



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 963 of 2012

JORAM GAKUMO CLAIMANT

V

THIKA COFFEE MILLS LIMITED RESPONDENT

RULING

By a Notice of Motion dated 19th February 2013 and supported by the Affidavit of **TOM MAINA MACHARIA**, Counsel for the Respondent, the Respondent seeks orders setting aside judgement entered on 29th January 2013 together with all consequential orders and that the Respondent be given a chance to defend the claim, that there be stay of intended execution as the same is pre-mature and un-procedural and therefore unlawful, and lastly, that costs of the application be costs in the cause. The grounds upon which the application is grounded is that there was inadvertent mistake on the part of Counsel who failed to diarize the hearing date resulting in the case proceeding ex-parte and that the Claimant failed to comply with Section 94 of the Civil Procedure Act which requires that a party seeking to execute a decree before taxation of costs can do so only with leave of the Court granted upon request either at the delivery of judgement or by formal application served upon the judgement debtor.

The Claimant has opposed the application by a replying affidavit sworn by his advocate **GEOFFREY ERIC ODONGO** on 21st February 2013 and filed in Court on 22nd February 2013. The main grounds of opposition are that failure to tax costs is not a ground for setting aside judgement, that the judgement was regular and that the defense on record raises no triable issues.

The parties agreed to prosecute the application by way of written submissions. The Respondent reiterated the contents of the Notice of Motion while the Claimant reiterated the contents of the Replying Affidavit. The parties further referred the Court to several authorities.

The Respondent relied on the following authorities:-

- (i) Article 159(2) (d) of the Constitution to the effect that “justice shall be administered without undue legend to procedural technicalities.”
- (ii) Section 1A and 1B of the Civil Procedure Act in the interest of Justice and Order that the Respondent be heard on merit.

(iii) Section 94 of civil Procedure Act.

(iv) Civil Appeal No.46 of 1986: Haji Ahmed Sheikh t/a Hasa Hauliers –vs- Highway carriers Ltd to the effect that a litigant should not suffer due to the mistakes and errors of his advocate.

(v) Muniu –vs- Giovanni [1995-1998] 1 EA 19 where the Court held that “the Court’s discretion was intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.”

(vi) A.W. (suing through Mother and Next Friend M.N.N. –vs- Gathuthi Tea Factory & Another [2011 EKLK].

(vii) Lakeland Motors Ltd –vs- Sembi [1998] L.L.R. 682 [C.A.K.].

(viii) Commercial Bank of Africa –vs- Lalji Karsan Rabadier & 2 others [2012] EKLK.

(ix) Nairobi HCCC 2,736 of 1990, Rebah Mumafu –vs- James Nganga.

(x) Civil appeal No.83 of 1995: Bamburi Portland Cement Co. Ltd –vs- Imranali Chandbhai Abdulhussein.

(xi) Nairobi HCCC No. 4231 of 1992; Mercedes Sanchez Rau Tusel –vs- Samken Ltd & others.

The Claimant also relied on the following authorities:-

(i) HCCC 258 of 2004 Aberdare Cheese

(ii) HCCC 29/1994 Arapan Wood & Equipment supplies –vs- Apollo Insurance Co.1.

(iii) Madan Mohan Aggarwal –vs- Samwel Karimi & Another [2008] eKLK.

I have considered the pleadings by the parties, the written submissions and the authorities.

The issues for consideration are the following:-

(i) Whether applicant is entitled to setting aside of ex-parte judgement; and

(ii) Whether applicant is entitled to stay of execution.

The test of setting aside ex-parte judgement is set out by Kasango J. *in the Abardare Cheese factory* case Supra which has been referred to by the Claimant and which I agree with as follows:-

“In deciding whether a party is entitled to the prayer for setting aside the Court should bear in mind whether the party has deliberately sought to obstruct or to delay the cause of justice and if the answer is in the negative the Court should set aside the ex-parte judgement to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. Additionally the Court should consider whether there is a reasonable defence, which raises triable issues.”

The Respondent has explained the failure to attend Court being mistake on the part of Counsel to diarize the hearing date. I agree that this is an excusable mistake on the part of Counsel for which the Client should not be punished.

This being the case, it is important to consider if the Respondent has a good defence.

The Claimant has submitted that the defence is a bare denial and that the Respondent has not attached documents to prove the reasons for termination which the Respondent alleges in the defence to be “gross

misconduct based on the Claimants practice of:-

- (i) Showing disrespect and using unpalatable language.
- (ii) Willfully disobeying instructions
- (iii) Disregarding authority

The letter of dismissal attached by the Claimant to his Memorandum of Claim does not bear the same reasons. It reads as follows:-

20th January, 2012

Joram Gakumo

C/o thika Coffee Mills Ltd,

THIKA

Dear Gakumo

RE: ----- SUMMARY DISMISSAL

On 20th January, 2012, you showed disrespect and used unpalatable language to your senior in total disregard of whoever was within the vicinity.

