



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1580 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 11th March, 2015)

BERNARD AMBALE KAGASICLAIMANT

VERSUS

FOR YOU CHINESE RESTAURANTRESPONDENT

RULING

1. The applications in court are the ones dated 23/7/2014 and 10/12/2014 respectively. By consent of the parties, the 2 applications were heard simultaneously and proceeded by way of written submissions.
2. In the application dated 23/7/2014, the Applicant sought orders for stay of execution of the decree herein and consequential orders arising from the award delivered by Hon. Justice Linnet Ndolo on 24/6/2014 pending the hearing and determination of this application.

The Applicant also sought orders that the Honorable court be pleased to set aside the hearing of the Claimant's claim conducted on 8/4/2014 and the subsequent award delivered on 24/6/2014. They also want the Respondent cross examined on his affidavit of service dated 31/3/2014.

3. The Applicants contend that the affidavit of service is full of perjury the same having not been served upon one Albert Seleti Ongwae Advocate. They contend that the said affidavit cannot lie as the name of the person who received the hearing notice if any is not disclosed on the face of the hearing notice. They have submitted that the Claimant does not stand to suffer prejudice if the orders sought are granted.
4. The application is supported by the supporting affidavit of Albert Ongwae Seleti, an Advocate of the High Court sworn on 23rd July 2014.
5. In the application dated 10/12/2014 the Claimant Applicant wants the Respondents application dated 23rd July 2014 dismissed and he be at liberty to execute his decree issued on 7th August 2014. The Respondent then moved court for a temporary stay of execution of the decree and substantial orders.

The Respondents were heard exparte on 24th July 2014 and matter ordered for mention on 30/7/2014. On 30/7/2014 the matter was ordered mentioned on 28/7/2014. On 28/7/2014 the matter was not in the cause list.

The Applicant therefore avers that the temporary stay of the decree granted on 24th July 2014 is

now more than 14 days contrary to Rule 16(8)(b) of the Industrial Court (Procedure) Rule 2010.

The Applicant avers that failure to prosecute the application is prejudicial to him and he wants the same dismissed with costs.

6. Upon hearing both Applicants in their respective applications, the issue for determination is whether the application dated 23/7/2014 has any merit. In considering that position, the court will address the mode of service upon the Applicant. On 9/1/2014, the Applicant filed an invitation to the Respondents in court asking the Respondents to meet them at the registry on 22/1/2014 at 2 pm to fix a hearing date. This invitation was served on the Respondent on 9/1/2014. It was stamped by Seneti & Company Advocates.
7. It appears that the Respondents didn't attend at the registry and so a hearing date for 8th April 2014 was taken. The Respondents were served with a hearing notice as per the affidavit of service filed in court on 31/3/2014. On the 8/4/2014 the case proceeded for hearing as the Respondents didn't turn up in court. The Applicant Respondents claim is that they were never served contrary to what the Claimant Respondents aver hence this application. They contend that the affidavit of service is full of perjury.
8. On the face of the record, the Applicants seem to have been served but given the contention, then it is the Applicants to prove that the signatures and stamp on the received copies are not theirs. In essence this can only be led through examination of the Process Server. I will therefore direct that the Process Server appears in court for cross examination by the Applicant before a final determination of this application.

On the Claimant Applicant's application, the same has been overtaken by events given the other application by Respondents.

Dated in open court this 11th day of March, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant present

No appearance for Respondent