



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1822 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 28th January, 2016)

CYRUS NYONGESA SIMIYU.....CLAIMANT

VERSUS

CONCEPTS AFRICAN LIMITEDRESPONDENT

RULING

1. The Application before Court is the one dated 17.8.2015 which is a Notice of Motion brought by the Respondent Applicants seeking orders that:

- 1. This application be certified as urgent and heard ex-parte in the first instance during the Court's vacation.***
- 2. This Honourable Court be pleased to grant leave to the firm of Kairu Mbutia & Kiingati Advocates to come on record for the Respondent/Applicant in the place of the firm of Njoroge O. Kimani & Company Advocates.***
- 3. This Honourable Court be pleased to grant an Order of stay of execution in the Judgments delivered by Lady Justice Hellen Wasilla on 30th June 2015 pending the hearing and determination of this application interpartes.***
- 4. This Honourable Court be pleased to set aside the judgment delivered on 30th June 2015 by Lady Justice Hellen Wasilla.***
- 5. This Honourable Court be pleased to re-open the Respondent/Applicant case and have the Respondent/Applicant's witnesses testify and produce evidence in Court.***
- 6. The costs of this application be awarded to the Respondent/Applicant.***

2. The Application is supported by the annexed affidavit of Dr. Kenneth Kibe and premised on the following grounds:

- a) This Honourable Court is currently on vacation pursuant to the Gazette Notice No. 5277 dated 14th July 2015.***

b) The Respondent/Applicant was previously being represented by the firm of Njoroge O. Kimani Advocates.

c) The Respondent/Applicant has engaged the firm of Kairu Mbuthia & Kiingati to represent them in this matter.

d) On 30th June 2015 judgment was entered against the Respondent/Applicant in the sum of Kshs.533,970/=.

e) The Respondent/Applicant was never given the opportunity to present its evidence before this Court.

f) The Respondent/Applicant was never informed of the proceedings in this case or the entry of judgment until 1st July 2015.

g) The Respondent/Applicant wishes to be given an opportunity to present its case before Court.

h) In the interest of justice it is only fair that the judgment be set aside and the case be re-opened for purposes of taking the Respondent/Applicant's evidence.

i) Unless an order of stay of execution is granted the Claimant will proceed to execute against the Respondent/Applicant making this application nugatory and causing the Respondent/Applicant to suffer irreparable loss.

j) The Claimant will not suffer any prejudice that cannot be compensated by way of costs.

k) In the circumstances it is only just and fair for this application to be allowed.

3. The Applicants also filed their written submissions in respect of this Application and they reiterated the contents of their application.

4. The Respondents opposed this application. They filed their replying affidavit on 14.10.2015. The affidavit was sworn by the Claimant Respondent herein and he depones that on 19.5.2015, the Respondents were present in Court when the judgment date was given and further on 30.6.2015 when the judgment was read. They want the application dismissed.

5. I have considered the averments of both parties. I have also looked at the Court record. This case proceeded for hearing interpartes on 21.4.2015 with Mr. Mutai being present for Claimant and Mr. Kariuki holding brief for Kiunga for Respondent. The Claimant testified and closed his case. Then Mr. Kariuki stated that he will not call any witnesses but will rely on what is on record. Thus the Respondents closed their case and directions on submissions were given and mention set for 19.5.2015.

6. On 19.5.2015 Miss Omesa was holding brief Kiunga for Respondent and Odawa holding brief Mutai for Claimant. The Claimants had filed their submissions. The Respondents were directed to file theirs within 7 days and judgment day set as 30.6.2015.

7. On 30.6.2015 Judgment was read in presence of Kimetto holding brief Kiunga for Respondent and Mulaku holding brief Mutahi for Claimant.

8. The assertion then by the Applicants that they had no notice of the judgment is false as they were always present or represented. If they contest that Counsel who held their brief had no authority to do so, then they can follow disciplinary mechanisms through the Law Society of Kenya. Otherwise, it is my finding that the Respondents were always present during the hearing and delivery of Judgment and so their application has no merit.

9. The application is therefore dismissed with costs to the Claimant Respondents.

Read in open Court this 28th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kashudi holding brief for Kageni for Respondent Present

No appearance for Claimant – Absent