



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1373 OF 2010

TONNY MOSES ODERA.....CLAIMANT

VERSUS

MILLIE G. A. ODHIAMBO

JACQUILINE ANAM

JEFFREY MAGANYA

WANJAU MURIU

ANDIA ADEKA (sued as the Trustees of

THE CRADLE – THE CHILDREN FOUNDATION.....1ST RESPONDENTS

ERIC OGWANG..... 2ND RESPONDENT

Mr. Namachanja for respondents/applicant

Mr. Rabala for claimant/respondent

RULING

1. The applicants/respondents by an application dated 31st August 2016 and filed on 1st September 2016 seek the following orders;

i. That an interim order of stay of execution be granted restraining the claimant/respondent his servant agents and all other parties from attaching and/or selling the respondent/applicant's assets in execution of the award delivered by this Honourable Court on 18th August, 2016, pending the hearing of this application interpartes.

ii. That an order do issue restraining the claimant/respondent his servants agents and all other parties from attaching and/or selling the respondent/applicant's assets in execution of the award delivered by this Honourable Court on 18th august 2016 until further orders of this Honourable Court.

iii. That the award of this Honourable Court delivered on 18th August 2016 and the decree and

execution process flowing there from be set aside.

iv. That this matter be heard *de novo*, or in the alternative, the respondent/applicant be granted leave and opportunity to present their case.

2. The application is based on grounds set out on the notice of motion and the annexed affidavit of Collins Namachanja, an advocate for the respondent as follows;

i. That the respondent/applicant's advocates on record were not aware that the matter was due for hearing on 18th pri, 2016. The hearing notice sent by this Honourable Court by post was received on 27th April 2016 well after the scheduled hearing date.

ii. That the respondent/applicant's advocates came to learn of judgment having been delivered through a letter dated 25th August 2016 from the advocates for the claimant/respondent and received on 29th August, 2016 by the respondent/applicant's advocates.

iii. In the said letter, the respondent/applicant has been threatened with execution if payment of the sum awarded is not paid within 7 days from 25th August, 2016. The seven days are set to lapse on 1st Septembers 2016.

iv. That the respondent/applicant's advocate's inability to attend court on the scheduled hearing date was beyond their control.

v. That in the circumstances, the respondent/applicant should be given an opportunity to be heard before final judgment is entered.

vi. That if stay of execution is not grated the respondent/applicant stands to suffer substantial loss.

3. The application is opposed vide a replying affidavit sworn by Tonny Moses Odero on 14th September 2016 and filed on even date in which he deposes as follows;

i. That I have read the applicants application dated 31st August 2016 and I have fully understood the same and I now wish to respond as hereunder;

ii. That I am informed and aware that my advocate on record Mr. Rabala, which information I verily believe to be true that he received a hearing notice from court indicating that this matter was coming for hearing on 18th April 2016. The said notice was received on 7th April 2010. (**Annexed and marked TMO 1 is a copy of the hearing notice**).

iii. That we attended court on the said 18th April with my advocate, the matter was called out and the learned Hon. Justice Rika was convinced that both parties had been served and given ample notice.

iv. That the presiding Judge ordered that the matter proceed and confirmed that there was an earlier order issued for parties to file their respective submission, which the applicants neglected to comply with and its over 4 years since the said order was made.

v. That the learned Judge Hon. Justice Rika directed that the court will consider all pleadings and our submission in arriving at its decision and directed that the judgement will be delivered on notice.

4. The court has considered the applications, the replying affidavit and the submission by the parties and has arrived at the following conclusions of fact and law;

a) Both parties were served with a hearing notice dated 31st March 2016 setting the matter for

hearing on 18th April 2016.

b) That the notice was sent by post and the matter was placed on the cause list displayed for the public, online and within court premises.

c) The court had determined the matter suitable to be proceeded on by way of written submission and the claimant filed written submission on 4th August 2011 and the respondent was directed to file written submission on or before 25th August 2011. The matter was set for mention on 6th September 2011.

5. On 6th September 2011, the respondents had not filed their submissions and requested to file on or before 27th September 2011. Hearing of the matter was set on 29th May 2012.

6. On 29th May 2012, the matter did not proceed and was set for hearing on 6th June 2012. Matter did not proceed and was allocated a hearing dated on 14th November 2012.

7. The respondent sought adjournment on 14th November 2012 and the matter was set for mention on 13th December 2013. Matter was set for hearing on 17th January 2013 and again for hearing on 3rd July 2013. The respondent sought adjournment on the day.

8. On 20th December 2013, the claimant obtained a date for hearing on 12th May 2014.

9. No further step was taken in the matter until the court issued a hearing notice to the parties that the matter would be heard during the service week on 18th April 2016.

10. On 18th April 2016, the claimant appeared but the respondent was absent.

Determination

11. The respondents filed a statement of response to the claim on 7th December 2010 dated 6th December 2010.

12. The statement of response contains comprehensive details of facts of the respondents case including the details of the parties, history of claimant's employment, organization key values, breach by the claimant of the terms of employment and summary dismissal, specific response to points raised in the memorandum of claim, analysis of the facts and prayers.

13. The parties had agreed to proceed by way of written submission in view of the detailed pleadings on facts of the case.

14. The court proceeded on the basis of the papers filed and did not hear any oral evidence before making its judgment.

15. The court made these observations in paragraph 4 of the judgment as follows;

“Parties agreed way back on 18th April 2011 to have the dispute considered and determined on the strength of the pleadings, documents and submissions. The claimant filed his submission on 4th August 2011. The respondents did not file their submission as agreed.”

16. This finding by the court is factual and has not been challenged by the applicant in the application.

17. This being so and the fact that the court in its judgment considered the response filed by the 1st respondent extensively in the judgment in paragraph 4, there is absolutely no basis for the applicant to

have the proceedings and judgment of the court set aside and the matter to start *de novo*.

18. The application is dismissed with costs to the claimants.

Dated and delivered at Nairobi this 5th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE