



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1499 OF 2011**

**JESSE K. NDERITU.....CLAIMANT**

**VERSUS**

**FINE SPINNERS LIMITED.....RESPONDENT**

**RULING**

1. The Respondent's application brought by Notice of Motion dated 10<sup>th</sup> November 2016 and filed in Court on even date seeks stay of execution of the judgment of the Court entered on 8<sup>th</sup> May 2015.
2. The application which is supported by the affidavit of Grace Kanyiri, Advocate is based on the following grounds:
  - a) That on 8<sup>th</sup> May 2015, judgment was delivered in favour of the Claimant in the sum of Kshs. 1,284,400 plus costs;
  - b) That being aggrieved by the said judgment, the Respondent filed an application dated 10<sup>th</sup> September 2015 seeking stay of execution and setting aside of the judgment;
  - c) That the Claimant had proceeded with execution to the Respondent's detriment;
  - d) That the decretal sum is a colossal amount and the Claimant had not demonstrated capacity to make restitution to the Respondent in the event the Respondent succeeds at the hearing of the application;
  - e) That if the Claimant is not restrained from proceeding with the execution, the Respondent stands to suffer irreparable loss as the application dated 10<sup>th</sup> September 2015 shall be rendered nugatory;
  - f) That it is fair and just that the Respondent is granted an opportunity to be heard.
3. In the supporting affidavit sworn by Grace Kanyiri, Advocate she depones that following delivery of the judgment herein, the Respondent was granted temporary orders of stay in September 2015, which orders had since expired.
4. In explaining the delay in prosecuting the application dated 10<sup>th</sup> September 2015, Counsel depones that there had been unsuccessful attempts to resolve the matter in an out of court settlement. She adds that the Respondent's Directors had traveled out of the country causing delay in the issuance of instructions.

5. The Claimant adopted his replying affidavit sworn on 8<sup>th</sup> October 2015 as his response to the application. He depones that the Respondent's application is not brought in good faith and is intended to deny him from enjoying the fruits of the judgment delivered in his favour.

6. Regarding the Respondent's prayer for setting aside of the judgment, the Claimant depones that the Respondent was duly served but chose not to attend court prompting the Court to hear the Claimant *ex parte*.

7. The Claimant further depones that the Respondent had undertaken to pay the decretal sum, an undertaking it had failed to honour.

8. In its application dated 10<sup>th</sup> September 2015, the Respondent seeks an order to set aside the judgment delivered on 8<sup>th</sup> May 2015 on the ground that the Respondent was not aware of the proceedings leading to the judgment.

9. Order 12 Rule 7 of the Civil Procedure Rules allows the Court to set aside an *ex parte* judgment upon such terms as may be just. This power is discretionary and discretion must always be exercised judiciously.

10. In considering a similar application in ***Joseph Macharia Mbugua v M/S Young Club 7 & Restaurant [2014] eKLR*** the Court held that apart from considering the sufficiency of the cause of an applicant's failure to participate in proceedings, the Court ought to inquire into whether the applicant is guilty of obstructing justice. Additionally, the Court is expected to take into account any defence filed by the applicant.

11. The Respondent was granted a temporary stay of execution in September 2015 but for some reason which was not clear to the Court, chose not to prosecute the application *inter partes*. Apart from a general statement by Counsel for the Respondent that there had been attempts to settle the matter, no credible reason was offered for such a long delay.

12. It seems to me therefore that the Respondent is guilty of obstruction of justice and I proceed to dismiss its application with costs to the Claimant.

13. The interim orders granted on 10<sup>th</sup> November 2016 are vacated.

14. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyabena for the Claimant

Miss Kanyiri for the Respondent

