



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU

CAUSE NO. 102 OF 2014

(formerly Kak. CMCC 87/13)

(Before Hon. Lady Justice Maureen Onyango on 5th June, 2015)

JOHN WAFULA CLAIMANT

-VERSUS-

WEST KENYA SUGAR CO. LTD RESPONDENT

RULING

The application before me is a Notice of Motion dated 9th February 2015 and filed on 10th February 2015 seeking the review of this court's orders made on 25th November 2014 allowing the plaintiff to proceed with hearing *ex-parte* and all consequential proceedings and/or orders emanating therefrom. The application is made under Section 1A, 3A and Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

The grounds upon which the application is made are the following:-

1. That this matter proceeded *ex parte* without the defendant/respondent's participation on 25th November 2014 in effect denying the defendant a chance to be heard.
2. That the failure to attend was not intentional and/or deliberate as the service was done on the firm's pupil who forgot to diarize and/or bring it up to the attention of the advocate.
3. That the counsel for the respondent was engaged in Webuye PMC CC No. 28 of 2014, Ndhiwa PMC CC No. 10/14, Kakamega CMCC Cr. C. No. 1119/13 on the said 25th November 2014 which had been set down for hearing prior to being served with this notice.
4. That the adverse orders issued on 25th November 2014 were never prayed/sought for in the applicant's application dated 17th November 2014 that came up for hearing as the said application only sought for direction and was not appealing the decision of the learned Magistrate who had dismissed the suit.
5. That the respondent should not suffer prejudice due to mistake of the advocate their advocate being engaged in other matters before other courts.
6. That the respondent has been condemned unheard.

7. That it is in the interest of justice that this application be allowed.

8. That the application that came up for hearing on 25th November 2014 was not properly before court and the plaintiff's suit was long dismissed with costs in Kakamega CMC CC No. 87 of 2013.

The application is supported by the affidavit of Raymond Olendo, counsel for the respondent which gives a history of the case. I will summarize the facts ahead.

The plaintiff opposed the application and on 25th February 2015 filed grounds of preliminary objection dated 6th March 2015 and a replying affidavit of Nicholas O. Ateya counsel for the claimant sworn on 6th March 2015. The grounds are as follows:-

- 1) That the amendments sought are misplaced and unattainable as this suit was long struck out with costs in the original Kakamega CMCC No. 87 of 2013 on 31.3.2013.
- 2) That the proposed amendment is introducing a new cause of action.
- 3) That the proposed amendments are merely meant to vex and embarrass the defendant and has no basis in law and fact.
- 4) That this application has been made in bad faith and is intended to undermine the defendant's defence to the plaintiff's suit which has already been served upon the plaintiff.
- 5) That the amendments sought are frivolous, vexatious.
- 6) That the proposed amendments should not only be refused but also expunged from the record because they are prejudicial to the defendant.

The application was heard on 10th March 2015. Ms. Odek instructed by Ogejo, Olendo & Company Advocates appeared for the respondent while Mr. Nicholas Ateya instructed by Ateya & Co. Advocates appeared for the claimant.

Brief facts of this case are that the claimant was employed by the respondent in October 1995 or January 1996 as a boiler operator. He was summarily dismissed on 29th October 2007. He filed suit in Bungoma Chief Magistrate's Court in November 2011 being CMCC NO. 756 of 2011 for compensation for wrongful dismissal. The suit was withdrawn due to want of territorial jurisdiction. The claimant then filed Kakamega CMCC No. 87 of 2013. The respondent filed an application to strike out the suit for want of jurisdiction on grounds that the proper court to hear the suit was (then) the Industrial Court (now Employment and Labour Relations Court). The respondent's application was dated 26th November 2013. It is not clear from the court record whether the application was argued. There is however a ruling on the record indicating it is dated and delivered on 31st March 2014 in the absence of the claimant and in the presence of Ms. Odek for the respondent. The ruling struck out the suit with costs.

