



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 461 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 23rd September, 2019)

GUYO HUKA.....CLAIMANT/RESPONDENT

VERSUS

MAWARA HOLDING LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant, Mawara Holdings Limited, filed a Notice of Motion application dated 03/05/2019 brought under Section 12 of the Employment & Labour Relations Court Act, 2011, Rule 33(1) (b) and (d) of the Employment & Labour Relations Court (Procedure) Rules, 2016 against the Claimant, Guyo Huka.

2. It seeks for orders that an interim injunction be issued staying any execution proceedings in regard to the Judgment and Decree issued in this cause and for this Court to review, set aside and vacate orders issued on 29/04/2019 dismissing its Application dated 19/03/2019 and the same be reinstated for full hearing and determination. The Application is supported by the grounds that:-

1. The Applicant received a letter dated 21/11/2018 from the firm of Gakoi Maina & Co Advocates (Respondent's advocates) through a whatsapp message in February 2019 and since it did not know the meaning of the letter, its director forwarded the same to its advocates, Njoroge O. Kimani & Co Advocates.

2. That its Advocates then attempted to peruse the file in the registry but the file could not be traced and the firm thus wrote to the Respondent's advocates seeking for pleadings in regard to the cause.

3. That its advocates only got copies of the pleadings after insisting and persisting through several letters and that the Applicant confirmed they had never been notified about the cause other than the letter dated 21/11/2018.

4. That it is on this basis that its advocates filed the application dated 19/03/2019 seeking to set aside the proceedings so that the Applicant could have a chance to defend the case.

5. The Applicant contends that it has never instructed any advocate to appear in this cause other than the current advocates and so it was astonished when its advocates were notified that an advocate named Miss Makori appeared for the Applicant on the 13/11/2017.

6. That the records on appearance of the said Miss Makori is a mistake and a misnomer and should be struck off as there is no indication of the firm she hailed from or a Notice of Appointment of Advocates filed on record.

3. The Application is supported by the Affidavit sworn by the Respondent's Director, Peter Chege Kiarie who annexes documents marked **PCK 1** and **PCK 2** being letters dated 17/12/2018 and 18/01/2019 sent by their advocates to the Respondent's advocates seeking for pleadings.

4. He avers that the advocate named Miss Makori is a stranger to them and did not have instruction to appear on behalf of their company in this cause or in any other matter. That this mistake should not be visited on the Applicant and that it is in the interest of justice that the orders sought in this Application are granted.

5. The Claimant/Respondent filed his Grounds of Opposition dated 17/06/2019 opposing the Respondent/Applicant's Application on the grounds that:-

1) *The Application constitutes an abuse of the Court process.*

2) *The Application is premised in bad faith and does not satisfy the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010.*

3) *The Applicant's Application is res judicata as a competent Court with competent jurisdiction already dealt with a similar application and delivered a ruling on the same on 29/04/2019.*

4) *The Court record can bear witness to the fact that the Respondent filed a similar application dated 19/03/2019 seeking stay of execution of the Judgment and the same was adjudicated upon by Hon. Lady Justice Wasilwa and dismissed on 29/04/2019.*

5) *The Application has been brought in bad faith and as a delay tactic.*

Applicant's Submissions

6. The Applicant submits that **Section 16 of the Employment and Labour Relations Court Act** gives power to this Court to review its judgments, awards, orders or decrees in accordance with the Rules. That its application herein is not an appeal and the stay thereto is not pending appeal as ensuing from Order 42 Rule 6 and that further, the said Order 42 Rule 6 is exempted from application in employment matters.

7. That it is noteworthy that the express application of Civil Procedure Rules is only on matters of execution as provided by **Rule 32 of the Employment & Labour Relations Court (Procedure) Rules, 2016**. It cites the Court of Appeal case of **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another –v- Ann Wangui Ngugi & 524 others [2018] eKLR** where it was held that the provisions of the Employment & Labour Relations Court Act and the rules made thereunder governing appeals are not limited or affected by the Civil Procedure Act and that the jurisdiction of the High Court and ELRC are distinct.

