



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1157 OF 2015

*(Before Hon. Lady Justice Maureen Onyango)*

WACUKA BARBARA WANJIKU.....1<sup>ST</sup> CLAIMANT  
ANAISHA KUTANG’U KANOTI.....2<sup>ND</sup> CLAIMANT  
GEORGIADIS GITONGA MWAMBIA.....3<sup>RD</sup> CLAIMANT  
ALVIN CHEPTOO KOGO.....4<sup>TH</sup> CLAIMANT  
AKOTH LILLIAN AGENG’O.....5<sup>TH</sup> CLAIMANT  
AGGREY ODHIAMMBO OJWANG.....6<sup>TH</sup> CLAIMANT  
HELLEN WANGARI MWANGI.....7<sup>TH</sup> CLAIMANT  
CAIHERINE MUKIRI.....8<sup>TH</sup> CLAIMANT  
SHADRACK MURUNGA WERUNGA.....9<sup>TH</sup> CLAIMANT  
NICHOLUS KIAMBI IRERI.....10<sup>TH</sup> CLAIMANT  
FRIDAH KAGWIRIA KUNGANIA.....11<sup>TH</sup> CLAIMANT  
FASCOLYNE CHERUTICH.....12<sup>TH</sup> CLAIMANT  
CHRISTOPHER KITHEKA.....13<sup>TH</sup> CLAIMANT  
ESTHER WAIRIMU GICHACHE.....14<sup>TH</sup> CLAIMANT  
GRACE MUCHIRI.....15<sup>TH</sup> CLAIMANT  
JUDITH CHEPKEMOI.....16<sup>TH</sup> CLAIMANT  
JOEL KATHEKA MUTISYA.....17<sup>TH</sup> CLAIMANT  
SUSAN NKATHA MUKINDIA.....18<sup>TH</sup> CLAIMANT

VERSUS

NAIROBI CITY COUNTY PUBLIC SERVICE BOARD.....RESPONDENT/APPLICANT

**RULING**

The Respondent/Applicant, Nairobi City County Public Service Board filed a Notice of Motion Application dated 12<sup>th</sup> April 2019 brought under Article 159(2)(d) of the Constitution, Sections 3, 16, 20(1), 29(1) of the Employment and Labour Relations Court Act, Sections 1A and 3A of the Civil Procedure Act, Rules 33 of the Employment and Labour Relations Court (Procedure) Rules, Rule 3(1) of the High Court [Practice and Procedure] Rules of the Judicature Act against the 18 Claimants/Respondents. It sought to be heard for Orders that:

1. The Application be certified as urgent and the same be heard ex parte in the first instance during the High Court's Vacation.
2. Pending the hearing and determination of this Application, there be a temporary stay of execution of the judgment of this court delivered on 19<sup>th</sup> January 2018.
3. The court be pleased to set aside the judgment dated 18<sup>th</sup> December 2017 and delivered on 19<sup>th</sup> January 2018.
4. Leave be granted to the Respondent to defend this claim out of time.
5. The annexed draft Response to statement of claim be deemed to be fully filed upon payment of the requisite fees.
6. The costs of this Application be in the cause.
7. Such other orders and/or directions that the court may deem fit to issue.

The Application is supported by the grounds that the cause was determined as an undefended cause as observed at paragraph 2 of the said Judgement dated 18<sup>th</sup> December 2017 and delivered on 19<sup>th</sup> December 2018 and that the Respondent/Applicant has been willing and ready to conduct the hearing of this case. That the case was heard and determined without the Respondent's solid response and/or evidence against the Claimants' allegations, which response need to be considered and the matter determined on merits. That the Respondent's draft Response to the Memorandum of Claim raises triable issues. That the Respondent has been condemned unheard contrary to the rules of natural justice and that the Claimants will suffer no prejudice whatsoever if the Respondent is allowed to defend this claim. That the Claimants can adequately be compensated by way of thrown away costs and that the best interest of justice will be served only if the prayers sought in the instant Application are granted.

The Application is supported by the Affidavit sworn by the Applicant's CEO and Secretary, Meshak Guto who avers that the failure to defend this cause was due to an inadvertent oversight on the Respondent's part and which oversight is deeply regretted. He avers that the Claimants/Respondents are in the process of executing the abovementioned ex parte judgment of this Court to the detriment of the Respondent/Applicant. That the Claimants/Respondents will not suffer any prejudice if the said judgment is set aside and the matter heard and determined on merit. He annexes documents marked **MG 1 - MG 3** in support of the Applicant's case.