This is an act of insubordination which calls for summary dismissal.

You are therefore dismissed from employment forthwith.

Please hand over all the Company's property to the Garage-in-Charge.

Yours faithfully,

For: Thika Coffee Mills Ltd

*E.M. Njenga
Adminsitration Manager*

Copy to:- Chief Executive Officer

*Finance in Charge
Payroll Officer*

The letter does not reflect a practice as suggested in the defence but points at only one incident. The letter further does not comply with the legal requirements as set out in Section 41 and 45 of the Employment Act. Section 41 requires the employer to give a hearing to the Claimant before termination or summary dismissal while Section 45 requires proof of valid reason and fair procedure. At Paragraph 22 of the award, the trial judge observed that ***“the Respondent did not plead that it gave the Claimant the opportunity to make any representations nor is there evidence that it extended to the Claimant the opportunity to make any representations and therefore there is no other conclusion I can reach except that the dismissal of the Claimant was procedurally unfair. The rules of natural justice were not observed.”***

I agree with the trial judge. Indeed in its Memorandum of defence which as observed by the Claimant in its submissions is bare denials, the Respondent at Paragraph 5 pleads as follows:-

“The Respondent cannot verify the veracity of the averments in Paragraph 7 and 8 and puts the Claimant to strict proof thereof.”

Paragraph 7 and 8 of the Memorandum of Claim the gist of the Claimants case as follows:-

7. The aforesaid termination of the Claimant’s contract of service was done in blatant contravention of fair procedure provided in the provisions of the Employment Act in that:-

a) The termination was done simply by handing over to the Claimant a letter of termination in blatant contravention of the elaborate procedure set out at Section 41(2) of the Employment Act with regard to termination on the grounds of gross misconduct justifying summary dismissal. The Claimant was not informed of the incident during which he was alleged to have shown disrespect towards his senior nor was he informed of the person he was disrespectful to and accorded an opportunity to make any representations prior to his termination from employment. The Respondent’s contravention of Section 41(2) of the employment Act by failing to give the Claimants a fair hearing meant that the respondent in turn failed to give consideration to any of the representations the Claimant may have had regarding the accusation made against him prior to reaching its decision to terminate his employment.

b) The Respondent in terminating the Claimants contract of service failed to act in accordance with justice and equity.

c) The Claimant was entitled to receive a certificate of service immediately upon termination of his contract of service which the Respondent did not issue to him.

8. From the foregoing, upon the Claimant’s contract of service being unlawfully terminated in blatant contravention of labour laws the following terminal dues lawfully payable to him have to-date not been paid to the Claimant:-

i) Unpaid salary from the 1st January 2012-20th January 2012 - Kshs.15,046.00

ii) Unpaid leave days – kshs.23,322.00

iii) Leave travel allowance - 2,400.00

iv) 318 over time hours – 28,506.00

v) 12 months’ salary as compensation for unlawful dismissal (as per Section 49(1)(c) of the Employment Act and Section 15 of Labour Institutions Act) – Kshs.279,864.00.

vi) One month salary in lieu of Notice – Kshs.23, 322.00

TOTAL:- Kshs.372,460.00

if the claimant cannot verify the very grounds and procedure for termination and the demands of the Claimant, then it surely does not have any defence to the claim.

The second issue is whether the respondent is entitled to stay of execution. The Respondent has not deponed in the affidavit in support of the application or in the grounds in support of the application when it learnt about the entry of judgement. I note from records in the file that the Respondent was served with Notice of Taxation on 18th January 2013 and Notice of Entry of judgement on 29th January 2013. They did not take any action to apply for setting aside of Award until the Auctioneer proclaimed the goods of the Respondent on 13th February, 2013 and again did not file their application for stay until 19th February 2013. As much as I agree with the Respondent that the execution proceedings were premature and in contravention of Section 94 of the Civil Procedure Act, there was opportunity for them to obtain stay orders before the proclamation when they were served with Taxation Notice on 18th January 2013. If that had been done, there would have been no proclamation.

For the foregoing reasons I make the following orders:-

- 1) That the Respondents application for setting aside judgement entered on 26th October 2012 together with all consequential orders is dismissed.
- 2) There will be stay of execution of decree until the Claimants Party and Party Bill of Costs is heard and determined.
- 3) The Respondent shall pay the auctioneers costs for proclamation in accordance with scale.
- 4) The Respondent shall pay the Claimants costs of this application.

Orders accordingly.

Read in open Court and signed on this 24th day of April 2013.

HON. JUSTICE MAUREEN ONYANGO

JUDGE

No appearance

In the presence of:- _____ for Claimant

Mrs. Rawal h/b Ms. Owino

_____ for Respondent