was properly served with a hearing notice on 20th August, 2018 and failed to attend court for hearing where the case was heard and concluded and judgement delivered on 21st January, 2019. The application now filed by the respondent is meant to delay justice as the firm of S.M. Omae & Company Advocates is not properly on record and the application filed lacks merit and should be dismissed with costs.

The claimant also avers that upon the close of hearing and pending judgement on 21st January, 2019 the respondent was served with a notice on 9th January, 2019 to attend court for judgement but did not take any action until 6th February, 2019 when the application herein was filed. Such inaction on the part of the respondent should not be allowed.

Both parties made oral submissions in court.

By consent, the firm of S.M. Omae & Company Advocates and Kipruto Gitau & Company Advocates agreed for change of advocates noting judgement entered on 21st January, 2019.

I take it the claimant was not served with such notice and this led to vehement objections to the procedure adopted by the firm of Kipruto Gitau & Company Advocates to enter on record for the respondent.

These are procedural matters which should not invite clandestine conduct and should be openly addressed to ensure each party is aware of any change and ensure the other party is acting and responding from a point of information and knowledge. The failure to serve the claimant and his advocates with the consent upon change of representation is not proper. Such conduct is not openly unprofessional but unbecoming on the part of an officer of the court as held in the case of **Paul Ekwom Nabuin versus Turkana County Government & another, Cause No.167 of 2017**.

Putting the above into account and noting the consent for the change of advocates, the firm of Kipruto Gitau & Company Advocates were allowed on record on 7th February, 2019.

On the substance of the application by the claimant, should the court stay execution of the judgement pending inter-parties hearing? Should the proceedings of 11th December, 2018 and judgement delivered on 21st January, 2019 be set aside?

The orders sought by the respondent are weighty and should be assessed based on the grounds upon which they are founded and the affidavits in support.

The background to the judgement delivered on 21st January, 2019 is that on 18th July, 2018 parties were scheduled to attend hearing directions; the respondent was served on 29th May, 2018 but failed to attend. On the due date a hearing date was allocated for the 11th December, 2018 and the respondent served on 20th August, 2018 but failed to attend. There are returns filed to confirm service. On the due date the claimant was not heard until 2pm. Hearing proceed and closed in the absence of the respondent.

At the close of the hearing the claimant was directed to serve the respondent with judgment notice which was done on 9th January, 2019 and there are returns filed in the regard.

Mr Obutu in his affidavit avers at paragraph 14 and 15 as follows;

I came to learn about the judgement on 29th January, 2019 when I was called from the office about the same.

On Friday 1st February, 2019 I travelled from my work station, Tamu to Nakuru to find out more about this matter.

As admitted, Mr Obutu left the firm of S.M. Omae & Company Advocates to join the office of the ODPP as Prosecution Counsel upon appointment vide letter dated 27th September, 2018.

He left private practice with such appointment. I take it he was closely following up on the matter as immediately judgement was delivered on 21st January, 2019 he was called and informed of the outcome and which caused him to leave his duty station from Tamu to Nakuru to find out more about the matter. He personally attended to find out what had transpired up and until the issuance of judgement.

Such diligent is commendable save that it was applied at the wrong time.

Where Mr Obutu had personal conduct of this matter for the respondent and was aware there was hearing scheduled for the 11th December, 2018 due diligence called for his professional attendance. When Mr Obutu was not able to attend, similar professional approach ought to have applied and cause the sole proprietor in the law firm he was practicing to be informed and to attend.

From his affidavit, Mr Obutu avers that he was in training from 26th November, 2018 to 1st December, 2018. There is no account of the time soon thereafter.

Where Mr Obutu found it necessary and of utmost importance to leave his duty station on 21st January, 2019 to attend at Nakuru and find out the status of the matter, similar haste ought to have been gone into to avert hearing ex parte on 11th December, 2018. Such haste to attend ought to have applied and inform the proprietor of S.M. Omae & Company Advocates to attend at the hearing.

Mr Obutu also fails to account for the time between 20th August, 2018 to 20th September, 2018 when the respondent was served with Hearing Notice and his alleged appointment as Prosecution Counsel. The dates and directions to Ms Owino to communicate to the respondent on the changes and exit from the firm of S.M. Omae & Company Advocates is not addressed. The need to issue directions to Ms Owino as secretary and not the sole proprietor of S.M. Omae & Company Advocates is professional not proper.

The keenness to details on the whereabouts of Mr Obutu stops at 1st December, 2018. There is no effort as to what happened from 11th December, 2018 to the date judgement was delivered when heightened activity picked leading to consent for change of advocates from S.M. Omae & Company Advocates to Kipruto Gitau & Company Advocates on 6th February, 2019.

The above outline demonstrates parties keen to frustrate the course of justice. In abuse of court process. Such should not receive the sanction of the court.

Due process was applied by the claimant to urge his case which has since concluded and judgement delivered. There are no proceedings to be stayed. Execution should ensue to him to enjoy the fruits of his judgement.

The respondent is not without recourse. He instructed his advocates to represent him herein which duty they neglected to abide. There exists a procedure to address such negligence but not herein.

Accordingly, application dated 6th February, 2019 is found without merit, such is in abuse of court process and is hereby dismissed with costs to the claimant.

Delivered at Nakuru this 7th day of March, 2019.

M. MBARU JUDGE

In the presence of:.....