



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.145 OF 2014

GODFREY GITOTO OCHIENG & 6 OTHERS.....CLAIMANTS

VERSUS

HYDROBUILD CONSTRUCTION COMPANY LIMITE.....1ST RESPONDENT

JOHN OTIENO OOKO2ND RESPONDENT

RULING

The respondents, Hydrobuild Construction Company Limited and John Otieno Ooko by application and Chamber Summons filed on 14th June, 2017 are seeking for orders that;

The court be pleased to grant leave to the firm of RO Nyamweya & Co. Advocates to come on record for John Otieno Ooko. ...

Pending hearing and determination of this application the Notice to Show Cause dated 2nd March 2017 be set aside to allow the advocate of record to study the file and take proper instructions to file relevant papers.

The application is supported by the 2nd respondent application and on the grounds that on 2nd March, 2017 the court read judgement herein and a Notice to Show Cause has since been issued. The advocate for the claimant misled the deponent by advising him not to involve other advocates and was enough to do so in the matter. This was a mistake. Judgement was passed unchallenged when the 2nd respondent was lured into signing consent without proper advice. The judgement sum is so huge and the respondent will not be able to settle.

The claimants filed a replying Affidavit sworn by Counsel, David Kamau Githinji and who avers that the application fails to meet the requisite threshold for a review application, it I filed after 16 months since judgement was read and the same seems to mutate between an application seeking for stay of execution and review. There is no challenge to the judgement of the court and the same only premised on fact that the claimant is seeking for time to explore amicable settlement.

The respondents were represented by the firm of Ashitiva & Co. Advocates and thus false for the respondents to state that there was erroneous advice from the claimant's counsel. The averments made by Mr Ooko in support of his application are disparaging of the character and person of the claimant's advocate as an officer of this court. The respondents were at all times at liberty to appoint counsel and nothing stopped them from doing so.

To this application, the parties agreed on 26th June, 2017 to file written submissions. On the due date,

only the claimants had filed their written submissions. The respondents advocate submitted that they were still in communication with the claimant to settle the matter and required more time. However, this is an application filed by the respondents and it is their duty to urge it or file consent on any agreed issue. The claimant thus having filed their written submissions, the ruling herein is due.

The respondents have been acting in person since the withdrawal of their advocates on 22nd September, 2015. As such, the leave and prayer seeking to appoint new advocates after judgement has been delivered and premised on the respondents' fundamental right to be represented by counsel of their choice, such cannot be declined.

The other orders sought by the respondents' is that *Pending hearing and determination of this application the Notice to Show Cause dated 2nd March 2017 be set aside to allow the advocate of record to study the file and take proper instructions to file relevant papers.* The rounds thereto are that the respondent was misled by the claimant's advocate not to hire an advocate and into signing consent.

On 14th June, 2017 the respondents' advocate, Mr Nyamweya came on record and seeking to represent the respondents'. The court gave directions. The position is regularised with the grant of leave and order allowing the respondent to appoint counsel of choice.

However, on the grounds supporting the application, and as well submitted by the claimants, an application seeking a review or setting aside of court orders, judgement or are required by the Rule of this court ought to be filed through a Notice of Motion and the threshold to be met is well set out under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. To thus seek time to take instructions when counsel has already attended and been issued with appropriate directions and further go to give grounds that infer ill motive upon the claimants' advocate and without going into the challenge of the consent orders or the judgment of the court is abuse of court process.

The respondents have at all material times in margin attendance in court enjoyed indulgence of the claimants up and until this date. On several occasions and based on the court record, the claimants' advocate asked for time to allow the respondent when acting in person to read and appreciate the documents filed. The court allowed for such time and was generously applied. See proceedings on;

6th October, 2015;

7th October, 2015;

14th October, 2015;

14th December, 2015;

19th January, 2016; and

Particularly proceedings on 9th February, 2016.

At all material times, the claimants' advocate moved the court with a caution that he was addressing all claims to the respondent who was unrepresented as of 6th October, 2015 when his advocates withdrew from acting for him. Indeed on the June, 2017 the 2nd respondent stated in open court as follows;

I gave consent for the respondent property to be sold for the judgement amount to be reduced. We have tried to sell this property without success.

To the above submissions, the claimants advocate submitted as follows;

We have been in communication with the respondent. He has tried to sell his property to over 20

people by private treaty. The respondent is well versed on what he needs to do.

From the various court attendances, I find the claimants and their advocate have moved reasonably and with a lot of responsibility and the inference that there has been misleading representation for the respondent is sheer ignorance of the facts apparent on the court record. The court on its own motion urged the respondent to source for his own advocate. This has since been secured. It would thus be an erroneous misrepresentation of facts that he respondents have been misled at any stage in the proceedings herein.

The purpose and intent of the application before court is thus lost. From the point when the respondents' advocate sought to be allowed to join in the proceedings, to take the claimants back to matter now relating to judgement and consents not challenged would be to negate the principles governing good practice and fair labour relations. Such is not to be allowed where the court is alive to the facts on-going between the parties.

Accordingly, the application is without merit, the same is found to be in abuse of the court process save that the respondents are allowed to have the advocates of their choice to represent them herein costs to the claimants.

Dated and delivered in open court at Nairobi this 11th day of August, 2017.

M. MBARU

JUDGE

In the presence of:

Court Assistants: Lillian Njenga and David Muturi

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