8. It further submits that on the claim by the Claimant of the application being res judicata, it relies on the case of **Kenya Union of Commercial Food & Allied Workers Union –v- Kapa Oil Refineries Limited [2018] eKLR** where the Court held that res judicata was explained in the case of **John Florence Maritime Services Limited and Another v Cabinet Secretary for Transport and Infrastructure and 3 Others [2015] eKLR** and that:-

“A judicial review application is not the same as a review and an application for review of a decree or order cannot be affected by res judicata. A review is not another suit. It is an application to either amend or set aside a decision.”

9. That an application herein is hedged on the ground “*on account of some mistake or error apparent on the face of the record and for any other sufficient reason*” and that when it came up for hearing on 29/04/2019, the Applicant was not aware that the said Miss Makori had allegedly appeared for it.

10. That before drafting and filing the application dated 19/03/2019, it made several attempts to peruse the file but it was not available in the court registry and that the name Miss Makori which came up during the hearing of the application resulted to the dismissal of the said application. That it is apparent the court dismissed the application based on apparent mistake and error that the Applicant was represented in the cause.

11. The Applicant refers the Court to the case of **Oscar Juma –v- Telkom Kenya Limited & 2 others [2019] eKLR** where upon being ceased with the correct position and the law, the Court proceeded to set aside orders of an earlier application after observing that it had made orders without all the probative evidence.

12. It is submitted by the Applicant that it is therefore not true that an application of stay of execution was adjudicated on 29/04/2019. It relies on the case of **Butt –v- Rent Restriction Tribunal [1979] eKLR** where the Court held that it is in the discretion of the Court to grant or refuse stay but what has to be judged in every case is whether there are reasons or not in particular circumstances in the case to make an order staying execution.

13. The Applicant finally submits that there is an error in the prayers being that the orders of 29/04/2019 were issued by Justice Nzioka when the proper name should be Justice Wasilwa and that the inadvertent mistake is regretted. That it has however met the threshold for a review, a stay of execution and a reinstatement of the application dated 19/03/2019 for full hearing on merit.

Claimant/Respondent's Submissions

14. The Claimant submits that the doctrine of res judicata is set out in Section 7 of the Civil Procedure Act and that **Order 45 Rule 6 of the Civil Procedure Rules** provides that “*No application to review an order made on an application for a review of a decree or order passed or made on review shall be entertained.*” He cites the case of **Phillip Cavine Ochieng –v- Securex Agencies Limited Nairobi CA 219 of 2017** where Njuguna J dismissed the matter for being res judicata while relying on the case of **A.N. v B.K. [2015] eKLR** where the Court stated:-

“The provision of Order 45 Rule 6 of the Civil Procedure Rules is mandatory that a second application for review shall not be entertained. It is my view and finding that the trial magistrate acted wrongly in entertaining and proceeding to allow the second application for review after the first application had been dismissed by Mr. J. Ndubi Senior Resident Magistrate as he then was.”

15. That the Learned Njuguna J further cited and relied on the case of **Mburu Kinyua –v- Gachini Titi 1976-80 1 KLR 790** while

dismissing the Appellant's appeal stating that the second application was res judicata since the facts on which it was based were known to the appellant at the time when he made the first application. That the appropriate mode of testing the Judge's decision on that application was to appeal against his ruling other than make another application to set the judgment aside.

16. He finally submits that the Respondent/Applicant's attempt to bring another Application with the same prayers and relief is an exercise to mislead and embarrass this Court and that this Honourable Court should dismiss the Application for being res judicata.

17. I have examined the averments of both Parties. I note that on 29.4.2019, I was presented with an application dated 19.3.2019 filed by the Respondent seeking stay orders. I heard the application and dismissed it on the grounds that the contention by Respondent that they had not been served is not correct because they attended Court on 13/11/2017 before J. Nzioki. I therefore dismissed the application on that ground.

18. The Applicants seems to have refiled the same application which is now currently before me.

19. I find that I have no jurisdiction to handle this application, the same being res judicata. I therefore dismiss it accordingly with costs to the Claimant.

Dated and delivered in open Court this **23rd day of September, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Njunge for Claimant/Respondent – Present

Respondent – Absent