



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1237 OF 2013

JOSEPH SOHELO MARIKO.....1ST CLAIMANT

CHARLES MUSEE MUOVA.....2ND CLAIMANT

VERSUS

PADYA MUKESH T/A RELISH RESTAURANT.....RESPONDENT

RULING

The respondent, through application and Notice of Motion dated 3rd October 2016 is seeking for orders that there be stay of execution of the decree issued on 19th September, 2016 pending the hearing and determination of the application; that judgement of 29th July, 2016 be set aside; the Respondent be allowed to cross-examine the Claimants and to give evidence in support of their case; and payment of costs.

The application is based on the grounds that judgement was entered against the Respondent on 29th July, 2016. In 2013 the Respondent was employed by Relish Restaurant Ltd as a Supervisor cum manager as worked for 7 months and left in the same year. The Respondent left his employment because the management changed hands and it was taken over by Zar Restaurant and his services were no longer needed. The Respondent then lost touch with his advocate who were acting then, KK Nyakundi & Co. Advocates and there has been no communication with these advocates since and therefore could not know the progress of the case and hearing until 30th September, 2016 when he was shown a proclamation served by Icon Auctioneers giving 7 days to satisfy the decree.

Further grounds in support of the application are that the Respondent was only a causal employee at Relish Restaurant Ltd and his connection with the owners ended with his employment in 2013. He is not a director of the business and cannot be held liable for the actions of the company he was never related with as the owner/director.

There will be prejudice caused if the Claimant is not restrained from proceedings with the execution process against the respondent. He will suffer irreparable damage and loss if his household goods proclaimed by the auctioneers is allowed to proceed.

The Respondent in his supporting affidavit also confirms his application and the matters set out in supporting grounds.

The respondent's advocates, Paurvi Rawal also filed Further Affidavit in support of the application on the basis that there is CR12 obtained from the Registrar of Companies showing that Relish Restaurant Limited is held by directors and shareholders being;

Suresh Kamar Durllabhjubhai

Meshani Mukesh Manubhai

Muhuma Shivaram Hedge

That when the Claimants moved the court against the Respondent they lacked due diligence to establish the owner and directors of the restaurant. The business name search reveal the 3 directors and the Respondent is not one such director. The judgement should be set aside.

In reply, the Claimants filed **Replying Affidavit of Joseph Sohelo Mariko** the 1st Claimant and avers that the respondent's application is frivolous and lack merit. The allegation that the Respondent was an employee employed in 2013 and left at the end of the year is a total fabrication as upon service of the claim he instructed an advocate who made an appearance on his behalf and filed a defence, through Lalji R Raghwani Advocate, but was withdrawn and KK Nyakundi Advocate came on record.

That invitation notices were sent to the advocates on record for the respondent, Affidavits of Service are on record in this regard, service was acknowledged and hence the Respondent was aware of the proceedings herein at all material times. The consent now filed by the firm of Paurvi Rawal Advocates for the Respondent to replace the firm of KK Nyakundi Advocates upon the court entering judgement amounts to obstruction of justice. Where the firm of KK Nyakundi advocates failed to advise the Respondent appropriately, action should be taken against such firm and not be visited upon the Claimants who has proceeded and obtained judgement and is in the process of execution.

Both parties made their oral submissions in court.

Determination

On 29th August 2013, the Respondent entered appearance through his advocates.

On 13th September, 2013 a defence was filed and paragraph 2 is an admission of the descriptive contents in the memorandum of claim. With this admission, the averments that the Respondent as described as the employer of the Claimants put in motion the hearing process against the correct respondent. There was therefore no need and objections that may have led to the Claimants going out of their way to search for who their employer was as the Respondent admitted to this fact.

What is clear from the pleadings, the Respondent has since changed his advocates and a consent obtained from his previous advocates on record, the firm of KK Nyakundi & Co. Advocates to Paurvi Rawal Advocate. The consent drawn between the advocates is evidence that the Respondent has been in touch with his advocates all along and is able to trace and get his instructions.

The hearing proceeded on the premise that the Respondent was served with various hearing notices and failed to attend court. Such hearing notices are evidenced by the Affidavits of Service filed herein. Defence was entered for the Respondent without any objections to the description. That sets in motion the proceedings herein.

No evidence of the Respondent employment, its terms and termination dates – these have not been provided. The Respondent cannot therefore hide behind the business name to negate the proceedings herein and avoid the process of execution. Where indeed execution has proceeded against the Respondent and he is of the view that a third party ought to be joined herein so as to bear the bulk of the judgment, there is a set procedure for such purpose. The process of seeking to set aside the judgement herein for purposes of cross-examining the Claimants and setting out the defence is not stated as to which party will play this role in the absence of the respondent.

The respondent, by seeking to recall the Claimants for cross-examination and offering their defence is a further admission that indeed the right person/party is sued as the respondent. Otherwise the orders sought

would be of no purpose.

As such, I find the application by the Respondent is premised on abuse of court process, such shall not receive the blessing of the court, there is no merit to warrant the orders sought, application dated 3rd October 2016 is hereby dismissed with costs to the claimants.

Delivered in open court at Nairobi this 8th day of December 2016.

M. MBARU JUDGE

In the presence of:

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