



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 362 OF 2015

NOAH WEKO MANDU

CLAIMANT

v

GILLY'S SECURITY LIMITED

RESPONDENT

RULING

1. On 11 March 2015, the firm of Nchogu, Omwanza & Nyasimi Advocates (applicant) filed a Memorandum of Claim in which one Noah Weko Mandu was named as the Claimant and Gilly's Security Ltd was listed as the Respondent.
2. The Respondent, through the firm of Okong'o Wandago & Co. Advocates filed a Response and witness statement on 23 April 2015.
3. On 3 November 2015, the applicant invited the firm of Okong'o, Wandago & Co. Advocates to attend before the registry to fix a hearing date.
4. Another invitation was made on 17 November 2015 and hearing was scheduled for 3 October 2016, but the hearing aborted.
5. On 2 June 2017 the applicant again invited the Respondent's advocate to attend before the registry to fix a hearing date. The hearing was scheduled for 8 March 2018 and a hearing notice was duly served upon the Respondent.
6. Unknown to the applicant, the Claimant had on 3 October 2017, filed a *Notice of Intention to Act in Person* and a *consent* indicating that he had reached settlement with the Respondent. Both the Notice to Act in Person and the consent were dated 21 May 2015.
7. Having learnt of the developments, the applicant moved the Court on 30 November 2017 seeking
 1. **THAT** the Claimant's purported Notice of Intention to act in person dated 21st May 2015 and purported Consent dated 21st May 2015 be set aside.
 2. **THAT** the adoption by the Court, of the consent purportedly executed by the Claimant and the Respondent on 21st May 2015 be set aside; and
 3. **THAT** the costs of this application be provided for from the Respondent.
8. The Respondent filed a replying affidavit sworn by Amos Ogutu Wandago, advocate in opposition to

the application.

9. It is not clear whether the Claimant was served with the application.

10. The Court took arguments on 17 January 2018.

11. In seeking the orders under deliberation, the applicant contended that the Claimant could not enter into out of court negotiations with the Respondent as it was still formally on record for him; that the Respondent coerced the Claimant to enter into the consent and that the consent was obtained fraudulently.

12. On legal anchor to the application, it was submitted that the action of the Claimant in filing a *Notice to Act in Person* flew in the face of the provisions of Order 9 rule 8(1) of the Civil Procedure Rules which provide

Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of intention to act in person, with the necessary modifications.

13. In opposing the application, the Respondent contended that the Claimant had not challenged the validity of the *Notice to Act in Person*; a party could not be compelled to prosecute a Cause; Claimant had not filed any affidavit suggesting that he was coerced and that the applicant's remedy or proper course was to file a bill of costs against the Claimant.

14. The Court has given due consideration to the material placed before it.

15. Order 9 rule 8 of the Civil Procedure Rules envisages a litigant intending to act in person to notify both his advocate and the other parties' advocate.

16. In the instant case, the Claimant filed the *Notice to Act in Person* in Court on 3 October 2017 but did not himself serve the applicant, which was on record for him.

17. That Notice was only brought to the attention of the applicant on 3 October 2017 by the Respondent's advocate.

18. It is probable that the Respondent was prompted to serve the Notice and consent upon the applicant because of the hearing notice which had been served upon it.

19. It was a statutory obligation placed upon the Claimant and not the Respondent to notify the applicant of his intention to act in person but he did not.

20. In the view of the Court that failure alone cannot vitiate the *Notice to Act in Person* and consent, as the applicant (firm of advocates) was acting on the instructions of the Claimant, a principal.

21. Even if the failure could have vitiated the Notice and consent, the Court would not be able to compel the Claimant to prosecute his Claim. He could as well take to the dock, swear on the holy book and apply to have the Cause withdrawn.

22. That would not only waste the Court's time, but the applicant's time as well.

23. On the issue of coercion and fraud, the applicant has not given any scintilla of evidence that the Respondent coerced the Claimant to compromise the Cause.

24. The applicant has also not demonstrated that there was fraud on the part of either the Claimant or the Respondent to warrant the setting aside of the consent which was entered into to settle the Cause (legal

principles on setting aside a consent are trite and the Court need not relate the same in this ruling).

25. The applicant's recourse may be to follow up with the Claimant on the question of legal fees, if at all, using the ordinary channels.

26. For the above reasons, the Court declines the invitation by the applicant and orders that the application dated 27 November 2017 be dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 26th day of January 2018.

Radido Stephen

Judge

Appearances

Claimant did not participate

Applicant Mr. Nyasimi instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Ms. Ameyo instructed by Okong'o Wandago & Co. Advocates

Court Assistant Lindsey