The claimants filed their Grounds of Opposition/ Preliminary Objection dated 25<sup>th</sup> April 2019 on the following inter alia grounds that:-

1. The Application dated 12<sup>th</sup> April 2019 is a gross abuse of the court process and should be struck out and/or dismissed in limine based on the Record of Proceedings before this Court without any hearing or hesitation.
2. The Respondent participated in the court proceedings from inception including recording various Consent Orders and has even effected substantial parts of the said Consent Orders and the Judgment herein. The Respondent has left a portion of the Judgment unsatisfied for which the Claimants have sought execution after over one year of unfulfilled promises by the Respondent to satisfy the Judgment and Decree of this Court.
3. The Application has been brought after an inordinate delay and the Respondent has not offered any explanation as to the delay and what happened between the date of Court Directions given Inter-Partes on 23<sup>rd</sup> May 2016 and the subsequent hearing of Formal Proof on 15<sup>th</sup> February 2017 (two years ago) when it was duly served and the date of filing this Application (two years, two months later).
4. The Record of Proceedings herein shows a clear abuse of the court process by the Respondent from the chronology of proceedings within the abovementioned period.
5. From the record of proceedings, the Respondent was fully aware of every step taken and was given ample opportunity to file any Statement/Defence/Reply on the outstanding issues of the Court on 23<sup>rd</sup> May 2016 but failed to do so. The Respondent's advocate subsequently appeared in court on 15<sup>th</sup> August 2016 and 21<sup>st</sup> September 2016 but still failed to file any response despite having been served with the Claimants' Statement dated 10<sup>th</sup> August 2016 together with a Supplementary List of Documents.
6. After delivery of the Judgment, the Respondent's Attorney was duly served with a copy of the judgment by a letter dated 10<sup>th</sup> April 2018 which they received on 12<sup>th</sup> April 2018 and a Reminder on 27<sup>th</sup> September 2018. The Advocates were subsequently served with the Claimants' Bill of Costs dated 15<sup>th</sup> October 2018 and Notice of Taxation dated 18<sup>th</sup> October 2018 with an Affidavit of Service being filed on 1<sup>st</sup> November 2018 but the Respondent's advocate failed to appear before the Deputy Registrar for Taxation.
7. The Claimants Bill of Costs proceeded for Taxation on 5<sup>th</sup> November 2018 and a Ruling delivered on 21<sup>st</sup> December 2018 with the Certificate of Taxation and Decree being issued on 18<sup>th</sup> January 2019 and both documents duly served upon the Respondent on

23<sup>rd</sup> January 2019.

8. The Respondent has only woken up over two years later when the Claimants applied for a Certificate of Order under Order 29, Rule 3 filed in Court on 4<sup>th</sup> April 2019 and served upon the Respondent on 9<sup>th</sup> April 2019 for purposes of Execution through an Order of Mandamus after having failed to satisfy the remaining monetary part of the Judgment and Decree given on 19<sup>th</sup> January 2018 and issued on 23<sup>rd</sup> January 2018.

9. A substantial portion of the Judgment including Orders recorded by Consent of both advocates have been effected and cannot be set aside and this Court should not exercise its discretion in favour of the Applicants who had all the time but failed to file a defence to the outstanding issues.

10. Application should be dismissed with costs to the Claimants for lacking merit and Execution be allowed to proceed.

The Claimants also filed a Replying Affidavit dated 24<sup>th</sup> April 2019 sworn by the 1<sup>st</sup> Claimant, Wacuka Barbra Wanjiku on behalf of the Claimants in which she avers that she fully adopts the grounds of opposition and specifically the chronology of events set out therein at Paragraph 4 (a) – (o). That the Respondent should be ordered to settle the outstanding judgment, decree and costs already taxed which continue to accrue interest as the Respondent denies them enjoyment of the fruits of their judgment. That the Respondent's Advocates were actively involved in the Proceedings for 4 years from August 2015 to date and so the allegation of inadvertence, being condemned unheard and a claim of violation of rules of natural justice are misplaced and have no merit whatsoever.

That the Claimants will be heavily prejudiced if the orders sought are granted as the Respondent has already issued them with Letters of Employment on permanent and pensionable basis and adjusted their salaries to align with the other Health and Medical Staff within the County Government as ordered by the Court. That what is pending is only the payment of arrears on their allowances, damages and interest thereon as awarded by the Court. She annexes a Schedule of Documents marked **WBW1 (Nos. a-x)** in support of their Grounds of Opposition which documents she contends show that the Respondent was in the picture from 14<sup>th</sup> July 2015 up to 9<sup>th</sup> April 2019.

