



**REPUBLIC OF KENYA'**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 229 OF 2014**

**JACOB JOSEPH ONYANGO**

**CLAIMANT**

v

**JOHN NDUNGU MUREITHII**

**RESPONDENT**

**RULING NO. 3**

1. It might be useful to set out the background to the dispute herein in detail to appreciate the course the proceedings that have so far taken place.
2. On 10 July 2015, the Court delivered judgment in which it awarded the Claimant Kshs 2,645,374/75 comprising of compensation for unfair termination of employment, overtime pay, outstanding leave at dismissal, pay in lieu of notice, underpayments and wages for May 2013.
3. The Cause had proceeded as an undefended Cause and the judgment set out at length the attempts at service of process which had been made.
4. The Respondent moved Court on 2 September 2015 seeking
  1. .... (Spent)
  2. .... (Spent)
  3. THAT the *ex parte* decree issued by the Court in default of appearance and defense be set aside by the court *ex debito justitiae* or upon the court's exercise of discretion and on such terms as may be just.
  4. THAT the respondent be granted an unconditional leave to defense (sic) this claim.
  5. THAT cost of this application be borne by the claimant.
5. After hearing the motion, the Court rendered a ruling on 22 January 2016 in which the *ex parte* judgment and decree was set aside and the Respondent was given leave to defend but on certain conditions.
6. The conditions included deposit of half of the decretal sum in a joint interest earning account in the names of the advocates on record with a commercial bank within 10 days and filing and service of a Response before 4 February 2016.
7. The Court also ordered that on failure to comply with any of the conditions, execution would proceed.

8. The Respondent was aggrieved with the ruling and on 26 January 2016, he filed a motion seeking variation of the conditions (to give a bank guarantee instead of depositing half of decretal amount in a bank) upon which the *ex parte* judgment was set aside and leave to defend given.

9. In a ruling delivered on 5 February 2016 (Ruling No. 2), the Court dismissed the application seeking the variation.

10. It appears that the Respondent did not comply with the initial conditions for setting aside and grant of leave to defend, and the Claimant proceeded to execute and proclaimed and or attached certain assets of the Respondent.

11. This prompted the Respondent to move Court on 21 March 2016 seeking

2. THAT pending the hearing of this application, there be a stay of sale of the respondent's motor vehicle registration number KBV 510E.

3. THAT the court extends time within which the respondent can deposit the security ordered by the court and having deposited the security, the respondent be granted leave of this court to defend the cause.

4. THAT the execution be set aside, the court directs that the auctioneers return the respondent's motor vehicle to him subject to such conditions as to costs and charges as the court may impose.

5. ....

12. When the motion was placed before Court on the same day, the Court directed that it be served for *inter partes* hearing on 11 April 2016.

13. It is germane to mention at this juncture that the firm of Githui & Co. Advocates had been on record for the Respondent.

14. Before the return date of the application of 21 March 2016, the Respondent changed advocates and the firm of Elizabeth Wangari & Co. Advocates filed an application on 29 March 2016 seeking

(a). ....

(b). THAT pending the hearing and determination of this application *inter partes*, this court be pleased to order for stay of execution of the judgment of this Court issued on 10<sup>th</sup> July, 2015 together with all consequential orders arising thereof.

(c) THAT pending the hearing and determination of this application, this Honourable court be pleased to stay execution of the judgment of this court issued on 10<sup>th</sup> July, 2015 therein together with all consequential orders arising thereof.

(d) THAT pending the hearing and determination of this application, this Honourable court be pleased to order the unconditional release of motor vehicle KBV 510E ISUZU PICK-UP upon payment of the auctioneers fees as would be agreed upon.

(e) THAT this Honourable Court be pleased to enlarge time for compliance of the court orders issued on 22<sup>nd</sup> January, 2016.

15. This application of 29 March 2016 was transmitted to the Court sitting in Nyeri and Ongaya J who heard it *ex parte* ordered that

(a) The Applicant depositing the bankers cheques for Kshs 1,403,261.00 in favour of the Chief

Magistrate's Court Nakuru by close of today being security for stay of execution herein.

(b) The Applicant paying auctioneers fees herein to be agreed upon or to be taxed.

16. The Court also directed that the application be served the same day and *inter partes* hearing be held on 12 April 2016.

17. Because the motion of 21 March 2016 had been scheduled for hearing *inter partes* on 11 April 2016, the file was placed before me.

18. Ms. Mukira who had come on record for the Respondent applied to have the motion withdrawn and she opted to proceed with the motion dated 29 March 2016.

19. Mrs. Ndeda for the Claimant did not object to the withdrawal and the Court acceded to the application and marked the motion dated 21 March 2016 as withdrawn with no order as to costs.

20. After the withdrawal, Ms. Mukira indicated that she was not ready to proceed as she wished to file another affidavit. The Court allowed her up to 15 April 2016 to file and serve the further affidavit and fixed the motion for hearing on 4 May 2016.

21. On the morning of 4 May 2016, Mrs. Ndeda filed her own motion under certificate of urgency seeking that the *ex parte* orders granted by Ongaya J on 30 March 2016 be set aside.

22. After hearing submissions from the parties, the Court directed that the Claimant's application to set aside the orders by Ongaya J be treated as grounds of opposition to the Respondent's application dated 29 March 2016. The Respondent was granted liberty to file a further affidavit in response before 31 May 2016, and the motion was set for 12 July 2016.

### **Application for determination**

23. Come 12 July 2016, Ms. Mukira for the Respondent submitted that she was seeking proposed order (e) as set out in the motion (enlargement of time) because the other orders were mandatory in terms and the same had been granted on conditions which had been complied with.

24. As to why the Respondent was seeking enlargement of time, Ms. Mukira submitted that the Respondent had not been advised of the Court orders of 22 January 2016 by the then advocate on record and that the mistakes of an advocate ought not to be visited upon a litigant.

25. Ms. Mukira also contended that the Claimant would suffer no prejudice if time was enlarged and that justice requires that enlargement be allowed.

26. On the assertion by Mrs. Ndeda that the Respondent had concealed material facts when he appeared before Ongaya J, Ms. Mukira denied any concealment.

27. The Respondent also cited case law (*Paul Asin t/a Asin Supermarket v Peter Mukembi* (2013) eKLR and *Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 Ors* (2013) eKLR to support his case.

28. When her chance to submit came, Mrs. Ndeda was emphatic that the Respondent had concealed material facts from Ongaya J (application dated 29 March 2016) and that the Respondent did not disclose that the application dated 21 March 2016 was still pending before Court.

29. To buttress her submissions, Mrs. Ndeda, relying in *Aviation & Airport Services Workers Union v Kenya Airports Authority & Ar* (2014) eKLR urged that the failure to disclose material facts was fatal.

30. Counsel added that the Respondent's application was an abuse of the court process and that the Claimant had not been afforded an opportunity to be heard before the mandatory orders (on 30 March

2016) were granted by Ongaya J.

31. From the foregoing, 2 clear issues emerge but closely related. These are whether there was material non-disclosure and whether the Respondent has made a case for grant of the order sought on the merits.

*Material non-disclosure*

32. The legal principles and implications as to non-disclosure of material facts have been restated in several cases and one such case is *Ruaha Concrete Co. Ltd & Ors v Paramount Universal Bank & Ors*, High Court Civil Case No. 430 of 2002 cited in the *Aviation* decision relied on by Mrs. Ndeda and I need not rehash the same in this ruling.

33. The motion dated 21 March 2016 by the Respondent seeking setting aside of execution and extension of time to comply with the conditions for setting aside the *ex parte* judgment and granting leave to defend was supported by the Respondent's own affidavit sworn before Munene C, Advocate & Commissioner for Oaths.

34. In said supporting affidavit, the Respondent deposed

3. *THAT when I was informed by my advocate of that condition, I informed my advocate that owing to the nature of my condition, I had assets worth much more than the amount required by the court but I was unable to raise the said amount immediately. I asked him to make an application to substitute the security with a bank guarantee.*

4. *THAT the application was heard but the same was disallowed. 'Annexed hereto is a copy of the application marked JNM 1'.*

35. The motion dated 29 March 2016 was equally supported by the Respondent's own affidavit and in paragraph 5, he deposed thus

5. *THAT prior to the notification of sale, I was not informed of the hearing and/or progress of the case by my previous advocates on record.*

36. From the cited depositions by the Respondent, it is as clear as a bell that he was aware on 29 March 2016 that there was a pending application, and that the Court had previously allowed him leave to defend but on conditions which he had failed to comply with.

37. In the view of the Court, the existence and pendency of the application dated 21 March 2016, and indeed the previous applications were material facts which the Respondent ought to have disclosed either in the motion dated 29 March 2016 or orally before Ongaya J.

38. The failure to make the disclosure was material and such failure was and continuous to be fatal.

39. On that singular ground, the Court is prepared to vacate and or set aside the orders granted by Ongaya J on 30 March 2016.

40. However, the Court feels constrained to say a little bit more.

41. One, it appears that the Respondent lied under oath and at the same time perjured himself if the 2 affidavits are considered.

42. Two, the right to fair hearing which is now constitutionalised in Article 50(1) of the Constitution and which right has long antecedents in the principle of *natural justice* deprecates an impartial tribunal or Court from deciding a case with finality without affording the other an opportunity to be heard.

43. In the instant case, it appears that the Court in Nyeri was misled into giving orders which ought not

to have been granted at the first instance.

44. Three, there is a possibility that the Respondent's conduct amounts to an abuse of the court's process. The Respondent moved Court in Nairobi on 3 September 2015 and was granted stay of execution *ex parte*. The stay of execution was confirmed *inter partes* on conditions which were not complied with.

45. Thereafter, the Respondent unsuccessfully sought variation of the conditions.

46. Soon after on 21 March 2016, the Respondent again sought stay of execution when an asset was attached.

46. Even the motion of 29 March 2016 was similar in tenor to the failed applications.

47. Before concluding the Court wishes to observe that it fervently hopes that the Respondent was not intent on running rings not only against the Claimant but the Court as well.

### **Conclusion and Orders**

48. The upshot of the foregoing is that the Court declines to grant enlargement of time and orders that

(a) The motion dated 29 March 2016 be dismissed and all the orders issued on 30 March 2016 be and are vacated.

(b) The Kshs 1,403,261/- be released to the Claimant within 10 days unless the Court of Appeal determines otherwise.

(c) Execution for the balance of the decretal sum can resume.

(d) Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 23<sup>rd</sup> day of September 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Ms. Mukira instructed by Elizabeth Wangari & Co. Advocates

Court Assistant Nixon