



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 253 OF 2014**

**ALEX OLUCHILI MILOKO.....CLAIMANT**

**v**

**NAKUMATT HOLDINGS LTD.....RESPONDENT**

**RULING**

1. The Court, in a judgment delivered on 26 February 2016 found and held that the dismissal of the Claimant was unfair and awarded him a total of Kshs 4,850,000/- which included compensation and other entitlements accruing out of the employment contract.

2. The Cause had proceeded in the absence of the Respondent and its advocate who was present when the hearing date was fixed.

3. On 12 May 2016, the Respondent moved Court under certificate of urgency seeking

*1. ....*

*2. This Honourable Court do grant a stay of execution of the Judgment issued at Nakuru on the 26<sup>th</sup> February 2016 and decree dated 29<sup>th</sup> February 2016;*

*3. The Default Judgment entered against the Respondent (Applicant) herein and all consequential Orders entered against the defendant be set aside;*

*4. Court be pleased to grant the Applicant/Respondent leave to file the pleadings in terms of Witness Statement, list of documents to be relied on at the hearing among others within the next 14 days from this ruling; and*

*5. The costs of this Application be in the cause.*

4. Ndolo J before whom the motion was placed on 13 May 2016 certified the motion urgent but declined to grant any interim relief and directed that the file be transmitted back to Nakuru.

5. The motion was served and the Claimant filed a lengthy replying affidavit on 26 May 2016, and this prompted the Respondent's advocate to file a Further Affidavit on 29 June 2016.

6. The Claimant in turn filed a Further Affidavit on 11 July 2016 (Court will not consider this further affidavit as no leave was sought), on which date the parties informed the Court that they had agreed to have the application determined on the basis of the record and written submissions.

7. The Respondent filed its submissions on 20 July 2016, while the Claimant filed his submissions on 26 July 2016. The submissions were highlighted on 9 September 2016.
8. The Court has considered all the applicable material placed before it including the authorities.
9. The Respondent was served with Notice of Summons on 3 July 2014 and Nyaberi & Co. Advocates filed a Memorandum of Appearance and a Notice of Appointment of Advocates on 15 August 2014.
10. At the same time, the Respondent filed a Preliminary Objection on the ground that the cause of action was time barred in terms of section 90 of the Employment Act, 2007.
11. The Respondent's Preliminary Objection was taken on 21 October 2014 and in a ruling rendered on 21 November 2014, the Court dismissed the objection.
12. In the ruling, the Court noted that the Respondent had not yet filed its Response to the Memorandum of Claim.
13. In terms of the Rules of this Court, a Response ought to have been filed on before 18 July 2014. No Response was filed by that timeline.
14. Immediately after the ruling, the Respondent sought and obtained leave of Court to file its Response and documents. The Court directed that the Response and documents be filed before 5 December 2014.
15. The Response and documents were filed on 4 December 2014, and on 5 December 2014, the Court scheduled the hearing date in the presence of both parties' advocates.
16. The Respondent and its advocate however did not attend the hearing which proceeded and judgment was delivered on 26 February 2016, prompting the instant motion.
17. The grounds advanced by the Respondent include that its offices were broken into and several items including diaries and files were stolen on 23 November 2015. A copy of police abstract was exhibited.
18. It was also asserted that the Associate who was handling this particular Cause had left the firm in early November 2015 and the firm only got to know of the judgment when it was served with a bill of costs.
19. The Claimant opposed the application on the grounds that it had taken the Respondent 3 months to move Court, had failed to comply with the court's order as to filing of witness statements, the hearing date was taken in the presence of both parties' representatives and that after delivery of judgment it sent to the Respondent a notice of delivery of judgment dated 11 November 2015.
20. The Claimant further contended that the Cause was heard on 3 November 2015, while the theft took place on 23 November 2015.
21. In the instant application the primary and relevant order for determination is whether the judgment should be set aside (order 3 of the motion), because if that order is granted it would be superfluous to grant stay of execution (which is not stay pending appeal).
22. The legal principles attendant to grant of the orders sought (setting aside) are now legion.
23. The power to set aside/grant leave to defend is a discretionary power and the applicable legal principles have been considered in many cases including cited by the Claimant.
24. The Court of Appeal discussed the principles in Nairobi Civil Appeal No. 315 of 2002, *Kenya Steel Fabricators Ltd v Kenya Auto Electrical*, and *Pithon Waweru Maina v Thuku Mugiria* (1983) eKLR where extensive reference to earlier case law in cases such as *Patel v E A Cargo Handling Services Ltd*

(1974) EA 75 and *Kanji Naran v Velji Ramji* (1954) 21 EACA 20.

25. From the case law, the legal principles are that *there are no limits to the judge's discretion except that setting aside should be on just terms, the discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, the Court has no discretion where there was no proper service, the nature of the case should be considered, denying a subject a hearing should be a last resort of a Court and the discretionary power should be exercised judicially and in a discriminatory manner.*

26. The Respondent in seeking the setting aside of the judgment, no doubt requires the Court to exercise its discretion. The same should not be exercised arbitrarily or capriciously. It should be exercised judiciously to avoid obvious injustice but not to aid a party who is not diligent.

27. The Respondent's principal reason for failure to attend the hearing on 3 November 2015, was the theft which was deposed happened on 23 November 2015, and the consequent loss of diaries and some files.

28. However, that reason cannot stand because the Cause proceeded for hearing about 2 weeks before the theft.

29. In the further affidavit, the Respondent's counsel, Atim Joan Apuun deposed that the inconsistency was an honest mistake but in the Court's considered view, that does not change much.

30. The fact is that the diaries and files had not been stolen when the hearing took place, and no sufficient or convincing reason has been advanced to explain the failure to attend the hearing.

31. The upshot is that the Court finds no merit in the motion dated 12 May 2016 and orders that it be dismissed with costs to the Claimant.

**Delivered, dated and signed in Nakuru on this 14<sup>th</sup> day of October 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant            Mr. Kirwa instructed by Mwakio, Kirwa & Co. Advocates

For Respondent        Ms. Atim instructed by Nyaberi & Co. Advocates

Court Assistant        Nixon