



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 12 OF 2017**

***(Before D. K. N. Marete)***

**STEPHEN KIPROTICH KOECH.....CLAIMANT**

**VERSUS**

**HON. EDWIN K. BARCHILEI.....RESPONDENT**

**RULING**

This is an application by the respondent/applicant dated 4th December, 2017, seeking the following orders of court;

1. *THAT service of this application be dispensed with in the first instance.*
2. *THAT there be a stay of execution of Judgement delivered on 15<sup>th</sup> November 2017 and all consequential orders pending the hearing and determination of this application.*
3. *THAT Judgement delivered on 15<sup>th</sup> November, 2017 be reviewed and/or set aside.*
4. *THAT the costs of this application be provided for.*

It is grounded as follows;

1. *There is an error apparent on the face of the record as the judgement orders reinstatement of the claimant whose contract by statute was to expire on 7<sup>th</sup> August 2017 at the end of 11<sup>th</sup> Parliament term.*
2. *The Respondent/Applicant has never been the Claimant's employer.*
3. *The Respondent/Applicant only facilitated employment of the Claimant/Respondent as employee of Soy Constituency office under the pay roll of Parliamentary Service Commission.*
4. *The Claimant/Respondent ought to have joined the Parliamentary Service Commission as a Respondent in this suit.*
5. *The Claimant/Respondent has misled this Honourable Court by filing false affidavits of service.*
6. *The Respondent/Applicant has never been notified by any person of the proceedings in this matter till after judgement when he received Sms messages threatening him with Civil Jail.*
7. *The Respondent/Applicant do intend to defend this suit and has a merited defence.*
8. *The judgement requires clarification on whether the sum of Kshs.392,760/= ordered is general damages or salary arrears/unpaid salary.*
9. *The Claimant misled the Court in ordering payment inclusive of taxes and other statutory deductions.*

The claimant/respondents did not file any response to the application.

The matter came to court for hearing on 18th May, 2018 when Mr. Nyandimo, counsel for the applicant submitted that the applicant was never served with the hearing date or even the court papers. Judgement, too, was delivered in his absence. He further submitted that the affidavit of service avers that service was effected by courier and again made at the Constituency Development Fund offices.

In further submission, the applicant avers that he ceased to be a member of parliament and would be ineffective in an execution of the orders issued. He was only a member of parliament and not an employer of the claimant/respondent. He therefore urged the court to allow the application and set aside the judgement per Article 50, of the Constitution of Kenya, 2010 which dictates a fair determination of disputes.

Mr. Mogambi, counsel for the claimant/respondent submitted that all service of the application and orders of court had been had – see acknowledgement of the orders of court issued on 21st February, 2015 and received by Mursoi K. Denis, COM Soy Constituency on 22nd February, 2017.

He further submitted that in Annexure A is a confirmation that the respondent was an employee of Soy Constituency office whereas Annexure B confirms that the receiving party was an employee with authority to receive service as such. He also submitted a filing of Return of service in respect of all service effected. This was done through the known postal address of the respondent/applicant and accords with rule 11 (7) of the Employment and Labour Relations Court (Procedure) Rules on postal service.

The claimant/respondent further rubbishes the submission of an error on the face of the record as espoused in ground number 1. He also rubbishes the other grounds as follows;

Ground No. 4 – non joinder of the Parliamentary Service Commission – the claimant was an employee.

Ground No. 5 – False affidavits: there was no cross-examination on this.

Ground No. 7 – There is no defence on the matter or at all. A merited defence is not ascertainable.

Again, paragraph 8, 9 and 10 all confirm unlawful termination of employment and Ground No.10 is a lie on non service. It is entirely untrue as the applicant was served with all court process as evidenced on the record of court.

This application is not meritorious. It is clear from the submissions of the claimant/respondent that all court process was served onto the respondent/applicant and this is evidenced on the record of court. Service of the claim and all subsequent processes including mentions and hearing dates were served onto the respondent in person or Soy Constituency Office and also through registered post. Service to the Constituency Office was made to an employee who was authorized to receive such service.

The claimant/respondent submits that the applicant's submission of no service is a lie and a probable afterthought. I agree. The record of court is replete with evidence of service at all instances during the prosecution of the matter.

The application does not bring out any tangible case for review. The plea and submission that there is an error on the face of the record does not hold water. That the respondent/applicant was not an employer of the claimant but only facilitated his employment is not in issue at this juncture. This is an issue that should have been developed at the hearing.

This court in its judgement dated 15th November, 2017 made the following finding;

*The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his testimony at the hearing reiterates his case as presented in his pleadings and supporting documents. This is not defended or denied by the respondent who throughout these proceedings opted for silence. There was no defence.*

*In the absence of a defence and on the basis of the case, evidence and supporting documents presented in support of the case, I find a case of wrongful, unfair and unlawful termination of employment of the claimant by the respondent. And this closes the 1st issue for determination.*

This was a finding of the court. It cannot be equated to an error on the face of the record as pleaded and submitted by the respondent/applicant. This limb of the application therefore fails *in toto*.

This comes out as a case of indolence and neglect in the prosecution of the respondent's case from the onset. It is the causative of the anguish this court and the parties are now going through. This must be condemned in the strongest terms. Parties who do not diligently pursue their matters at the opportune moment and only come back later to tantrum and treat us to lamentations should be treated with equal ridicule.

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 Nyandimo instructed by Kamunye Gichigi & Company Advocates for the respondent/applicant.
2. Mr. Mogambi instructed by Wambua Kigamwa & Company Advocates for the claimant/respondent.