### **Submissions**

The Application came up for hearing on 6<sup>th</sup> May 2019. The Respondent/Applicant's Advocate stated in Court that he would be relying on the contents of the Notice of Motion, grounds and affidavit in support of the application. That the previous advocate did not conduct the matter as should have been done and has since been terminated. That the mistakes of Counsel should not be visited on the client. That they are willing to pay throwaway costs to compensate the Claimants and that they have included their response that raises triable issues with a strong defence.

The Claimants' Advocate submitted that what the Court is being asked is to exercise a discretion since the orders being sought are discretionary. That the discretion should be exercised on sufficient material. He relied on the grounds of opposition and replying affidavit which set out the listing of the matter and participation of Respondent's Counsel for 2 years before Judgment and 1 year after Judgment. That the Claimants were asking for letters of employment and that Orders were given by consent and letters of appointment issued. That the Claim is largely agreed on and implemented and that the only orders remaining are as set out in the Judgment being on arrears and discrimination. That the respondent never took opportunity to do anything after Judgment was delivered. That even after taxation, the respondent did nothing and that no useful purpose will be served by reopening the matter. That there was sufficient opportunity for the respondent to be heard. That the belated offer to pay throw away costs is frivolous. That the Applicant should either settle or the Claimants be allowed to proceed with execution.

The Applicant/Respondent's Advocate in a rejoinder submitted that the Respondent's office is a revolving door with hundreds of people walking in and some matters fall into the cracks and that the Respondent's hands may be tied.

### **Analysis and Determination**

The Applicant has submitted that judgment was delivered without taking into account its response/defence which raises triable issues while the Respondents submit that the Applicant has implemented most of the orders in the Judgment and Consent except for the monetary part as awarded by this Court. I opine that the Applicant implementing a large part of the Judgment proves that it was aware of the proceedings in this cause and so the claim that it now has a strong defence is an excuse to avoid paying the Claimants as ordered by this Court. This Application has not been brought in good faith and the Claimants/Respondents have proved in the documents produced in court that the Respondent and its advocate were aware of every step of the proceedings, judgment and up to the taxation stage.

Courts have wide discretion to set aside *ex parte* judgments and orders as was held in the case of *Shah vs. Mbogo and Another* [1967] EA 116. In the case the court held that in exercising its discretion, the court's concern should be to do justice between the parties, avoid hardship resulting from accident, inadvertence, excusable mistake or error and not to assist a person who has deliberately sought to obstruct or delay the course of justice. In *Wayua James and another -V- Daniel Kipkorong Tarus & Another* [2014] eKLR, the Court found that the delay and inaction by the applicant was inexcusable and not justified and that courts have never assisted an applicant who was indolent. The Court therein also found that even though there were triable issues, some had been proved by admission and that the applicants being indolent, were not deserving of the exercise of its discretion.

In the case of *Felix Lipesa Shabuya v Meena Jatishya Shah t/a Floral Heritage* [2017] eKLR, Wasilwa J in dismissing the application held as follows:

“Allowing the application to set aside the judgment already obtained by the Claimant is to deny the Claimant the fruits of his judgment and aid those not.

I decline to grant orders sought by the Respondents and order execution to proceed.

Costs to the Respondent/Claimant.”

In the present case, the applicant has been aware of the case from the beginning. As has been stated in the replying affidavit and grounds of opposition to the application, parties even attempted out of court settlement and a substantial part of the claim was settled leaving only two issues which were determined by the court. The applicant has not demonstrated the reasons why it did not file its defence, or why it did not attend court for hearing. The applicant has further not explained the long delay from the time of delivery of judgment on 19<sup>th</sup> January 2018 to 12<sup>th</sup> April 2019 when the present application was filed a period of almost one and a half years. The respondent has not denied that it was served with notice of judgment as stated in the affidavit. It has further not denied service of the Bill of Costs and taxation notice. The respondent appears to have gone deaf and mute to any communication from the claimants until it was woken up with the threat of execution.

The only conclusion that can be drawn from the facts herein as presented by the parties is that the instant application was filed to buy time to stall the execution process and to deny the claimants the fruits of their judgment.

Stay of execution is a discretionary power that the court must exercise judiciously, and with the interests of both parties in mind. The applicant has not demonstrated that it is deserving of the orders. It has not demonstrated that it has come to equity with clean hands. Equity aids the vigilant and not the indolent. He who comes to equity must come with clean hands and must do equity.

For the foregoing reason I find no merit in the application. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**