



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.1516 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 24th October, 2018)

PETER MUCHA GACHOKACLAIMANT

-VERSUS-

PROTOCOL SOLUTIONS LIMITED.....RESPONDENT

RULING

1. The Application before Court is the Notice of Motion application dated 13.6.2018 filed by the Respondent/Applicants herein seeking orders as follows:-

1. "THAT the firm of JACOB OLOO & COMPANY ADVOCATES be granted Leave to come on record and file a Notice of Appointment of Advocates to act for JOB MAXWEL OCHIENG NDEGE, who is named as one of the directors of the Respondent Company.

2. THAT there be a Stay of any Execution Proceedings in relation to any Judgment entered herein against JOB M. O. NDEGE and consequent Orders herein including the Orders given on 22/02/2018 pending the hearing and determination of this Application.

3. THAT the orders given on Notice of Motion dated 03/08/17 and Amended on 04/12/17 and any Consequential Orders given herein be Set Aside and the said Application be heard on its full merits with the participation of the JOB M. O. NDEGE.

4. THAT the Costs of this Application be provided for in any event.

2. The Application was filed through a Notice of Motion application and brought under Order 9 Rules 9 and 10, Order 22 Rule 22, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 together with Section 1A and 3A of the Civil Procedure Act - Cap 21.

3. This Application is supported by the annexed affidavit of Job M.O Ndege one of the persons named as Respondent's Director herein.

4. The Application is also premised on the following grounds:-

1. "On or about Saturday 17/02/18 a sealed envelope was dropped at Job M. O. Ndege's work place, Receptionist desk, in Nanyuki relating to this case while he was away on work related duties for Two (2) weeks.

2. On 26/02/08 when he returned to work, he opened the Sealed envelope and found a Hearing Notice dated 25/01/17, given by this Court, evincing that an Amended Notice of Motion dated 04/12/17 was fixed for hearing of Examination of Directors of the Respondent Company on 22/02/18 and he was named as the one of the Directors of the Respondent Company in the Notice.

3. In the envelope was only a Hearing Notice without any other court documents prompting him to forward the Notice to a friend in Nairobi to check for him the court file only to discover that a Notice of Motion dated 03/08/17 and an Amended Notice of Motion dated 04/12/17 which had been filed by the Claimant had proceeded for hearing in Court on 22/02/18 in his absence and the same was allowed by Court.

4. Effective 30/10/16, and 31/10/16 Job M. O. Ndege resigned as Managing Director and Director/ Shareholder of the Respondent Company respectively, thereof notifying the Board of Directors to effect changes in Companies Registry records.

5. Consequently, he took up the job of Chief Technical Officer at Mawingu Network Services Ltd in Nanyuki hence no longer in the know of the affairs of Respondent Company.

5. In the affidavit, he reiterates the averments made in the above grounds. He avers that he indeed resigned as Respondent's managing Director on 31/10/2016 vide a letter dated 14/9/2016 copied and annexed herein as Appendix JMON2.

6. He avers that at the time of leaving the Respondent's Company the Respondent owed him Kshs.10,744,000/=. He also avers that he was not involved in the Board operations at the Respondent's Company and was not privy to the Assets and Books of Accounts and Properties of the Company which was being controlled from the parent office of Protocol Solutions Africa Limited based in Mauritius and the local office in West End Towers 6th Floor Waiyaki Way was just a subsidiary which has since been closed and the Directors are in Mauritius, South Africa, Angola and Zimbabwe.

7. The Applicant annexed his appointment letter as Managing Director of the Respondent as an exhibit and a letter showing he resigned from the position of Managing Director on 13/9/2016 and as a Director on 31/10/2016.

8. The Respondent/Claimant opposed this application. They filed a Replying Affidavit to this Application on 20/6/2018. The Affidavit was sworn by the Claimant/Respondent herein. He avers that the application filed is a sham and meant to deny him realizing the fruit of his judgement.

9. He also stated that the Respondent Company is still in existence and has 2 Directors as per his Appendix PMG.1. Two Directors are Job Maxwell Ochieng Ndege and Tony Ketter.

10. He avers that the Applicant herein was properly served with the application that made this Court order a NTSC be served upon him. On whether he Applicant is still Respondent's Director or not the Respondent contends that there are prescribed regulations detailing how a person can cease being a Director of a Company. These regulations provide that at the very minimum, the Directors should swear an affidavit and sign prescribed forms to cease acting as a Director which are then forwarded to the Registrar of Companies. That this, the Applicant has not done.

11. He therefore avers that the Applicant is still a Director of the Company and so should be ordered to settle the decretal sum. He seeks that this application be dismissed accordingly with costs.

12. The Applicant filed a further affidavit on 17/7/2018 where he reiterates that the list of Directors of the Respondent Company have since been updated as per JMON3. He also avers that the cause of action arose before he was made a Director of the Respondent.

