



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.11 OF 2016 CONSOLIDATED WITH CAUSE NO. 12 OF 2016

MOSES MURIITHI NJUE.....1ST CLAIMANT

DAVID MURIUKI NJERU.....2ND CLAIMANT

CHARLES KATHUNI NJIRU.....3RD CLAIMANT

VERSUS

CHINA OVERSEAS ENGINEERING

GROUP COMPANY LIMITED (COVEC).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th May, 2017)

RULING

The court delivered the judgment in the suit on 07.10.2016. The court entered judgment for the claimants against the respondent for:

The declaration that the respondent's termination of each of the claimant's contract of employment was unfair.

The respondent to pay the 1st claimant **Kshs.635,227.00**; the 2nd claimant **Kshs.635,227.00**; and the 3rd claimant **Kshs.1,001, 000.00** by 01.12.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

The respondent to pay each claimant's costs of the suit.

The respondent filed a notice of motion on 30.01.2017 through D.B. Osoro & Company Advocates. The application was brought under Article 159(2) (d) & (e) of the Constitution of Kenya, 2010, section 3, 12(3) & 16 of the Industrial Court Act, 20 of 2011, and, Rule 16 & 32 of the Industrial Court (Procedure) Rules, 2010. The substantive prayers were that the honourable court is pleased to review and set aside the judgment delivered on 07.10.2017 and all consequential orders; the respondent be granted leave to defend the suit; and costs of the application be provided for.

The application was supported by the affidavit of He Liang Zhong attached thereto, the further supporting affidavit of He Liang Zhong and upon the following grounds:

The respondent was not aware of the proceedings herein and came to learn of the claims when they were visited by the auctioneers on 20.10.2017 in execution of the decree.

The claimants misrepresented their respective salaries to the court as they exaggerated the monthly pay.

The respondent has an arguable defence against the claims by the claimants and it is only fair and just that the respondent be given an opportunity to defend the suit.

In the interest of justice the judgment be reviewed, set aside, and the suit be reinstated for hearing and final determination.

It was in tandem with the overriding objectives in Article 159 of the Constitution of Kenya, 2010 and interests of substantive justice to allow the application.

The claimants opposed the application by filing the replying affidavit of Moses Muriithi Njue on 16.02.2017 through Victor L. Andande & Company Advocates. The grounds of opposition can be summed up as follows:

- a) The application is a belated effort by the respondent to delay the course of justice.
- b) It was not true that the respondent was not aware of the suit as service was effected at each step taken in the suit but the respondent had failed to attend court or take necessary steps.
- c) The respondent's representative had declared court papers were not genuine and at one point had visited the offices of the claimants' advocates to confirm the position.
- d) The respondent had not annexed a draft response to establish the alleged triable or arguable issues.
- e) The respondent had not applied to cross examine the processes-server to confirm alleged lack of knowledge of the suit or service per the return of service on record.
- f) In subsequent steps in the suit the claimants' Advocate on record had effected personal service of the mention or hearing notice or submissions but the respondents had failed to take steps to attend court.
- g) The respondent had advanced empty allegations to achieve a review of the judgment.
- h) The claimants had not misrepresented to the court their monthly salaries as they relied upon informal agreement on the amount set out in their cases and the respondent had not denied existence of such an agreement.

The parties filed their respective submissions on the application.

The court has considered the parties' respective cases and the material on record. The court makes findings as follows:

1. The material on record shows that the respondent was properly served. It cannot be said that the respondent was not aware of the suit whereas the respondent has not disputed the personal service that was on diverse dates personally effected by the claimants' advocate on record and as per the filed affidavits of service. For example, it is clear that counsel for the claimants served submissions on 21.09.2016 and served a hearing notice on 17.06.2016 and the respondent's manager one Mr. Lee received the service. The court returns that at all material time the respondent was aware of the suit and the steps taken by the claimant in the suit and as per the various affidavits of service on record. In particular, the respondent was aware of the date scheduled for the hearing and for no good reason opted not to attend at the hearing. In such circumstances, the court considers that it would not be just and fair to revisit the suit by reopening pleadings and hearing as judicial service delivery must be efficient and effective; and not derailed by a litigant who deliberately fails to take steps in the suit as duly served and notified accordingly. In the circumstances of this case the court is convinced that the respondent was

aware of the suit at all material times but failed to take steps to file a response, documents and witness statements or to attend court when the case was scheduled for hearing.

2. The court considers that when the affidavit of service of summons and the claim is read together with the subsequent affidavits of service as was effected by the counsel for claimants, it is clear that the respondent was aware of the institution of the suit. The summons and the claim are said to have been served at the respondent's Gatondo office upon a person who introduced himself as being in charge of the office and who accepted service and signed a copy which was returned to the court. The court finds that the processes-server complied with rule 11(6) as he returned the signature of the person who received service and in any event there is no doubt that the claim and summons had been delivered at the respondent's office per rule 12 (b) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

3. It is clear that the respondent cited in the application fictitious or wrong statute and rules and the court considers that the same would serve as an impetus in dismissing the application.

4. The court considers that in this case which went to full hearing, the overriding consideration to set aside the judgment is if the applicant gives a good reason for non-attendance as envisaged in rule 22 of the rules of the court on proceedings in the absence of either party. In this case, the respondent's counsel served the relevant hearing notice on 17.06.2016 for the hearing scheduled on 08.09.2016, the date when the hearing proceeded in the absence of the respondent. The court finds that the respondent has not established a good reason for the non-attendance at the hearing of the suit and the application will therefore fail.

In conclusion, the application filed for the respondent on 30.01.2017 and dated 27.01.2017 is hereby dismissed with orders that the applicant will pay the claimants' costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 5th May, 2017.

BYRAM ONGAYA

JUDGE