



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 365 OF 2013**

**JOSPHAT MUNKE MPOE**

**CLAIMANT**

v

**DAVID WAIGANJO KOINANGE**

**RESPONDENT**

**RULING**

1. The Court delivered judgment on 6 February 2015 in which judgment was entered in favour of the Josphat Munke Mpoie (Claimant) and David Waiganjo Koinange (Respondent) was ordered to pay him outstanding salaries and accrued leave totalling Kshs 5,400,000/-, less any monies paid earlier.
2. The Respondent was aggrieved with the judgment and on 10 February 2015, the firm of Mongeri & Co. Advocates filed a motion under certificate of urgency seeking leave to be allowed to come on record for him and, stay of execution pending appeal.
3. The Court certified the motion urgent on 11 February 2015, and directed that it be served for *inter partes* hearing on 20 February 2015. The Court ordered status quo to be maintained.
4. On the day set for *inter partes* hearing, the Respondent applied to have the motion withdrawn and the Court allowed the withdrawal.
5. On 23 February 2015, Mongeri & Co. Advocates filed another motion under certificate of urgency seeking *leave to be allowed to come on record for the Respondent, stay of execution of the judgment delivered on 6 February 2015 and that the judgment of 6 February 2015 be set aside and the Cause be reopened and Respondent be granted leave to call witnesses.*
6. The Court certified the application urgent on 24 February 2015, and directed it be served for *inter partes* hearing on 27 February 2015. On this date, the Claimant sought 5 days to file a response to the motion.
7. The Court allowed the Claimant time and directed that the motion proceeds on 6 March 2015.
8. In the intervening period, the Claimant moved to execute and on 3 March 2015, the Respondent filed another motion seeking a stay of execution. The Court certified this motion urgent and directed that it be served for *inter partes* hearing on 4 March 2015.
9. On 4 March 2015, the Court directed that the motion of 20 February 2015 be heard on 5 March 2015, instead of the earlier scheduled date of 6 March 2015.
10. On 5 March 2015, before the motion dated 20 February 2015 was heard, the Court granted leave to the firm of Mongeri & Co. Advocates to come on record.
11. This was necessitated by the change of Advocates after judgment, and the fact that the firm of Mongeri & Co. Advocates had secured the consent of the firm of Mirugi Kariuki & Co. Advocates, who had been on record for the Respondent before judgment.

**Motion dated 20 February 2015**

**Respondent's case/submissions**

12. The pending substantive prayers in this motion are prayers 3 and 4 seeking *stay of execution, setting aside the judgment and granting leave to the Respondent to defend*. These prayers are governed by different legal principles.
13. The grounds enumerated on the face of the motion by the Respondent are that; his then Advocate on record, Mirugi Kariuki & Co. Advocates and himself were not served with hearing notice, that he had witnesses to call and it would be in the interest of justice that he be granted an opportunity to be heard and that the rules of natural justice demand a fair hearing.
14. Mr. Tombe urged the Respondent's case.
15. On the setting aside, he submitted that the Court should exercise its discretion pursuant to sections 1A and 3A of the Civil Procedure Act.
16. He also submitted that the Respondent was not aware of the hearing date and that the Respondent had an arguable defence and should be granted the opportunity to be heard.
17. On the stay of execution, he submitted that the Respondent was ready to deposit half of the decretal sum as security.
18. The Claimant opposed the application and his case was taken by Mr. Kanyi. Mr. Kanyi relied on a replying affidavit of the Claimant and notice of preliminary objection filed on 4 March 2015.
19. The Claimant's case is that the motion under consideration was misconceived, incompetent and an abuse of the court process; the hearing date was taken by consent; that the matter was in the cause list; no justifiable reasons have been given to set aside a regular judgment; the firm of Mongeri & Co. Advocate was not properly on record; that the Respondent had initiated 2 distinct processes to challenge the judgment of Court and that the supporting affidavit was not sworn by the Respondent.
20. Mr. Kanyi submitted that the Respondent had not complied with Order 9 rule 5 of the Civil Procedure Rules; was attempting to follow 2 distinct procedures and that once the Notice of Appeal had been filed, the proper forum was the Court of Appeal (*African Airlines International Ltd v Eastern & Southern African Trade & Development Bank* (2003) eKLR and *Halai & Ar v Thornton & Turpin (1963) Ltd* (1990) KLR 365).
21. He also submitted that the hearing date was fixed by the consent of the parties and the cause was cause listed and therefore the Respondent's failure to attend the hearing was to ignore the Court proceedings (*Kamunyi v Macharia & Ar* (1990) KLR 470).
22. He further submitted that the Respondent had not filed a Response to the Memorandum of Claim and no draft Response had been annexed to the motion to demonstrate there was a defence with triable issues.
23. The Court will discuss the objection raised on leave of Court to come on record, setting aside and stay of execution and parallel processes, in that order.

## **Evaluation**

### ***Leave to come on record after judgment***

24. Order 9 rule 9 of the Civil Procedure Rules require that after judgment, an advocate must seek *leave of Court to come on record* and such advocate must **either** *apply to come on record with notice to all the parties, or get the consent of the previous Advocate and file such consent*. The only commonality under the 2 scenarios is the leave of Court for the new Advocate to come on record.
25. In the instant case, the firm of Mongeri & Co. Advocates secured the written consent of Mirugi Kariuki & Co. Advocates and filed the consent on 23 February 2015.
26. This was after the motion had been filed on 20 February 2015. The Court finds that this was an irregularity but it did not prejudice or cause the Claimant any injustice.
27. It is in this regard that the Court allowed or granted an *ex post facto* leave to come on record on 5 March 2015.
28. In the circumstances of this motion, the Court considers this failure to secure leave at the opportune time as an irregularity which was cured when leave was granted.

