



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1029 OF 2014

POLLY JENNIFER MWONJARU.....1ST CLAIMANT

MILDRED KAGURE MACHARIA.....2ND CLAIMANT

VERSUS

VISION EMPOWERMENT TRAINING INSTITUTE.....1ST RESPONDENT

PEARLS OF KNOWLEDGE (NGO).....2ND RESPONDENT

RULING

1. On 19th January 2015 my brother **Nzioki wa Makau J** delivered judgment in favour of the Claimants.
2. The Respondents subsequently came to Court by way of Notice seeking orders declaring the 1st and 2nd Claimants' accounts contra-statute and setting aside the *ex parte* orders issued by the Court. The Respondents also sought to be allowed to respond to the claim.
3. The application which is supported by the affidavit of Judy Mueni Kituto sworn on 4th July 2016 is based on the following grounds:
 - a) The assets of the 1st and 2nd Respondents have been proclaimed by Jocet Auctioneers;
 - b) The claim by the 1st and 2nd Claimants is frivolous and an abuse of the court process. The 2nd Claimant has been fully paid and the 1st Claimant is only owed Kshs.10,000/=
 - c) The amount of Kshs.341,745 indicated on the warrants of attachment is farfetched and imaginary;
 - d) The Respondents were never served with the Claimants' claim but were taken by surprise when they were served with a proclamation by Jocet Auctioneers on 24th June 2016;
 - e) The Claimants provided service to the 1st Respondent as tutors for a period of less than three months at a salary of Kshs. 10,000 each.
4. The Claimants' response is contained in a replying affidavit sworn by the 1st Claimant on 22nd July 2016. She depones that the Respondents' application together with the supporting affidavit are marred with misrepresentation, non-disclosure and half-truths.

5. The 1st Claimant counters the Respondents' averment that they were never served with the claim and notice of summons to enter appearance. In response to the 1st Claimant's affidavit, Judy Mueni Kituto swore a further affidavit on 25th July 2016.

6. In their application, the Respondents have gone into great detail to demonstrate why the Court should not have entered judgment in the Claimants' favour. This however is not what is before the Court. The question before the Court is whether the Respondents have made out a case for setting aside of the judgment by my brother **Nzioki wa Makau J.**

7. In the submissions filed on behalf of the Claimants on 17th March 2017, reference was made to the decision in ***Shah v Mbogo & another (1967) EA*** where it was held that the discretion of the Court to set aside an *ex parte* judgment is to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. It cannot be used to aid a party who deliberately obstructs or delays the cause of justice.

8. From the court record, I have seen five (5) affidavits of service filed on behalf of the Claimants none of which have been challenged by the Respondents.

9. More significantly, at paragraph 11 of her supporting affidavit sworn on 4th July 2016 Judy Mueni Kituto depones as follows;

“That I do confirm that the 1st Respondent, myself, or any office within the institution did not receive any pleadings pertaining to the claim and that is why the institution never filed any response to the claim.”

10. Subsequently at paragraph 6 of her further affidavit sworn on 28th July 2014 the same Judy Mueni Kituto depones as follows:

*“THAT there was an omission on the part of our staff in handling the summons respecting this matter and which could have been on the misapprehension of the material facts that the matter was finally settled as per letter marked as **JMK/3.**”*

11. These sharply divergent averments by the same deponent, on the same issue, not only render her affidavit evidence worthless but also draw the attention of the Court to possible perjury.

12. In light of the foregoing I make the following orders:

- a) The Respondents' application dated 4th July 2016 is dismissed with costs to the Claimants;
- b) The deponent to the supporting and further affidavits sworn on 4th July 2016 and 28th July 2016, Judy Mueni Kituto is hereby summoned to appear before the Court in person on 20th July 2017 to explain the apparent contradiction on the issue of service of the claim in her two affidavits.

13. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF MAY 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Ojwang for the Claimants

Mr. Muriuki for the Respondents