



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. 3 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

LABAN MOKUA

MOFFAT MUNENE

SAMSON OMECHI

DOUGLAS WESONGA

PHUYLLIS NYAITOND.....APPELLANTS

PARTICK MULAGHUI

JENNIFER NAITORE

MARGARET WAKIO

NELID LULUMA

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS.....2ND RESPONDENT

RULING

The 3rd Appellant/Applicant herein filed a Notice of Motion dated 3rd May 2018 seeking to stay and set aside the Notice to Show Cause dated 29th March 2018, Application for Execution of Decree dated 26th January 2018 by the 2nd Respondent (Kenya Union of Commercial Food and Allied Workers) and Proceedings before the Deputy Registrar's chambers. This Court then granted a temporary stay of execution on 17th May 2018 pending the *interpartes* hearing of this Application.

The Applicant, Mr. Samson Omechi avers that after he was served on 5th April 2018 with the Notice to Show Cause dated 29th March 2018 and the Application for Execution of Decree dated 26th January 2018, he filed and served upon the 2nd Respondent a Replying Affidavit dated 26th April 2018 opposing the two contradicting judicial processes. That the parties appeared before the Deputy Registrar in Chambers on 30th April 2018 where his Replying Affidavit was technically disregarded for reason that the matter was purely for execution. That he was further unfairly directed by the Deputy Registrar to look for other co-appellants within seven days and return on 7th May 2018. He contends that his rights under Article 47 and 50 of the Constitution are likely to be violated. That the concepts and principles guiding the execution of the Court Decree on grounds of Costs are well established in law and that there must be due diligence to oversee the exercise but which principles however did not apply herein. That to date neither he nor the Appellants' advocate have been served with the Warrants, Decree and Certificate of Taxation in regards to the Ruling of the 2nd Respondent's Party & Party's Bill of Taxation dated 24th July 2014.

The Applicant continues to aver that it is not clear how the 2nd Respondent being the Decree Holder decided that he as the 3rd Appellant would be the one to carry the burden of satisfying the purported costs awarded by the taxing officer since the Judgment delivered on 9th July 2014 by Nzioki Wa Makau J was against all the 9 Appellants. That the 2nd Respondent is only using the excuse of recovering costs to settle scores with him as there is another matter (Appeal 3/2017) pending before this court wherein he is one of the Appellants while the 2nd Respondent is an Interested Party. That this court should take judicial notice that the Notice to Show Cause was served directly upon him almost four years later when in essence service was previously effected through the advocate on record. That choosing to specifically target him among all the Appellants mars the whole exercise with malice and discrimination, is contrary to Order 1 Rule 10 of the Civil Procedure Rules. That this should be disallowed by this Court. That since the 2nd Respondent lost interest and abandoned the process after this Court made and delivered a decision in 2014, it cannot be allowed to initiate execution of such a decision. Further, that this court should note that the 2nd Respondent is now trying to prosecute the matter vide the two applications/ notices without any explanation.

He avers that he has come to court in good time without undue delay and has presented a prima facie case and that by granting the orders he seeks, this court will promote the rule of law, equity and justice. That the 2nd Respondent will suffer no prejudice as the intended execution lacks integrity and is guilty of want of prosecution and that it is he who stands to suffer loss and damage and violation of his rights under Articles 22(1), 25(a) and (c), 27(1), (2), (4) and (5), 28, 29, 35, 36, 39, 47, 48, 50 & 159 of the Constitution. That this Court should therefore reject the application for execution of decree and the notice to show cause as they are both time barred, discriminatory, punitive and bad in law.

In his Supporting Affidavit dated 3rd May 2018, the Applicant avers that the last service received from the 2nd Respondent in relation to this matter of appeal was vide a letter dated 26th May 2016 forwarding a draft decree for approval. That he is not aware when the 2nd Respondent amended its application dated 24th July 2014 effectively discontinuing the other 8 Appellants as parties to the Appeal and that if such application was ever filed, then he was not served and neither did he participate in such proceedings. That he is also not aware of any court orders directing the 2nd Respondent to seek costs from him and that the 2nd Respondent must have misled this court when it obtained the Notice to Show Cause. That it is clear from the application for execution of decree that the Taxing Master arrived at Kshs.287,694.00 which is below one-third of the entire cost claimed by the 2nd Respondent. That he will be inviting the 2nd Respondent to show this Court from which part of the Judgment/ Ruling the decree containing Kshs.287,694.00 has been extracted from.

