



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 270 OF 2013**

**DAVID OKOTH OLAYO CLAIMANT**

**V**

**LEAH MALOT RESPONDENT**

**RULING NO. 2**

1. Initially, the hearing of this Cause had proceeded on 29 July 2015 when the Claimant's case was taken and thereafter an adjournment was granted up to 23 November 2015 for the Respondent's case. The adjournment was at the request of the Respondent.
2. Come 23 November 2015, the Respondent sought another adjournment on the ground that the Respondent was ill. Because there was no documentation to show the illness, the Court placed the file aside in order to allow Mr. Akello, on record for the Respondent to produce documentation from hospital. The documentation was not produced and the Court ordered the hearing to proceed after declining another attempt to secure an adjournment.
3. The rejection of the renewed application for adjournment led Mr. Akello in effect to tell the Court he had no instructions to proceed, and the Court ordered that the Respondent's case be deemed as closed. The Court gave directions on the filing of submissions and set judgment for 18 March 2016.
4. On 16 December 2015, the Respondent filed an application seeking to have the hearing reopened to enable her to testify and the Court reluctantly acceded to the application (even the medical records exhibited in the application to have the hearing reopened were disowned by Moi Teaching & Referral Hospital as is set out in ruling of 7 March 2016).
5. The Respondent's case was taken on 28 July 2016 and the Court directed the Claimant to file and serve his submissions before 19 August 2016, while the Respondent was directed to file and serve her submissions before 16 September 2016. Judgment was reserved for 7 October 2016.
6. The Claimant filed supplementary submissions on 12 August 2016 (initial submissions had been filed after the Court ordered Respondent's case closed).
7. It appears that the Respondent filed her submissions on 16 September 2016 (the very last day directed) but for undisclosed reasons the submissions were not brought to the attention of the Court by the morning of delivery of judgment on 7 October 2016, a fact captured in paragraph 8 of the judgment.
8. The Respondent moved Court on 22 November 2016 (after delivery of the judgment) seeking

1. ....

2. **THAT** there be a stay of execution and or proceedings and judgment of the court pending the hearing and determination of this application.

3. **THAT** the court be pleased to review and set aside its judgment delivered on 7<sup>th</sup> October, 2016.

4. **THAT** the court proceeds to admit the respondents written submissions filed on 16<sup>th</sup> September, 2016.

5. **THAT** the court proceeds to write a judgment taking into account the respondents written submissions.

6. **THAT** the court do grant the respondent an opportunity to set off the sum of Kshs 68,000/- as against the respondent as against the claimant in Eldoret Rent Restriction Tribunal cause no. 97 of 2013 **Leah Malot – David Okoth Olayo**.

7. **THAT** the respondent application be provided for.

9. The Court certified the motion urgent and granted order 2 on condition that the decretal sum be deposited with the Court before 14 December 2016 (it appears the condition was complied with a day later).

10. The Claimant filed a replying affidavit in opposition to the motion which was taken *inter partes* on 15 December 2016.

11. Orders 1 and 2 as proposed in the motion are already spent and need not be addressed in this ruling.

12. The Court has anxiously considered the other substantive orders sought by the Respondent and come to the conclusion that the motion is not merited.

13. The key anchor to the order seeking reviewing and/or setting aside of the judgment are the contentions that the Respondent's submissions were not considered, which according to the Respondent is an error apparent on the face of the record, and that the decretal sum ought to be set off against a decree the Respondent obtained before the Rent Restriction Tribunal against the Claimant.

14. In my view, the mere fact that written submissions were not considered cannot without more be a sufficient ground for reviewing and or setting aside a judgment.

15. If a party feels that in its decision, a Court misapprehended the facts as recorded during the hearing or committed an error of law in applying the law to those facts, the proper avenue is to challenge the decision before an appellate Court.

16. And without belabouring the point, in the instant case, the Respondent's submissions rotated largely on the twin factual and legal questions of whether the Respondent was the employer of the Claimant.

17. The Court addressed the question at length from paragraphs 10 to 18 of the judgment, and if the Respondent is of the view the Court was wrong, an appeal ought to have been preferred to the Court of Appeal on that issue.

18. The other ground relied on seeking the review is that the Respondent has a decree against the Claimant from the Rent Restriction Tribunal, which decree should be offset against the decree of this Court.

19. However, that was not an issue which the Respondent raised in her Response filed in Court on 1 October 2013 (it was only brought up during the hearing of Respondent's case and which issue the Claimant was not questioned on).

20. Considering that there are statutory provisions as to enforcement of orders and decrees of the Rent Restriction Tribunal, the Respondent ought to or should use those legal avenues to enforce the order.

21. The only semblance of counterclaim against the Claimant was failure to hand over certain tools of trade but whose value was not proved during testimony.

22. The net effect of the above is that the Court orders that the motion dated 22 November 2016 be dismissed with costs to the Claimant.

23. And to obviate unnecessary litigation, the Court orders that the decretal sum deposited into Court be released to the Claimant's advocate after the expiry of 10 days from today unless the Respondent secures an appropriate stay from the Court of Appeal.

**Delivered, dated and signed in Nakuru on this 24<sup>th</sup> day of February 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Alwala instructed by Kakai Mugallo & Co. Advocates

For Respondent Mr. Akello instructed by A.K. Chepkonga & Co. Advocates

Court Assistants Nixon/Daisy