



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 25 OF 2013

NICHOLAS OTINYU MURUKACLAIMANT

VERSUS

EQUITY BANK LIMITED RESPONDENT

RULING

The respondent filed the application on 21st November 2013 through a Notice of Motion under sections 9, 21, 23, 24, 31, 33, 34, 40 and 56 of the Advocates Act, sections 12 and 27 of the Labour Institutions Act, Rule 16, 27 and 31 of the Industrial Court procedure Rules, section [article] 159 of the Constitution, Order 42 rule 6 of the Civil procedure rules and section 1A and 1B of the Civil Procedure Act seeking for orders that Wesonga Geoffrey Eric had not applied for a practicing certificate when he filed the suit herein, the court to set aside all orders herein the same being a nullity, the pleadings drawn by Wesonga Advocate be expunged and that Wesonga Advocate and Daystar Auctioneers do pay back to the respondent the sum of kshs.1,108,208.00 paid in settlement of the claim and that appropriate disciplinary action be taken against Wesonga Advocate and Daystar Auctioneers. This application is supported by the annexed affidavit of Joyce Munene. In reply the claimant filed the Replying Affidavit through Geoffrey Ericc Wesonga on 5th December 2013, the claimant filed a Further Affidavit on 10th February 2014 and the claimant also filed a Supplementary Affidavit on 18th March 2014.

The respondent's application is on the grounds that on 8th November 2013 the claimant though their auctioneers commenced execution following the court award against the respondent, there were warrants of attachments and decree of the court dated 24th June 2013 for the payment of Kshs.894,938.00. The respondent made the payment of kshs.1, 108,208.00 to avoid business disruption. This amount included the decretal sum plus costs. There was default judgement despite the respondent filing a defence on 8th February 2013 and served on the claimant on 11th February 2012.

Other grounds are that by the time the claimant's advocate filed the suit he had no practicing certificate and the proceedings were a nullity and should be expunged and the paid sums refunded to the respondent.

In the supporting affidavit the deponent the legal manager of the respondent states that judgment was entered in default of defence, judgment was entered on 24th June 2013 and the proclamation was wrongly enforced and hence illegal and in breach of Auctioneers rules. The respondent was forced to make a payment to the claimant. Proceedings took place without notice to the respondent despite their being a defence filed on 8th February 2013. By the time the claimant filed the claim the advocate had no practicing certificate and hence proceedings herein are a nullity and should be expunged.

The respondent in reply stated that the prayers sought by the respondent are scandalous, vexatious and an abuse of the court process as the respondent advocates only filed appearance and failed to file a defence hence judgement herein and subsequent orders and execution. The advocate for the claimant had a practicing certificate for 2013 which was valid and paid for. Upon the respondent failure to file defence, the claimant took directions from court and an award was made and execution proceeded. The orders being sought by the respondent are meant to subject the claimant and his advocate to ridicule and will not achieve any useful purpose and the application should be dismissed.

Proceeding in this matter took place upon the court ascertaining that the respondent was aware of the proceedings herein; there was a Notice of Appointment of Advocate but no defence to the claim. The documents attached by the respondent to indicate there was a defence filed was not on the court file at the time the claimant was heard and the court took directions. All court documents are filed at the registry, payments made where the paying party is issued with a receipt and a stamped copy of the filed document. Court documents are misfiled, misplaced and or cannot be traced for one reason or the other and the subject party copy is always accepted as a true copy in confirmation. Where this stamped copy and the receipts are missing, the practice that has largely been accepted by the Industrial Court is to allow a party confirms this fact either by filing an affidavit to confirm the facts or seeking the other party recipient of the filed documents to supply the court with a copy of any documents served upon them. In this case, the respondent states that a defence was filed and paid for but these are documents not on the court file, the stamped copy of the defence was contested by the claimant noting that they were not served hence the need to confirm through the receipt the respondent used to pay for this document which was missing as well as the receipt the respondent took upon filing the said defence. There is no evidence in support of the missing receipts and the defence attached to the respondent application remains contested.

In a matter like this one where court has concluded proceedings on the basis of crucial processes like default in filing a defence, the respondent should have taken this issue more carefully to try and address the core of the matter in seeking to set aside the orders of the court. To casually come to court with unconfirmed claims that the filed defence and the receipts in payments are missing is not an enough reason as to warrant the court setting aside orders herein.

On matters that the proceeding herein should be expunged on the basis that the claimant advocate acted without a practicing certificate for the year 2013 and disciplinary proceedings should be commenced against the advocate and the auctioneers in execution, these are facts that the respondent should have taken prior caution before using them in court against the claimant. I take it that all members of the Bar make their applications for practicing certificates as under the Advocates Act and through the Law Society of Kenya. A confirmation from the Law Society of Kenya stating as to whether Wesonga Ericc Geoffrey advocate had a practicing Certificate for 2013 would have informed the respondent of this fact before undertaking rush business practices of extracting the application made by the advocate noted as annexure "EG5". This is why the Law Society of Kenya exists to assist members of the public seeking information about practicing advocates and the society members who are advocates to exercise their rights within the law and to enjoy professional courtesy from colleague's members of the Society. To act otherwise to a fellow society member is what would be professional misconduct. I will say no more but note that there is evidence that the claimant's advocate Wesonga Ericc Geoffrey had a practicing certificate for the year 2013. Equally, the claim against the auctioneers stated to be Daystar Auctioneers are misplaced and have no basis in the absence of such a party not having been enjoyed herein.

At the core of this application is that the respondent has failed to address the issue as to why there was no defence on file at the time the court entered judgement to warrant the setting aside. To order the refund of monies paid to the claimant would therefore be the injustice.

The application dated 13th November 2013 and filed on 21st November 2013 is hereby dismissed. Costs awarded to the claimant.

Delivered in open court this 1st day of April 2014.

M. Mbaru

Judge

In the presence of

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