### **Setting aside of judgment**

29. Stay of execution pending appeal is anchored in Order 42 of the Civil Procedure Rules and generally to get a stay of execution, a party should demonstrate substantial loss if stay is not granted, furnish security for due performance of the decree and the application is brought without undue delay.
30. The Respondent here is not seeking stay pending appeal, but rather a stay of execution pending the setting aside of the judgment and grant of leave to defend.
31. Setting aside of judgment and grant of leave to defend are governed by Order 10 of the Civil Procedure Rules.
32. 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 Nairobi Civil Appeal No. 315 of 2002, *Kenya Steel Fabricators Ltd v Kenya Auto Electrical*, cited by the Claimant.
33. The Respondent asserted that his then Advocates and himself were not served with a hearing notice and further that he was not notified about the filing of submissions.
34. The Court narrated the history of the Cause herein in the judgment. It would not take a lot of space to briefly recite again what appears from the record leading to the Cause being heard *ex parte* on 26 November 2014.
35. On 10 February 2014, in the presence of Mr. Kanyi for the Claimant, Ongaya J fixed the Cause for hearing on 14 April 2014.
36. The Court did not sit on that day but the Cause was placed before the Deputy Registrar. The Deputy Registrar directed that the Cause be placed before the Judge on 8 May 2014.
37. On 8 May 2014, Mr. Kanyi was present for the Claimant while Mr. Kahiga was present for the Respondent. The record bears that the parties agreed by consent to the Cause proceeding to hearing on 25 June 2014.
38. On 25 June 2014, Ms. Kibiru appeared for the Claimant and Mr. Kahiga appeared for the Respondent. Ms. Kibiru informed the Court that the Claimant's witnesses had not been informed to attend Court.
39. Mr. Kahiga, on his part informed the Court that he was ready to proceed with the hearing and that his client had travelled from Nairobi, and he asked for Kshs 6,000/- costs, if the hearing did not proceed.
40. Ongaya J granted an adjournment and the Cause was fixed for hearing on 26 November 2014, by consent of the parties. Costs of the day were granted to the Respondent.
41. The Respondent and his counsel were not in Court on 26 November 2014 when the Cause was called out for hearing.
42. The Respondent's contention that a hearing notice was not served upon his counsel or himself is therefore misplaced. Both the Respondent and his counsel were in Court on 25 June 2014 when the Cause was fixed for hearing and there was no need to serve a hearing notice.
43. The Respondent therefore cannot succeed in his attempt to set aside the judgment on this ground.

### ***Triable issues***

44. The Respondent also sought the Court's intervention to set aside the judgment on the ground that he has a defence which raises triable issues.
45. The Memorandum of Claim was filed on 28 October 2013. On record, there is an affidavit of service sworn by one Douglas Mungai on 30 October 2014 and filed in Court on the same day. The deponent of the affidavit of service has deposed that he met the Respondent on 29 October 2014, at the offices of Kanyi Ngure & Co. Advocates and served him.
46. According to the Notice of Summons, the Respondent had 14 days after service to file a Response. He should therefore have filed a Response to the Memorandum of Claim on or around 12 November 2013. No such Response was filed.
47. The failure by the Respondent to file a Response to the Claim has not been explained. The record further bears out there were feeble attempts at negotiations to settle the matter out of Court, but that cannot be an excuse not to file a Response on time.
48. The Respondent did not file a draft Response. A party seeking leave to set aside a regular judgment and leave to defend a Suit should demonstrate even one triable issue. The Respondent herein has not demonstrated either through a draft Response or through the supporting affidavit a single triable issue.

49. On this ground again, the Respondent has not satisfied the test for setting aside and grant of leave to defend.

### ***Opportunity to be heard***

50. The right to a hearing or natural justice is a cornerstone of any system of administration of justice. But within the administration of justice, there are procedures which have been called the handmaidens of justice.

51. To actuate the right, a party is required to inform the other party about the complaint raised against him, the venue and forum where the complaint has been raised and when and how the party should respond.

52. The Respondent herein was served with Notice of Summons. The Summons informed him of the timelines for filing a Response. The Summons had details of the forum and venue. He was served with the Memorandum of Claim.

53. The Respondent failed to respond. He has not explained the failure.

54. In my view, such a course of conduct cannot be undone under the guise of *it is in the interest of justice* or the *right to a hearing* being a fundamental right.

55. Even on this ground, the Respondent fails.

### **Stay of execution**

56. The Respondent having failed in his attempt to set aside the judgment and be granted leave to defend, this order becomes otiose.

57. Where the Court exercises its discretion to set aside judgment, it may set aside the judgment on conditions. The Respondent has failed and this question need not be discussed though the Respondent had indicated he was ready to deposit half of the decretal amount.

### **Parallel procedures**

58. The Claimant raised the issue of the Respondent taking two distinct procedures to challenge the judgment, i.e. preferring an appeal at the Court of Appeal and seeking setting aside before this Court.

59. It is not necessary to discuss this ground, in the circumstances of this case, as it is not determinative.

### **Conclusion and Orders**

60. I believe I have said enough to make a determination on the motion. The motion must fail for the reasons outlined herein above.

61. The Court therefore dismisses the motion with costs to the Claimant. The option available to the Respondent is to consider an appeal

**Delivered, dated and signed in Nakuru on this 20<sup>th</sup> day of March 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant  
Advocates

Mr. Kanyi instructed by Kanyi Ngure & Co.

For Respondent  
Advocates

Mr. Tombe instructed by Mongeri & Co.