13. He seeks stay pending setting aside of the orders issued on 22/2/2018 which application is still pending for hearing and determination before this Court.

14. In a further affidavit dated 20th July 2018 and filed in Court on 23/7/2018, the Applicant disputes service of the application. He avers that Messrs T.O. Kopere and Company Advocates for the Respondent were the ones served with this application dated 3/8/2017 and amended on 4/12/2017 which did not constitute service upon him as he was to be served personally.

15. He avers that subsequently, Samson M. Wambua served his secretary, which was also not service upon him as required by law. He was later served with a NTSC why he should not be arrested and committed to civil jail.

16. He avers that he has since petitioned the Registrar of Companies to expunge his names as Director of the company and the same was allowed on 22/8/2018. He reiterates that since the Decree Holder left the Respondent Company a month after the Applicant joined, the claim against the Respondent Company for his dues cannot be executed against him. He seeks to be allowed to prosecute his application dated 3/8/2017 and amended on 4/12/2017 because the same was not served personally upon him.

17. The Claimant Decree Holder filed a supplementary affidavit where he reiterates that T.O Kopere and Company Advocates have all along been acting for the Respondent in this suit. That in main suit Mr. Ndege was summoned as a witness and was also examined as Managing Director of the Respondent at the main hearing.

18. He also avers that orders issued by this Court were issued when the Applicant was Respondent's Managing Director and so he cannot escape liability.

19. He avers that the Applicant even lied to the Registrar of Companies to enable him cease being Respondent's Directors (PMG-2). He avers that the Applicant signed minutes of a meeting held on 19.6.2018, which indicate he was with Mr. Tony Ketter yet had deponed in affidavit of 16.7.2018 and 20.7.2018 that he had been unable to trace the said Directors for purposes of settling this claim.

20. I have considered the averments and submissions of both parties. The issues for determination in this case are whether the Applicant has met the threshold for grant of stay orders.

21. Order 42(6)(2) of Civil Procedure Act states as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless:

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the

application has been made without unreasonable delay; and

b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

22. In considering therefore whether to grant stay orders, this Court must be able to satisfy itself that the Applicant approached it within reasonable time, that the Applicant will suffer irreparable harm if the orders sought are not granted and lastly that the Applicant is able to fulfil conditions of security that may be ordered by Court.

23. In respect of time, the orders of Court were given on 3/5/2017 and amended on 4/12/2017. Further orders were given on 22/2/2018. The Applicant filed his application in June 2018. I must say he came to Court late despite being the Respondent's Director at the time the orders were given. The Applicant even testified before Court during the hearing of this case and was all aware of what was happening as there was Counsel on behalf of the Respondent on record.

24. The Applicant has offered no security to the Court nor had he demonstrated how he stands to suffer if the orders sought are not given. The Applicant has not demonstrated any of the 3 conditions.

25. In respect of whether this Court should set aside the orders given in this cause, **In Gideon Mose Onchwati vs Kenya Oil Company Limited and Another (2017) ekLR** Abwiril J cited various case law and stated as follows:-

“Setting aside an ex parte judgment is a matter of the discretion of the court, as was held in the case of Esther Wamaita Njihia & 2 others vs. Safaricom Ltd where the court citing relevant cases on the issue held inter alia: -

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo) ...

In Shah vs Mbogo and Ongom vs Owota the Court held that for such Orders to issue inter alia the court must be satisfied about one of the two things namely: -

a. either that the defendant was not properly served with summons; or

b. that the defendant failed to appear in court at the hearing due to sufficient cause.”

26. In determining whether or not I can grant orders setting aside orders earlier given, I note that setting aside of an ex parte judgment or ruling is a discretionary issue. I can only exercise this discretion judiciously by considering the fact that the Applicant was not properly served or he failed to appear in Court due to a sufficient cause.

27. Indeed the Applicant has submitted that he was never served with the summons to appear in Court. He also avers that he should have been served personally which was not the case.

28. I note that the Process Server in the return of service dated 22.2.2018 and sworn by Samson M. Wambua indicate that the notice was served upon the Director Mr. Ndege – the Applicant herein.

29. Prior to the grant of the orders of Notice to Show Cause (NTSC) the Court was informed that the Applicant had been duly served. There is evidence of service upon the Applicant. At the time, the Claimant was the Respondent's Director. Judgement was entered against the Respondent when Applicant was still Respondent's Director and he even gave evidence before Court on behalf of the Respondent. The issue of setting aside the judgement for failure to be served will therefore not arise.

30. I however exercise my discretion and allow the application for oral examination of the Respondent's Directors be heard on its full merit with the participation of the Applicant.

31. Costs in the cause.

Dated and delivered in open Court this 24th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mumbi holding brief for Gachoka for Claimant/Degree Debtor – Present

Respondents – Absent