In the meantime, on 27th January 2014 the claimant filed a Miscellaneous Application in this court seeking the transfer of Kakamega CMCC No. 87 of 2013 to this court. The application was heard on 14th March 2014 and the court granted the orders on 25th March 2014. On 18th November 2014 the claimant filed a notice of motion dated 17th November 2014 seeking orders that:-

"That the Honourable Court be pleased to give directions in this case."

The application was supported by the affidavit of Nicholas O. Ateya, Counsel for the claimant and on grounds among others, that the alleged dismissal of Kakamega CMCC No. 87 of 2013 by Hon. Ongondo Ag. Principal Magistrate on 31st March 2014 by striking it off with costs to the defendant was immaterial since the matter had already been ordered transferred to the Industrial Court Kisumu.

The application was served upon the respondent's advocates on 18th November 2014. The application came up for hearing on 25th November 2014 when it was granted as prayed as there was no appearance by the respondent's advocates. The court directed as follows:-

- "1. That the application dated 17.11.2014 has not been opposed and the same is allowed as prayed.**
- 2. That the order given by the Hon. Ongondo Acting Principal Magistrate on 31st March, 2014 striking off the case with costs is hereby vacated having been given after this Honourable Court had ordered the case transferred to the Industrial Court on 25th March, 2014.**
- 3. That both parties to take an appropriate date for the hearing of the case before the Industrial Court, Kisumu."**

It is these orders that the respondent seeks to be reviewed and/or set aside in the present application.

The respondent's grounds for seeking review or setting aside are that the service of the claimant's application dated 17th November 2014 seeking directions was effected upon a pupil Julie Ogola who was not authorized to receive documents and who failed to diarize the date in the firm's court diary. The respondent's counsel further states that on that day he was involved in Webuye PMCC No. 28 of 2014, Ndhiwa PMCC 10 of 2014 and Kakamega CMCC Tr. No. 1119 of 2013 whose dates had been fixed earlier.

There is no affidavit of Julie Ogola, the pupil who is alleged to have received the hearing notice and failed to diarize it. Mr. Raymond Olendo's statements in the affidavit about service upon the pupil is hearsay and inadmissible as evidence in the application. The fact that counsel was engaged in cases in subordinate courts cannot be used as an excuse for failure to attend a superior court. However, these are peripheral issues.

The main issue that I have to consider is whether, as pleaded in the respondent's application, the court granted orders that were never sought, and whether the plaintiff's case had long been dismissed by the Chief Magistrate's Court in Kakamega.

From the record in the court file, the orders transferring Kakamega CMCC No. 87 of 2013 were made on 25th March 2014. The Ruling of Hon. Ongondo striking out Kakamega PMCC No. 87 of 2013 was delivered on 31st March 2014, after the court ordered the file to be transferred to Kisumu. It therefore follows that the orders were made after the Hon. Magistrates jurisdiction to handle the case had been withdrawn as the file was no longer available to the Hon. Magistrate for purposes of making any order from 25th March 2014 when this court ordered the transfer of the case from the subordinate court.

On the prayer that the orders granted were not prayed for, one only needs to read the application dated 17th November 2014 to note that it was seeking directions. The grounds upon which those directions were sought are expressly stated on the face of the application and the supporting affidavit. The court granted those directions which were in effect only a confirmation of facts that had already occurred earlier on 25th and 31st March 2014.

The orders of 25th November 2014 being only clarification and restatement of facts that already existed on the court record, did not change the status of either the claimant or the respondent. Even without the orders of 25th November 2014, the position of the claimant's case was that Kakamega CMCC No. 87 of 2014 was transferred to this court by order of this court made on 25th March 2014 and that the dismissal of the case on 31st March 2014 was without jurisdiction and therefore null and void.

This being the case, I find the application of the respondent dated 9th February 2015 to be without merit and dismiss the same. The costs of the application shall be in the cause.

MAUREEN ONYANGO

JUDGE

5/6/2015