



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 45 OF 2002**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION ..... 1<sup>ST</sup> CLAIMANT**

**JOHNSON WANDO THUO ..... 2<sup>ND</sup> CLAIMANT**

***VERSUS***

**KENYA TEA GROWERS ASSOCIATION ..... 1<sup>ST</sup> RESPONDENT**

**NGORONGO TEA FACTORY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Application dated 9<sup>th</sup> February 2015 seeks to;
  - i. set aside, review, vary and / or discharge in its entirety the orders awarded on 26<sup>th</sup> April 2013 and 2<sup>nd</sup> April 2014 in Miscellaneous Application No. 3 of 2013; and
  - ii. grant the 2<sup>nd</sup> Respondent leave to file a Replying Affidavit in response to the Claimant's Notice of Motion Application dated 24<sup>th</sup> January 2013 and the same application be re-fixed for interparties hearing.
  
2. At the outset, the Court notes that the orders sought to be reviewed and / or set aside were made more than two (2) years and one (1) year respectively.

There is no explanation why there is such an inordinate delay in bringing the application.
  
3. The Application is founded on grounds set out on the face of the Notice of Motion to wit;
  1. the orders were obtained through fraud and / or misrepresentation of pertinent material facts;
  2. the orders stand to greatly prejudice the 2<sup>nd</sup> Respondent;
  3. the orders of 26<sup>th</sup> April, 2013 were awarded ex parte without affording the 2<sup>nd</sup> Respondent an opportunity to be heard contrary to the rules of natural justice;
  4. the Claimant is currently taking steps to enforce the orders obtained on 2<sup>nd</sup> April 2014 to the detriment of the 2<sup>nd</sup> Respondent.

4. The Application is further supported by the Affidavit of George Omuga the General Manager of the 2<sup>nd</sup> Respondent sworn on 9<sup>th</sup> February 2015.
5. The deponent states that the 2<sup>nd</sup> Claimant herein obtained orders on 26<sup>th</sup> April 2013 making the 2<sup>nd</sup> Respondent herein as well as himself parties to the already concluded suit being Industrial Cause No. 45 of 2002 between Kenya Plantation & Agriculture workers Union *Versus* Kenya Tea Growers Association through his notice of motion Application, Misc. Application No. 3 of 2013 dated 24<sup>th</sup> January 2013 without the Respondent's knowledge.
6. That the said orders made on 26<sup>th</sup> April 2013 were granted *ex parte* without the 2<sup>nd</sup> Respondent being afforded an opportunity to respond to the Application.
7. That the orders further granted leave to the Claimant to personally execute the decree made on 28<sup>th</sup> November 2003 in the Industrial Cause No. 45 of 2002 against the 2<sup>nd</sup> Respondent who is a former employer of the Claimant.
8. That the said situation came as a shock to the 2<sup>nd</sup> Respondent having successfully defended Industrial Cause No. 310 of 2011 Johnson Wando Thuo *Versus* Ngorongoro Tea Factory Limited which the 2<sup>nd</sup> Claimant had instituted claiming not to have been paid his rightful dues by the 2<sup>nd</sup> Respondent but was dismissed by the Honourable Court on 23<sup>rd</sup> February 2013.
9. That this Notice of Motion by the 2<sup>nd</sup> Claimant dated 24<sup>th</sup> January 2013 was not served on the 2<sup>nd</sup> Respondent hence the impugned *ex parte* orders.
10. That the Claimant has since commenced execution proceedings and sent a firm of Auctioneers who have proclaimed as against the 2<sup>nd</sup> Respondents assets by notices of attachment dated 2<sup>nd</sup> April 2014.
11. That it is in the interest of justice that the orders made on 26<sup>th</sup> April 2013 be set aside entirely and that leave be granted to the 2<sup>nd</sup> respondent to file its response to the Notice of Motion Application dated 24<sup>th</sup> January 2013 and the same be re-fixed for *inter partes* hearing.
12. The 2<sup>nd</sup> Claimant filed a Replying Affidavit sworn by Gachoka Mwangi advocate on 18<sup>th</sup> February 2015.

The Application is opposed on the grounds that;

- a. it was brought with undue delay;
  - b. the Applicant has made material mis-representations; and
  - c. the Application, if allowed would be highly prejudicial to 2<sup>nd</sup> Claimant.
13. Furthermore, the Respondent states that the Application for joinder was filed on 25<sup>th</sup> January 2013 and same was served on the Applicant on 12<sup>th</sup> March 2013 with a clear indication that it was due for hearing on 15<sup>th</sup> March 2013.
  14. An Affidavit of Service sworn by one Martin Mwaniki on 14<sup>th</sup> March 2013 is attached and marked 'GMI'.
  15. Matter did not proceed on 15<sup>th</sup> March 2013 and was set for hearing on 26<sup>th</sup> April 2013 and hearing notice was served and an Affidavit of service sworn by Martin Mwaniki on 25<sup>th</sup> April 2013 is attached and marked "GM2".
  16. On 26<sup>th</sup> April 2014, all other parties failed to appear and Marete, J. issued the prayers sought.

17. That the decree was drawn and served on all the parties but it was difficult to execute since same did not reflect sums payable to the 2<sup>nd</sup> Claimant

18. On 31<sup>st</sup> October 2013, the 2<sup>nd</sup> Application dated 31<sup>st</sup> October 2013 seeking the Court to specifically state the amount payable to the 2<sup>nd</sup> Claimant was filed.

19. The Application was served on the 2<sup>nd</sup> Respondent on 13<sup>th</sup> November 2013 with a hearing date on 20<sup>th</sup> November 2013. An Affidavit of service sworn on 19<sup>th</sup> November 2013 by Martin Mwaniki is annexed and marked "GM3".

Matter did not proceed on 20<sup>th</sup> November 2013 and was reset for hearing on 18<sup>th</sup> December 2013.

20. On 25<sup>th</sup> November 2013, the Advocates for the Applicant wrote to the Respondent seeking further details on the case. The Applicant had not asked why they were a party to the suit up until then.

21. Kimani and Michuki Advocates filed a notice of appointment on 18<sup>th</sup> December 2013 and matter was adjourned and a new date was fixed for 25<sup>th</sup> March 2014. Hearing notice was served by Martin Mwaniki who has sworn an Affidavit of Service on 24/3/2014 marked 'GM6'.

22. The Applicants did not attend the hearing on 25<sup>th</sup> March 2014 and Court ordered they be served again for on 2<sup>nd</sup> April 2014.

23. On 2<sup>nd</sup> April 2014, the Applicants were represented by Mulanya Advocate. Upon hearing the matter, Marete J. made orders in favour of the Respondent. It is misleading therefore for the Respondent to allege that the orders were granted exparte.

24. That the Respondent wrote a letter to the Applicants advocate seeking payment of the decretal sum but no payment was made.

Taxation of the bill was done on 21<sup>st</sup> April 2014.

25. It is the Respondent's submission that this Application has been brought two (2) years down the line and it is far-fetched for the Applicant to say, it was caught unawares.

26. The Respondent was as a union member entitled to salary increment back on 28<sup>th</sup> November 2007 and was not awarded the increments for twelve (12) years hence the joinder and subsequent orders.

## 27. **Determination**

The Court is satisfied that the Applicant was properly served with the Applications that culminated in the Ruling and decree of the Court in favour of the Respondent.

28. The Court has perused the various Affidavits of service sworn by Mr. Mwaniki and is satisfied that service was proper.

29. The Applicant did not call for the cross examination of the process server if it had doubts on the authenticity of the service made.

30. Accordingly, the Application has no merits and the same is dismissed with costs to the 2<sup>nd</sup> Claimant / Respondent.

**Dated and Delivered at Nairobi this 29<sup>th</sup> day of May, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**