



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 66 OF 2014

STEPHEN KAMAU NJOROGE.....CLAIMANT

-VERSUS-

MURANG'A FARMERS CO-OPERATIVE UNION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th March, 2017)

RULING

The respondent filed an application on 17.10.2016 by way of a notice of motion through Macharia Gakaria & Associates Advocates. The motion was under Order 10 Rule 11, Order 22 Rule 22, of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all enabling provisions of law. The respondent prayed that there be stay of execution pending the hearing and determination of the application and further prayed for the following orders:

- a) The honourable court be pleased to set aside the ex-parte judgment entered herein against the respondent.
- b) That the respondent be granted unconditional leave to defend the claimant's claim herein.
- c) That cost of the application is provided for.

The application was supported with the affidavit of Francis Ngone Gathiga and on the following grounds:

- a) The claimant had commenced execution proceedings.
- b) The claimant had taken proceedings prejudicial to the respondent without inviting the respondent to participate in the proceedings.
- c) The respondent will be prejudiced if the orders sought are not granted.
- d) The respondent had at all material time appointed an advocate to act in the suit but had not received a communication from the advocate until 12.10.2016 when the respondent's chairperson and general manager received a notice to show cause why the matter should not proceed ex-parte.
- e) The respondent's advocate was not served with court documents and was not served with a notice of delivery of judgment and only learned about it when the notice to show cause was served upon the advocates 10.10.2016.

f) The respondent has a good defence to the suit as it raises serious triable issues. The respondent should therefore be allowed to defend the suit.

g) The application was made in good faith.

The claimant opposed the application by filing his replying affidavit on 02.11.2016 through J.N.Mbuthia & Company Advocates. The grounds of opposition are as follows:

a) The respondent's case was that it appointed Kirubi, Mwangi Ben & Company Advocates to act in the suit and subsequently filed on 31.03.2016 a notice of change of advocates to Macharia Gakaria Associates Advocates. Nevertheless the alleged notice of change of advocates had not been exhibited on the affidavit in support of the application and had not been served at all. Thus, there was no known change of advocates in the suit as was alleged on the part of the respondent.

b) That Kirubi, Mwangi Ben filed and served a notice of withdrawal from acting on 02.11.2015 and there was no notification that the respondent had appointed other advocates. Thus, all subsequent service in the suit was effected upon the respondent. Affidavits of service were filed to show that the respondent was served with hearing notice, submissions, and mention notice on submissions but the respondent opted not to attend court. The respondent was served with a taxation notice and notice on ruling on taxation but never attended court.

c) As the respondent was duly served with notifications as required, the application lacked merit and should be dismissed with costs.

The court has considered the parties' respective cases and submissions. It is clear that the respondent never served a notice of change of advocates. The evidence is that after the respondent's initial advocate withdrew from acting, the respondent was served in person but opted not to take steps to participate at the hearing, submissions, and subsequently taxation for costs. The court returns that in such circumstances, the respondent has not established a case for granting of orders as was prayed for. As submitted for the claimant, the current application was prompted with the notice to show-cause why the respondent's chairperson and general manager should not be imprisoned for failure to pay up the decretal sum. In such circumstances, the court returns that the respondent does not merit the court's discretion and the application would be liable to dismissal with costs.

In conclusion, the respondent's application dated 17.10.2016 and filed on the same date is hereby dismissed with costs and parties are invited to take directions on the next steps in the matter.

Signed, dated and delivered in court at Nyeri this **Friday, 24th March, 2017.**

BYRAM ONGAYA

JUDGE