



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 391 OF 2014**

**BENSON MURIITHI KAGAI.....CLAIMANT**

**VS**

**KENGA EQUATORIAL HOTELS LTD T/A**

**MOMBASA INTERCONTINENTAL RESORT LTD.....RESPONDENT**

**RULING**

**Introduction**

1. On 13.4.2016, the claimant brought a motion dated the same date in person. The Motion seeks the setting aside of the Garnishee order absolute made by this court on 12.4.2016. The grounds upon which the said motion is grounded are that his advocates had concealed from him the judgment entered on 5.12.2014 and also the fact that kshs.300,000 of the said decreed sum was paid to the said counsel on 24.9.2015. The Motion was opposed by his counsel vide the grounds of opposition and the Replying affidavits filed on 9.5.2016. The gist of the objection being that the counsel was still properly on record and as such the claimant's motion could not be allowed. In addition the counsel deposed that the claimants was at all material times aware of the judgment and the part payment of kshs.300,000 out which the claimant was paid kshs.100,000.

2. In response to the Objection raised by the counsel, the claimant brought another Notice of Motion on 10.5.2016. The Motion is dated 9.5.2016 and seeks this court's leave to act in person. It also seeks for an order that the award of kshs.705,454.70 held by NIC Bank (Garnishee) be deposited in his own account number 1003280671, NIC Bank, Nyali Branch. The grounds upon which the Motion is brought are just the same as in the Motion dated 13.4.2016 save that in the present motion, the claimant was categorical that his relationship with the advocate had irretrievably broken down and he had no more confidence in the said Advocate. That the advocate had resulted into acting without his instruction and not updating him about the progress of the case.

3. The counsel has also opposed the second motion by his grounds of opposition and Replying affidavit filed on 12.5.2016 and 12.7.2016 respectively. The gist of the objection is that the motion is incompetent and bad in law. That the claimant is not truthful and the only reason he is withdrawing instructions is to deny him his lawful legal fees and fees owed to the auctioneers. That he has served the claimant professionally and diligently to the level of execution by garnishee proceedings which the claimant wants to undo. The two motions were disposed by written submissions.

**Analysis and Determination**

4. There is no dispute that the claimant instructed the firm Tindika and Co. Advocates to act for him in this suit. There is further no dispute that the counsel filed the suit and prosecuted the suit and obtained a judgment of kshs.720,000 plus costs and interest. It is also common knowledge that the counsel recovered kshs.300,000 out of the decreed sum and thereafter obtained a Garnishee Order absolute against the NIC Bank in execution of the balance of the decreed sum. It is also obvious that the claimant had decided to withdraw instructions from his said counsel and act in person for the remaining part of the proceedings which is basically to receive the balance of the decreed sum into his account which he holds at the Garnishee bank. The issues for determination in the two motions are:-

**(a) Whether the motions are competently before the court.**

**(b) Whether the orders sought by the claimant should be issued.**

### **Competence**

5. There is no doubt that the Notice of Motion dated 13.4.2016 is incompetent because it was brought by the claimant in person before first obtaining leave to act in person Under Order 9 rule 9 of the Civil Procedure Rules, an intention to act in person does not take effect without an order of the court, if party deciding to act was previously represented by an Advocate before judgment. The foregoing explains the decision by the claimant to bring the Notice of Motion dated 9.5.2016 whereby he sought leave to act in person. Consequently I strike out the Notice of Motion dated 13.4.2016 for being incompetent.

6. As regards the motion dated 9.5.2016, I do not see any incompetence in it because it seeks leave to act in person among other orders. That the same has been served on the counsel among other parties who are not interested in being heard in that dispute of representation between the claimant and his counsel. Consequently I give the Motion a clean bill of health and proceed to determine it on the merits.

### **Orders sought in the Motion dated 9.5.2016**

#### **Leave to act in person**

7. The right of party to be represented by counsel is enshrined under Article 50 of the Constitution. The right cannot however be forced onto a litigant who does not want to be represented by counsel. Likewise, the right is exercisable at any stage of the court proceedings such that a party may instruct a counsel upto a certain stage of a case and withdraw to act in person or to engage another one. However the choice of when to hire and fire a counsel has consequences on the client and it is also fettered under Order 9 rule 9 of the Civil Procedure Rules. The said provision has a historical explanation which I will not embark on herein. Suffice it to say that the rule was put in the Law books to safeguard the right of counsel to his legal fees in relation to clients who withdraw instructions after judgment.

8. In this case, the claimant instructed counsel who did more than what the claimant allegedly knew including getting a judgment of kshs.720,000, recovered kshs. 300,000 and executed for balance through auctioneers and Garnishee proceedings. According to the claimant, the counsel has done nothing professional and diligent. That he has not kept him updated on the progress of the case and for that matter he does not want to be represented by the counsel any more. Instead, he wants the Garnishee order absolute set aside and the decreed sum which is held by the Garnishee be paid to his account which is in the Garnishee Bank. The question that arises is what duty did the counsel for claimant fail to do?

9. In my view the counsel has done the whole case, and the only thing remaining is for the Garnishee to release the money to the counsel. Where it not for the application herein, the judgment would have been settled and the dispute closed. It would be abuse of the process of the court if the clients are allowed to use the services of a counsel from start of proceedings to execution of decree only to dump them when the cheque for settlement is pending signature just to deny the counsel's right to his legal fees. With due respect to the claimant's constitutional right to representation by counsel of his choice, this court will not sit and watch the litigants take for granted the services rendered to them by officers of this court.

10. In this court's view the claimant is merely fearful that the counsel may not account for the decretal sum if it is paid to him. That is the only reason he wants to dump him. According to the claimant, he has lost trust with the counsel. That may be so. However the stage where the proceeding have reached is that, the claimants will only laugh all the way to the bank to enjoy the proceeds of his judgment which he did very little to get. On the other hand the counsel will cry all the way to his chambers regretting the day he accepted to serve the claimant, and hope that he can have his Bill of Costs taxed before the claimant drains his account and disappears for good.

11. In consideration of the foregoing, I decline to grant the leave to act in person as prayed by the claimant because there is nothing pending other than to receive the balance of the decreed sum from the Garnishee. The two will remain in their Advocate -client relationship until the Advocate client bill of costs filed by the counsel is taxed and the counsel paid his fees for the services he rendered to the claimant herein. That way, as the claimant enjoys his judgment, the counsel will enjoy his legal fees.

**Deposit of Decreed sum in the claimant's**

**account**

12. In view of the foregoing, the rest of the orders sought by the claimant in the Motion dated 9.5.2016 cannot be granted. The reason being that his counsel will continue to act for him for the purpose of collecting and receiving the decreed sum from the Garnishee or the Respondent judgment debtor.

**Disposition**

13. For the reasons stated above:

- (a) The Notice of motion dated 13.4.2016 is struck out for being incompetent.
- (b) The Notice of Motion dated 9.5.2016 is dismissed for lack of merits.
- (c) Costs of the two motions will be paid to the counsel by the claimant.

**Signed, dated and delivered this 18<sup>th</sup> day of November, 2016.**

**ONESMUS MAKAU**

**JUDGE**