



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1045 OF 2015

AGGREY TUKUNYA ALUVANCE.....CLAIMANT

V

MAIKE POTGIETER.....1ST RESPONDENT

EXCELLENT AND TASTE T/A LE-RUSTIQUE RESTAURANT.....2nd RESPONDENT

RULING

1. The Cause herein proceeded to hearing on 16 October 2018 in the absence of the Respondents and their advocate on record.
2. The Court had earlier on 24 October 2017 directed that the Cause proceed undefended because the Respondents had failed to file *Response* despite having entered Appearance.
3. Upon close of the hearing and filing of submissions, the Court delivered judgment on 23 November 2018. The Claimant was awarded a total of Kshs 237,076/-.
4. On 24 April 2019, the Respondents filed a motion seeking orders
 1. (spent)
 2. (spent)
 3. **THAT** the *ex parte* Judgment delivered in Nairobi ELR Cause No. 1045 of 2015 on 23.11.18 by the Honourable Justice Stephen Radido be set aside, *ex debito justitiae*.
 4. **THAT**, this Honourable Court be pleased to make such further orders to meet the ends of justice.
 5. **THAT**, costs of this application be in the cause.
5. When the application was placed before the Duty Court on the same day, an order of stay of execution was granted *ex parte* on condition that the Respondents deposit the decretal sum into Court within 10 days.
6. The decretal amount was deposited into Court on 3 May 2019, and the Claimant filed grounds of opposition on 10 June 2019 ahead of the *inter partes* hearing.
7. However, when the application came for *inter partes* hearing on 11 June 2019, the Respondents were absent and the Court dismissed it (upon consent of the parties, the Court restored the application).
8. The Respondents filed submissions in support of the motion on 19 June 2019 while the Claimant's submissions were not on file by the set timeline.
9. In support of the application, the Respondents contended that the judgment was irregular because directions were not issued prior to hearing; there was no notice of judgment; hearing notice was not served; that the Claimant had failed to file submissions ahead of judgment as directed and that the Respondents sister company properties had been proclaimed yet it was not a party to the proceedings.

10. The Respondents urged that they stood to suffer irreparable damage as their restaurant business would be adversely affected if the orders sought were not granted.

11. In opposing the application, the Claimant took the position that the application was misconceived and an abuse of the court process. He asserted that the application was a delaying tactic and devoid of merit.

12. According to the Claimant, the application did not meet the requisite legal threshold for setting aside.

13. The Court has considered all the material placed before it.

Pre-trial directions

14. It is not correct as contended by the Respondents that directions were not taken before the Cause was set down for hearing.

15. Pre-trial directions were taken on 24 October 2017, and because the Court was satisfied that the Respondents had not filed a *Response*, it directed that the Cause proceed undefended.

Opportunity to participate in the hearing

16. The Court has closely examined the record and it indicates that the Claimant had sent out a letter to the Respondents advocate on 22 January 2018 to attend the registry to fix a hearing date after the giving of directions.

17. The Respondents advocate did not explain why it failed to send a representative to the registry to fix the hearing date. No hearing date was fixed.

18. On 28 February 2018, the Claimant's advocate again invited the Respondents advocate to attend the registry on 5 March 2018 in order to schedule a hearing date.

19. There is evidence on record that the Respondents advocate received the invitation on the same date. The registry went ahead to fix the hearing for 16 October 2018.

20. No explanation was offered by the Respondents why no representative was sent to the hearing date fixing on 5 March 2018.

21. Even more perplexing is that the Respondents did not make any attempt to explain why a *Response* was not filed despite having entered *Appearance*. A *Response* would essentially give a Respondent the *bona fides* or foundation to the calling of witnesses during the hearing.

22. The nature of unfair termination disputes (as codified in sections 43 and 45 of the Employment Act, 2007) is that an employer, like the Respondents herein must discharge a certain legal burden and that can only be anchored in a *Response*.

23. The Court finds that the Respondents were afforded opportunity more than once to participate in the litigation process but snubbed the chance(s).

Failure to file submissions and Notice of judgment

24. The failure by the Claimant to file submissions and/or failure to give a notice of delivery of judgment, in an undefended cause, in the view of the Court, is not an issue which would occasion any prejudice or injustice to a Respondent warranting the setting aside of a judgment.

25. The Court also notes that the Respondents did not attempt to demonstrate that they had a *Response* raising triable issues (no draft *Response* filed or the substantive defences disclosed in the supporting affidavit).

Proclamation on sister company

26. The Respondents strongest ground appear to have been the proclamation on a sister company.

27. It was contended that Le-Rustique Restaurant is located in Westlands Nairobi while the proclamation was carried out in Nanyuki (copies of KRA Taxpayer Registration Certificate and certificate of incorporation of Le-Rustique Ltd was filed).

28. The Claimant performed his duties in Nairobi. For unknown reasons, he did not attempt to offer any sort of explanation as to why he caused the properties of an entity which was not party to the dispute to be proclaimed.

29. To the Court, the proclamation was not only irregular or unprocedural, but illegal.

30. The proper remedy to the illegality, according to the Court, is not to set aside the judgment but interdict the execution process which had been set in motion against a person not party to the proceedings.

31. In all, the Court finds no merit in the order seeking setting aside the judgment/decreed, but at the same time finds and holds that the proclamation and warrants of attachment issued herein were illegal and void.

32. The warrants, proclamation and attachment is set aside.

33. The Claimant to bear the auctioneers fees.

Delivered, dated and signed in Court in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ondieki instructed by David Okoyo Ondieki & Associates Advocates

For Respondents Ms. Nyambura instructed by KTK Advocates

Court Assistant Lindsey