The 2nd Respondent filed its Replying Affidavit dated 14th May 2018 sworn by its advocate, Alfred Nyabena who avers that the 3rd Appellant swore an affidavit giving him legal authority to represent the other Appellants and that he cannot now refuse to be served with a Notice to Show Cause. That the court gave a ruling on the costs after the appeal was dismissed where costs were awarded to the Respondent. That the same was served upon the Appellants' advocate on record. That the 3rd Appellant has neglected, avoided and ignored to pay the 2nd Respondent's taxed costs and cannot in equity take advantage of his own wrongdoings. That when the 3rd Appellant appeared before the Taxing Officer, he sought time to get the other appellants so as to raise funds to pay the amount but that he instead moved to court to raise baseless allegations. That there is no time limitation on recovery of taxed costs and that the Applicant has also not shown how the mentioned articles of the Constitution have been violated against him. Further, that there has never been any objection to the Ruling of the Taxing Officer or any reference on the taxation of costs. That the 2nd Respondent should be allowed to proceed with its execution and/or committal to jail of the 3rd Appellant. That this Application has been brought after inordinate delay by the 3rd Appellant.

The Applicant filed his response stating that the Replying Affidavit is incurably defective as its deponent who is purportedly acting on behalf of the 2nd Respondent lacks authority pursuant to Section 2 of the Labour Relations Act 2007 and should thus be struck out of court records. That the deponent has also not tendered any valid and proper instrument before this court to enable him act on behalf of the 2nd Respondent's General Secretary and he is thus acting without jurisdiction. That if this court however admits the said Replying affidavit, it should note that it is retrogressive for the 2nd Respondent to imagine that because he swore an affidavit, he substituted the other Appellants from the appeal. That the 2nd Respondent has also not demonstrated that his application herein is defective or incompetent and neither has he annexed any evidence proving compliance of the costing process or that he was served with the same.

Applicant's Submissions

The Applicant submits that the 2nd Respondent has not tendered any explanation on non-compliance with service or of its delay to execute and that in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium –v- M.D. Popat & Others and Another [2016] eKLR*, the Court held in paragraph 11 that Article 159 of the Constitution and Order 17 Rule 2(3) gives the court discretion to dismiss the suit where no action has been taken for one year on application by a party in the interest of justice. That in the case of *Ivita –v- Kyumba [1984] KLR 441*, the court espoused that the test applied in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. He submits that it is therefore trite law that dismissal of a suit is a discretion which the court must exercise judiciously and that where a party fails to demonstrate reason for delay, it is presumed that the party lost interest.

He submits that if the processes initiated by the 2nd Respondent are not set aside, this will seriously prejudice him as he has been targeted alone to settle all the alleged costs and that it is further impossible for him to comply with a non-existent court order whose service was also not effected. He cites the case of *Sam Nyamweya & 3 others –v- Kenya Premier League Ltd & 2 others [2015] eKLR* where the court held that the act of isolating 1st defendant's directors to face contempt charges is tantamount to selective justice and promoting discrimination as exemplified in *Lord Johnson vs. Grant 1923 SC 789 at 790* that: "*The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being challenged*".

Respondent's Submissions

The 2nd Respondent submits that the Appellants have never challenged the taxation as allowed by the law and that the Applicant cannot thus

purport to now challenge the enforcement mechanism by the 2nd Respondent. That it has also not been demonstrated that the Deputy Registrar acted ultra vires in issuing the notice to show cause. That this application simply seeks to delay the finalization of this matter. That further, an advocate in the conduct of this appeal has authority and competence to swear and file a replying affidavit and the applicant's argument cannot therefore stand as Section 2 of the Labour Relations Act 2007 is inapplicable to this matter. It submits that the issue before this court is for the Applicant to show cause why the execution should not issue and that the authorities quoted in his submissions are not applicable. It prays that the application should be dismissed with costs to the 2nd Respondent.

Determination

The issue for determination is whether this Court should stay the application for execution of decree and the notice to show cause against the applicant on account of want of prosecution. The second issue for determination is whether the orders sought by the Applicant should be granted.

The Applicant claims the reason he did not file the application for stay earlier is because he was never served with the decree and certificate of taxation until 4 years later and so the same should be rejected for want of prosecution. The Applicant has not demonstrated how his constitutional rights are likely to be violated by execution of the decree.

From the arguments of the applicant, it is clear that he does not understand the procedures and processes of execution. Both the certificate of costs and the notice to show cause are regular. Perhaps the only issue should be why he was signed out for execution. This has been addressed by the respondent who represented his co-appellants.

I find no merit in the application and dismiss it.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE