



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

JUDICIAL REVIEW NO. 2 OF 2014

REPUBLIC

-VERSUS-

KENYA INDUSTRIAL ESTATES LIMITED.....1ST RESPONDENT

JULIUS MOKOGI.....2ND RESPONDENT

AND

TOM DULLA ODENY.....EX-PARTE APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 15th May, 2015)

RULING

The ex-parte applicant Tom Dulla Odeny filed the substantive notice for judicial review orders on 18.11.2014. On 26.11.2014 the matter came before the court and counsel for the respondents applied to file replying affidavit and the grounds of opposition within 14 days. The court ordered that the same be filed by 11.12.2014 when close of pleadings would be confirmed and directions on the hearing taken.

On 11.12.2014 the respondents had not filed the relevant replying affidavit and counsel for the respondents undertook to file and serve the same by close of that day. The court ordered them to file and serve the same by 30.12.2014.

By consent of the parties, the notice of motion was fixed for hearing on 3.03.2015 and parties were ordered to file and serve written submissions by 30.01.2015. The ex-parte applicant filed the submissions on 30.01.2015 and the respondents did not file the submissions at all.

On 3.03.2015 counsel for the ex-parte applicant attended court and the respondents and their counsel were absent. Counsel for the ex-parte applicant informed the court that the respondents had not filed the replying affidavit, the grounds of opposition and the written submissions.

In such circumstances, counsel submitted that the notice of motion was not opposed and the court proceeded to allow the application and the respondents were ordered to pay the costs of the proceedings.

On 05.03.2015 the respondents filed a notice of motion brought under Order 10 rule 11 and Order 51 rules 1 and 13(2) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The substantive prayers in that notice of motion were as follows:

1. That the honourable court be pleased to order stay of the ex-parte orders that were granted on 3.03.2015 pending the hearing and determination of the application.
2. That the honourable court be pleased to set aside the ex-parte orders herein together with all consequential orders and the respondents, the applicants, be allowed to file their replying affidavit to the ex-parte applicant's application dated 13.11.2014.
3. That the respondents, the applicants, be granted leave to file their replying affidavit within 7 days from the date of grant of leave sought herein.
4. That costs of the application be in the cause.

The application was based on the grounds in the application, the supporting affidavit of George Gitamo Onsombi Advocate filed on 05.03.2015 and the further supporting affidavit of George Gitamo Onsombi Advocate filed on 16.04.2015. The grounds and submissions to support the application are as follows:

1. The reason counsel for the respondents, now applicants, failed to attend court on 3.03.2014 was that the said counsel was in the process of filing a replying affidavit with the wrong case serial number namely Miscellaneous Application No. 4 of 2014 instead of Judicial Review Application No. 2 of 2014 and by the time counsel discovered the mistake and located the correct court, the court had already made the orders in the ex-parte proceedings of that date.
2. The ex-parte applicant will not suffer any prejudice if the application is allowed.
3. The case and the preparation of the relevant replying affidavit inadvertently escaped the secretary and counsel as assigned at the respondents' advocates' office. Thus the replying affidavit was not filed by 30.12.2014 as ordered by the court and that situation persisted till the hearing date on 3.03.2015.
4. That counsel who was assigned the file on 3.03.2015 was not properly seized of the details in the case and the previous counsel assigned to work on the file had left the firm of advocates on 2.03.2015 unceremoniously.

The ex-parte applicant opposed the application by filing on 17.03.2015 the replying affidavit of Tom Dulla Odeny. The grounds and submissions to oppose the application were as follows:

1. There was no credible reason why the applicants had failed to file the replying affidavit and submissions as ordered by the court.
2. Despite repeated chance to file the replying affidavit and to oppose the substantive application for the judicial review orders, the respondents failed to do so and no just reason had been advanced in that regard.
3. The failure by respondents and their advocates to attend court on 3.03.2015 was a litigation joke which no court in modern times could entertain.
4. The applicants have not shown that they have a serious defence to the judicial review application, thus they have acted casually throughout the proceedings.

The court has considered the parties respective submissions. On 3.03.2015 it is not disputed that the matter was fixed for hearing. It is the applicants' case that their advocate was within the court premises and instead of appearing before the court, counsel chose to proceed to the registry to file a wrongly headed replying affidavit and which was obviously outside the prescribed time as ordered by the court. In the opinion of the court, the legitimate and normal action was for counsel on that date to appear before the court and urge for appropriate prayers in view of the emerging predicament. In the circumstances, the court finds that there was no just and reasonable ground for failure by counsel for the respondents to attend court on 3.03.2015.

The court has considered the conduct on the part of the respondents' (applicants') advocates in this case. It is true that despite repeated opportunity to file replying affidavit, grounds of opposition and submissions no explanation has been made to explain that otherwise deliberate disobedience of the directions and orders given by the court towards just, expeditious and proportionate determination of the case as envisaged in section 3 of the Employment and Labour Relations Court Act. The counsel handling the matter is said to have left the firm of advocates on 2.03.2015. The respondents have stated nothing about the failure to comply with the timelines and directions by the court made long before 2.03.2015.

The court holds that a litigant or a litigant's counsel who fails to adhere to the clear directions by the court towards the just, expeditious and proportionate determination of the matter in dispute before the court will not be permitted to derail the path of justice and reverse the wheels of due process on account of unjustified or unreasonable inadvertence to comply with the directions.

The court has re-visited the submissions as made for the applicants. It has not been shown that the respondents have a serious defence or opposition to the substantive motion for the judicial review orders as was filed for the ex-parte applicant. In the opinion of the court, in an application like the present one for setting aside the ex-parte judgment and for leave to file a defence or opposition or replying affidavit belatedly, it is not enough for the applicant to merely urge a chance to so oppose or defend but must also show the clear facts of the line of opposition or defence. As submitted for the ex-parte applicant, the court finds that the applicants have failed to show a serious defence or opposition to the notice of motion for judicial review orders as already allowed by the court at the ex-parte proceedings of 03.03.2014.

In conclusion, the application by way of the notice of motion dated 5.03.2015 is hereby dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 15th May, 2015**.

BYRAM ONGAYA

JUDGE