



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 2212 OF 2012

(Formerly High Court Civil Case No.548 of 1995)

(Before Hon. Justice Hellen S. Wasilwa on 11th June, 2018)

WOI SAMUEL CHEGE GITAU AND 283 OTHERS CLAIMANTS

VERSUS

THE HONOURABLE ATTORNEY GENERAL RESPONDENT

RULING

1. The Application before me is the one dated 5/12/2017 which was filed by the Respondents herein seeking orders of stay of this Court's orders given on 21.11.2017 including Captain Joseph Mwangi Mbugua, Corporal Peter Nahashon Wambulwa, Senior Sergeant Joseph Guichuru Chege and WO II Thomas Joshua Were as beneficiaries of the Judgment of 17th February 2015.
2. They also seek setting aside of this order so that they can be given an opportunity to be heard on the Notice of Motion Application dated 10.10.2017 so that the said Application is determined on merit.
3. The Application is based on the grounds that the Application was fixed for hearing on 21.11.2017 and was listed before Hon. Justice Maureen Onyango.
4. That when the Application case of hearing, the matter was called out and Mr. Osoro Juma was present for the Applicants and Miss Ayuma Shigoli was present for the Respondent.
5. That Miss Ayuma Shigoli then went ahead and sought time to file a Replying Affidavit to the Application. The Court directed that the file be sent back to Judge Nderi for direction.
6. On 30th November 2017, the Respondents were surprised to be served with an order indicating that the Application had proceeded exparte and prayers allowed on 21.11.2017 in the absence of the Respondents when Counsel had gone to the High Court to place aside Petition 393/2017 before Judge Mwita.
7. They aver that it is in the interest of justice that the Application be allowed so that they have an opportunity to defend the Application on merit.
8. The Application was also opposed by the Claimants herein. They aver that when the parties appeared before Judge Onyango she directed parties to proceed before Court No. 3 where Judge Nduma was sitting to take directions before him. The file was placed before Judge Nderi who looked at the file and asked whether the Applicants were employees of the Kenya Air Force. He confirmed they were as their discharge certificates were attached to the Application. The Hon. Judge also asked if any one among them applied to withdraw from the suit and if they were served with any papers.
9. The Claimants aver that the Learned Judge was only concerned with whether the parties were employees of the Kenya Air Force and if they had filed the claim. Having confirmed they were employees of the Respondents, the Judge allowed/found that after the judgement was pronounced, the names of the Respondents herein were in the claim and that they are part of those who field Notice of Appeal. He allowed the Application.
10. The Respondents urge that the Application by the Applicant/Respondent should not be allowed as the Respondent stand to suffer

prejudice if their names are removed from the list of beneficiaries of the judgement delivered on 15/4/2016 and even as per the Notice of Appeal lodged in the Court of Appeal on 25/4/2016.

11. The Claimants herein filed their submissions and submitted that the Application should not be allowed. They aver that these Applicants were represented by the firm of Osoro Juma & Company Advocates who failed to comply with the mandatory requirements of Order 5 Rule 21 and 22 of the Civil Procedure Rules by failing to serve all the 3 firms of Advocates representing the Claimants herein. They also aver that this firm has no locus standi to address Court having not come on record.

12. The firm of Agina & Associates Advocates for 284 Applicants therefore supported the Application by the Attorney General. They state that as the Respondent/Applicants did not serve them with any process, an order that was made against them has no effect and is a nullity.

13. The Application before me is basically for stay pending of execution and that they be given an opportunity to be heard on merit on the Application dated 10th October 2017. The reasons given for the Applicants absence in Court on 21/11/2017 are not clear.

14. On this day, the Counsel for Applicant and Respondent appeared before Hon. Lady Justice Onyango. Judge Onyango referred the matter to Judge Nderi for direction on the same day. When the file was placed before Judge Nderi, Applicants' Counsel Osoro was present but Counsel for the Respondent was absent. Reasons for the absence are not explained.

15. The Honourable Judge Nderi considered the Application before him and allowed it.

16. The absence of the Applicants before Judge Nderi is not excusable. However, I note that this Court's main duty is to do justice to the Parties. The issues raised by the Applicants inclusion of some parties as beneficiaries of a judgement when they were not part of the claim are weighty issues and which should be considered on merit.

17. In the circumstances, I exercise my discretion and allow the Application of stay/set aside orders allowing inclusion of the 4 Applicants as part of the judgement and direct that the Application dated 10/10/2017 be set down for hearing on merit.

18. Costs in the cause.

Dated and delivered in open Court this 11th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omwanza holding brief for Osoro for Claimants– Present

Ayuma for Respondent – Present