



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 75 OF 2015

DALMUS WAMUGUNDA.....1ST CLAIMANT

ISAYA GITHAE.....2ND CLAIMANT

DICKSON GATURA.....3RD CLAIMANT

JOB MUGIRE.....4TH CLAIMANT

DAVID KARAINI.....5TH CLAIMANT

JOSEPH SIMIYU.....6TH CLAIMANT

DENNIS WEKESA.....7TH CLAIMANT

VERSUS

G4S KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th December, 2016)

RULING

The court delivered the judgment in the suit on 18.11.2016. The court entered judgment for the claimants against the respondent for:

- a. The declaration that the termination by the respondent of the contract of service for each of the claimants was unfair for want of a valid reason for the termination.
- b. The respondent to pay the 1st claimant **Kshs.411,042.00**; 2nd claimant **Kshs.334,794.76**; 3rd claimant **Kshs.336, 213.67**; 4th claimant **Kshs.297,847.29**; 5th claimant **Kshs.345109.41**; 6th claimant **Kshs.335,794.76**; and 7th claimant **Kshs.324,766.84**; and to pay them by 15.12.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

The respondent filed an urgent application on 07.12.2016 by way of the notice of motion invoking sections 3, 12(3) and 16 of the Employment and Labour Relations Court Act, Rules 16(1) and (2), 27(g) and 32 of the Industrial Court Rules, the inherent power of the Court and all other enabling provisions of the law. The substantive prayers are that the ex-parte proceedings of 16.11.2016 and the judgment dated 18.11.2016 and all consequential orders there-from be set aside; the respondent be allowed to participate in the hearing of the matter; and the costs of the application be provided for.

The application is based on the supporting affidavit of Michi Kirimi Advocate attached on the application and the grounds set out in the application. The main ground is that the respondent was previously represented by the firm of Anne Babu & Company Advocates which firm ceased to act for the respondent and in its place Hamilton Harrison & Mathews was instructed to act and the notice of change of advocates was filed on 21.09.2016. The record shows that the claimants who were acting in person were not served with that notice of change of advocates. Thus the hearing notice with respect to the otherwise ex parte proceedings on 18.11.2016 was served upon the previous respondent's advocates, Anne Babu & Company Advocates. In such mix of things, the respondent and its new advocates failed to attend the hearing. It has been submitted that, in view that the notice of change of advocates was not served, it would be just if the ex-parte proceedings and the ensuing judgment are set aside as the applicant is willing to pay the thrown away costs.

The claimants opposed the application by filing on 15.12.2015 the replying affidavit of Dickson Gatura, the 3rd claimant. It is the claimants' case that the application was an afterthought because the hearing notice was duly served at the provided address of Anne Babu & Company Advocates as the notice of change of advocates had not been served upon the claimants at all. Thus the application lacked merit and should be dismissed.

The court has considered the rival parties' positions on the application. It is clear that the notice of change of advocates was not served and the claimants not having been notified accordingly, they were entitled to serve Anne Babu & Company Advocates, the applicant's previous advocates. The applicant has not offered any reason why the notice of change of advocates was not served. The court has considered that the claimants were acting in person and they religiously took all the necessary steps to prosecute the suit including effecting service as was necessary. The court has further perused the statement of response filed on 30.06.2015 and considers that it does not specifically traverse the matters of fact as alleged in the amended statement of claim. The record further shows that there is no witness statement filed for the respondent so that there was no intention on the part of the respondent to call a witness. In such circumstances the court returns that as urged for the claimants, the present application is an afterthought calculated to belatedly avoid liability as it lacks merits. It would not be just and fair to allow the application.

It is urged for the applicant that the firm of Anne Babu & Company Advocates had on 21.07.2016 while receiving service by the claimants, signed a compliment slip stating that they were not on record for the applicant. The affidavit of service filed on 22.07.2016 at paragraph 3 states as much. It is notable that the said firm never filed and served a notice of cessation of acting and never disclosed to the claimants the new address of service for the respondent. In such circumstances, it is clear that the compliment slip did not aid the applicant's case seeking the setting aside of the ex parte hearing, the judgment and the consequential processes.

In conclusion the application by the notice of motion filed on 07.12.2016 and dated 06.12.2016 is hereby dismissed with costs.

Signed, dated and delivered in court Nyeri this Friday, 16th December, 2016.

BYRAM ONGAYA

JUDGE