



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 33 OF 2018**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY  
FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: WORK INJURY BENEFITS ACT CAP 236**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE LAW REFORM ACT CAP 26,**

**ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 AND ALL**

**OTHER ENABLING PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF: LEGALITY AND PROPRIETY OF EXPARTE PROCEEDINGS**

**AND CONSEQUENTIAL JUDGMENTS AGAINST THE APPLICANT IN**

**MILIMANI LAW COURTS CIVIL SUIT NO. 34 OF 2018**

**KIAMBU LAW COURTS CIVIL SUIT NO. 236 OF 2017**

**KIAMBU LAW COURTS CIVIL SUIT NO. 241 OF 2017**

**KIAMBU LAW COURTS CIVIL SUIT NO. 494 OF 2017**

**KIAMBU LAW COURTS CIVIL SUIT NO. 574 OF 2017**

**BETWEEN**

**REPUBLIC**

**APPLICANT**

**V**

**JOHN PAUL WEKESA**

**1<sup>ST</sup> RESPONDENT**

**JOHN WANDERI**

**2<sup>ND</sup> RESPONDENT**

**CHANO KYALO**

**3<sup>RD</sup> RESPONDENT**

**ANTHONY OPONDO**

**4<sup>TH</sup> RESPONDENT**

**ERASTUS ORENGE**

**5<sup>TH</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT, KIAMBU LAW COURTS 6<sup>TH</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT, MILIMANI LAW COURTS 7<sup>TH</sup> RESPONDENT**

**AND**

**CHINA NATIONAL AERO-TECHNOLOGY ENGINEERING CORPORATION**

**LTD *EX-PARTE* APPLICANT**

**JUDGMENT**

1. China National Aero-Technology Engineering Corporation Ltd (*ex-parte* applicant) was granted leave on 28 November 2018 to apply for judicial review orders against the decisions of the 6<sup>th</sup> and 7<sup>th</sup> Respondents, purportedly issued without jurisdiction.
2. While granting leave, the *ex-parte* applicant was directed to file in Court and serve copies of judgments in Civil Case No. 34 of 2018 and Civil Case No. 236 of 2017 before consideration of grant of leave in respect of the 2 judgments.
3. The *ex-parte* applicant did not comply with the order and therefore there is no competent application before Court against the 2 judgments.
4. Upon grant of leave in respect of the other 3 Causes, the *ex-parte* applicant filed a motion on 9 November 2018 seeking orders
  - a) An Order of Certiorari to remove into this Court and quash the proceedings undertaken against the *ex-parte* applicant herein before the 6<sup>th</sup> and 7<sup>th</sup> Respondents in Magistrates Court in Milimani Civil Case No. 34 of 2018, John Paul Wekesa, Kiambu Civil Case No. 236 of 2017 John Wanderi, Kiambu Civil Case No. 241 of 2017 Chano Kyalo, Kiambu Civil Case No. 494 of 2017, Anthony Opondo, Kiambu Civil Case No. 574 of 2017 Erastus Orege for having been undertaken without jurisdiction.
  - b) An order of Prohibition prohibiting the Respondents from undertaking any further proceedings, undertaking execution proceedings by way of attaching the *ex-parte* applicant's assets based on the decretal sums obtained without jurisdiction.
  - c) An order of mandamus compelling the 1<sup>st</sup> to 5<sup>th</sup> Respondents to discharge and/or release the *ex-parte* applicant's assets attached in execution of the decretal sums consequent upon the irregular proceedings.
5. K. Kibiku & Co. Advocates filed a *Notice of Appointment of Advocates* on 12 November 2018, to act for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.
6. On 19 December 2018, the *ex-parte* applicant filed another motion seeking orders
  - A) An Order of Certiorari to remove into this Court and quash the proceedings undertaken against the *ex-parte* applicant herein before the 6<sup>th</sup> and 7<sup>th</sup> Respondents in Magistrates Court in Kiambu Civil Case No. 241 of 2017 Chano Kyalo, Kiambu Civil Case No. 494 of 2017, Anthony Opondo, Kiambu Civil Case No. 574 of 2017 Erastus Orege for having been undertaken without jurisdiction.
  - B) An order of Prohibition prohibiting the Respondents from undertaking any further proceedings, undertaking execution proceedings by way of attaching the *ex-parte* applicant's assets based on the decretal sums obtained without jurisdiction.
  - C) An order of mandamus compelling the 3<sup>rd</sup> to 5<sup>th</sup> Respondents to discharge and/or release the *ex-parte* applicant's assets attached in execution of the decretal sums consequent upon the irregular proceedings.
7. On 7 February 2019, the *ex-parte* applicant applied to withdraw the proceedings against the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, and the Court accepted the application.
8. In consideration of the motion filed in Court on 19 December 2018 and the withdrawal of the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, the only valid and active proceedings are against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, anchored on the latter motion.
9. When the motion of 19 December 2018 came up for hearing on 14 February 2019, the Court was not satisfied with the service, and it directed the *ex-parte* applicant to serve the 3<sup>rd</sup> Respondent through the address he had used in a replying affidavit filed in Court previously, and the 4<sup>th</sup> Respondent. Hearing was rescheduled to 26 March 2019.
10. When the motion was called out on the scheduled hearing date, none of the remaining Respondents were in Court and the Court allowed the *ex-parte* applicant to proceed because there was evidence of service.
11. The Court has keenly considered the record before it and come to the conclusion that the application has no merit.

12. Despite *service of process* being a running theme during Court appearances, there is absolutely nothing on record to demonstrate that the 6<sup>th</sup> and 7<sup>th</sup> Respondents were served with the motion(s) filed in Court on 9 November 2018 and 19 December 2018 before the application to remove them from the proceedings was made.

13. The affidavits of service on record attest to service of mention notices only.

14. Secondly, the *ex-parte* applicant was seeking to quash the decisions of the 6<sup>th</sup> and 7<sup>th</sup> Respondents.

15. For reasons not disclosed, the *ex-parte* applicant withdrew the said Respondents from the proceedings.

16. By removing the said 2 Respondents, in the view of the Court, the proceedings became a shell rendering the application incompetent and fatally defective. It was the decisions of the removed Respondents under challenge.

17. Indeed, the 6<sup>th</sup> and 7<sup>th</sup> Respondents were the true Respondents, the 1<sup>st</sup> to 5<sup>th</sup> Respondents should have been enjoined as Interested Parties.

18. Lastly, when granting leave (and that the leave do operate as stay) to institute judicial review proceedings on 28 November 2018, the Court set a condition (deposit of the decretal sum into Court) which was not complied with by the *ex-parte* applicant.

### **Conclusion and Orders**

19. Arising from the above, the Court has no option but to dismiss the proceedings herein.

20. Each party bears own costs

**Delivered, dated and signed in Nairobi on this 5<sup>th</sup> day of July 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For *ex-parte* applicant Mr. Abdullahi instructed by Lisinko, Njoroge & Gathogo Advocates

For 4<sup>th</sup> Respondent K.Kibiku & Co. Advocates

Court Assistant Lindsey