



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.135 OF 2013

FREDRICK KANYANGO MBATIA.....CLAIMANT

VERSUS

INTEX CONSTRUCTION LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 24th March, 2016)

RULING

The respondent filed a notice of motion on 15.02.2016 under Order 12 Rule 7, Order 42 Rule 6(3), Order 9 Rule 9 and 10 and Order 51 Rule 1 of the Civil Procedure Rules, 2010; Sections 1A, 1B, 3A and 3B and 80 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya; Article 50 of the Constitution of Kenya 2010 and all other enabling provisions of the law.

The substantive prayer in the application is that the honourable court be pleased to set aside the ex-parte judgment of 6th March, 2015, the resultant decree and all other consequential orders thereto; and consequently allow the respondent to recall the claimant for cross-examination and to present the defence case.

The respondent had filed an application dated 06.05.2015 seeking similar prayers and which was determined by the consent orders given on 14.07.2015 thus:

- a. That the judgment sum of Kshs.3, 642,100.00 be deposited in an interest earning account in a bank at Nyeri in the joint names of the parties' advocates by 21.08.2015. In default, the orders setting aside the judgment shall lapse.
- b. That subject to order (1) above, the proceedings of 4.12.2014 and the judgment delivered on 6.03.2015 be and are hereby set aside.
- c. That the hearing of the suit to be on 7.10.2015 at 9.00 a.m for one hour.
- d. That the respondent will pay costs of the suit and the application to be taxed or to be agreed upon.

The respondent failed to comply with the terms of order (a) as given on 07.08.2015. Thus order (b) as given on 07.08.2015 lapsed.

The claimant opposed the application by filing the replying affidavit of Duncan Waweru Macharia Advocate sworn on 23.01.2016.

The court has considered the material on record and makes findings as follows.

- a. The respondent's advocate says that the respondent became aware of the judgment and decree on

- 06.11.2015 when the applicant was served with the execution process. However, the respondent has not filed an affidavit stating as much and there is no affidavit by the respondent showing that the consent orders of 07.08.2015 were made without the respondent's instructions and knowledge in that regard. Further, by the letter dated 09.11.2015 by the respondent's former advocates, the advocates clearly stated that they had been instructed by the respondent to request the claimant's advocates to advise the auctioneers to withhold attachment to allow the respondent to make arrangements for the mode of paying the decretal sum. Accordingly the court finds that the respondent gave its former advocates proper instructions, the respondent was aware of the proceedings in the case and the court returns that the judgment and the processes flowing there from will not be set aside on account of the alleged lack of awareness on the part of the respondent.
- b. By the letter dated 11.11.2015 exhibited on the replying affidavit, the parties to the suit are said to have met in Nairobi and agreed to have the judgment sum paid in 12 monthly instalments of Kshs. 303,500.00 per month. The letter by the respondent's former advocates was not done on without prejudice basis and there is no reason to doubt that the respondent has resolved to make arrangements to pay the judgment sum. By the letter dated 2.12.2015 the respondent's former advocates wrote confirming payment of the legal fees and auctioneers fees and further confirming that the parties had agreed on how the respondent would pay the judgment sum to the claimant. The advocates further wrote the letter of 7.12.2015 stating that the respondent would pay the judgment sum in monthly instalments of Kshs.1 million effective January 2016. Again on 25.11.2016 one Sharon Mwakugu of the respondent company send an e-mail to the claimant's advocate showing negotiations were on going on the payment of the judgment sum. There is no dispute that the respondent has paid costs of the suit amounting to Kshs. 273, 533.00 and auctioneer's fee of Kshs. 321, 540.00. Accordingly, the court again finds that the respondent was keen and has undertaken to settle the judgment sum subject to acceptance of such terms by the claimant- and the correspondence show that the parties have entered an agreement on an arrangement on the payments.
- c. The consent orders of 07.08.2015 having not been adhered to by the respondent and the respondent having offered to make arrangements to pay the judgment sum, the court returns that the present application lacks merits especially that by that consent order the judgment was set aside upon the stated terms and the present application is clearly an abuse of the court process. The court has noted that part of the judgment is indeed already settled through payment of the costs or legal fees.

In conclusion, the respondent's application dated 12.02.2016 and filed on 15.02.2016 is hereby dismissed with costs.

Signed, dated and delivered in court at Nyeri this Thursday, 24th March, 2016.

BYRAM ONGAYA

JUDGE