



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 112 OF 2016

(Before D. K. N. Marete)

ALOYS MATAYA MOSETI..... CLAIMANT

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....RESPONDENT

RULING

This is an application by the respondent/applicant dated 27th April, 2018 seeking the following orders of court;

Orders;

1. ***THAT***, the present application be certified urgent and initial service of the same be dispensed within the circumstances.
2. ***THAT***, the Honourable court be pleased to grant orders to stay the execution of the decree against the respondent/Applicant by way of a Notice to show cause pending the final determination of the present application reinstate the respondent/applicant's application dated 30th March, 2017.
3. ***THAT***, the respondent/applicant's interrogatory application by way of Notice of Motion dated 30th March, 2017 be reinstated upon terms which the Honourable Court may deem fit and just to grant in the circumstances.
4. ***THAT***, the respondent/applicant be conditional stay of execution; and the setting aside of the dismissal orders on account of depositing the entire decretal sum into court as security for costs and/or upon terms which the Honourable Court may deem fit and just to grant in the circumstances.
5. ***THAT***, the applicant/respondent be granted liberty to defend the claimant's claim.

It is grounded as follows;

1. ***THAT***, the respondent/applicant undertakes to deposit the decretal sum in court as security for costs.
2. ***THAT***, there is imminent threat of execution by the claimant/respondent against the respondent/applicant in a sum exceeding Kshs.1,700,000.00.
3. ***THAT***, Counsel for the respondent/applicant had lodged a vital application dated 30th March, 2017 which application was inadvertently dismissed on 28th September, 2017.
4. ***THAT***, the respondent/applicant has mitigated that dismissal by lodging an application to reinstate the said application dated 30th March, 2017.
5. ***THAT***, the principles of Natural justice do demand that a party be granted an opportunity to be heard in opposition.
6. ***THAT***, the intended execution against the respondent/applicant will cause the county hardship and will render the present proceedings nugatory.

7. ***THAT***, the respondent/applicant will furnish adequate security as may be ordered and/or directed by the Honourable Court.

8. ***THAT***, the costs be provided for.

The claimant/respondent in a Replying Affidavit sworn on 2nd May, 2018 opposes the application and prays that this be dismissed with costs.

The matter came to court on 18th May, 2018 when the parties agreed on a determination of the twin applications on the basis of the pleadings set out therein.

The respondent/applicant anchors her case on the ground that she undertakes to deposit the decretal sum as security for costs.

She further bases this application on the ground that there is an imminent threat of execution by the claimant/respondent to the tune of a sum exceeding Kshs.1,700,000.00. Further, she has lodged a vital application dated 30th March, 2017 which application was inadvertently dismissed on 28th September, 2017. This has been mitigated by the launch of an application to reinstate the said application of 30th March, 2017.

It is her further case that the rules of natural justice demand that a party be granted an opportunity to be heard in opposition.

It is her penultimate averment that the intended execution against the respondent would cause hardship to the county and render the present proceedings nugatory. She undertakes to furnish adequate security as may be directed by this court.

The respondent/applicant's averments are further buttressed by their Supporting Affidavit of Thomas N. Maosa sworn on 22th April, 2018.

The claimant/respondent in his Replying Affidavit sworn on 2nd May, 2018 states his case of service to the respondent as follows;

- On 1st July, 2016 the respondent/applicant was served with a notice of summons. This notice of summons also had a mention date on 14th July, 2016 with a rider that unless the respondent filed a response within 14days, the claim would be heard and determined in their absence.
- By 14th July, 2016 the date the matter was fixed for mention the respondent had not filed any response whatsoever.
- On 14th July, 2016 the matter was fixed for hearing on 9th December, 2016. This is the time when the respondent filed a Notice of Appointment of Advocate through counsel holding her brief. No response had been had in the matter.

Again, counsel submitted that he had just received instructions and prayed for time to seek an out of court settlement in the matter. This was granted. The respondent however did not pursue this course or at all.

- On 16th December, 2016 the matter came for mention before court but the respondent was absent. This is despite the date having been taken in court *inter partes*.
- On 26th January, 2017 the respondent's advocate submitted that negotiations were in progress despite the fact that the claimant was not so involved. No report on negotiations, or at all, was adduced.
- On 21st March, 2017 a date taken by the parties, counsel for the respondent was absent but had requested a Mr. Rugut to hold his brief with a request for a further date as he was unwell. We objected to this and the court upheld our objection with directions that the matter proceeds to hearing.
- The respondent filed an application dated 30th March, 2017 with a view to hoodwinking the court and also delaying the determination and finalization of this claim. This was fixed for hearing on 28th September, 2017 and in the absence of counsel for the respondent, the application was dismissed for want of prosecution.

The claimant/respondent further avers that it took the respondent about six (6) months to do and file a response in the matter.

It is the claimant/respondent's further averment that this application is undeserving of any favourable consideration bearing in mind the conduct of the applicant in these proceedings. From the onset, it is notable that the applicant's application dated 30th March, 2017 was dismissed for want of prosecution. This was occasioned by the absence of her counsel at the hearing. No good reason has been advanced to warrant its reinstatement and the court is *functus officio* in the matter.

Again, the court awarded the respondent/applicant ample opportunity to be heard but this was squandered. This is explicit in the proceedings of 9th December, 2016, 26th January, 2017 and 21st March, 2017. The applicant has only herself to blame for her current predicament.

It is the claimant/respondent's averment that the issues raised in this application are a consequence of the laxity and belligerence of the respondent/applicant in the prosecution of the claim the causative of this application. She has been indolent through and through and this should not be rewarded. She avers that this application is not meritorious and should be dismissed with costs.

I agree with the sentiments of the claimant/respondent. This is not an application deserving of consideration. The respondent has been overtly negligent in the prosecution of her defence of the claim. She cannot on the eleventh hour be heard to plead for mercy or indulgence. Equity aids the vigilant and not the indolent. This is a long time warning to careless litigants and others who seek recourse on equity.

This application cannot stand the test of the day. It fails *in toto*. It is not deserving of any positive attention. The applicant should reap the fruits of her

indolence. This would be an everlasting reminder of the requisitions of justice and equity under all (such) circumstances.

I am therefore inclined to dismiss the application with costs to the claimant/ respondent.

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Thomas N. Maosa instructed Maosa & Company Advocates for the respondent/applicant.
2. Mr. Onchwang'i instructed by Ogutu-Mboya & Company Advocates for the Claimant/respondent.