



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

**CAUSE NO. 19 OF 2011**

*(BEFORE D.K.N. MARETE)*

**JOHN GACHAU GITONGA .....CLAIMANT**

VERSUS

**MISS NDUTA MBILE .....RESPONDENT**

**RULING**

This is an application by way of a Notice of Motion dated 11th June, 2013

wherein the Claimant/Applicant seeks the following orders of court;

1. **THAT** *this application herein be certified as urgent and service thereof be dispersed with in the first instance.*
2. **THAT** *the Honourable Court be pleased to review, uplift and set aside the orders made on 8th May 2013 before Honourable Justice D.J. NJAGI MARETE Court No. 11 and all other consequential orders thereof.*
3. **THOSE** *costs of this application in the cause WHICH APPLICATION is based on the following grounds:*
  - a. **THAT** *the Court set aside an award in favour of the respondent awaiting an Appeal by the Respondent and the Claimant aver that the Respondent was given 14 days to Appeal against the judgement as awarded on 28<sup>th</sup> day of August 2012. That the Claimant be paid a sum of Kshs.498,228/35 as set out in the Memorandum of Claim plus cost of the same.*
  - b. **THAT** *since the 14 days granted by the Court on 8<sup>th</sup> May 2013 and he respondent has never moved the Court thereof nor served the Claimant as directed the Court.*
- (c) **THAT** *the Claimant is to be granted with Orders to proceed with Execution.*
- d. **THAT** *pursuant to the Respondent grant of appeal within 14 days from 8<sup>th</sup> May 2013 which Appeal the Respondent has never done.*
- (e) **THAT** *the Claimant is made to suffer from that date since the Claimant does not have any other source of income.*

f. *THAT the Claimant aver that evident from the pleadings and evidence tendered by the Claimant are quite correct and not fraudulent as claimed by the counsel for the Respondent and adds that the Labour Consultant is consistent and Registered under the name of A.O. JACOB KENYA LABOUR CONSULTANT under the Business Names Act Cap. 499 Section 14(2) under the Business Names Act whose licensed photocopy certificate is here annexed for court certification and therefore the Claimant contends that the Labour Consultant is in existence not as alleged by the counsel for the Respondent.*

*(g) THAT the Claimant had proved that the demand letter emanated from M/S A.O. JACOB KENYA LABOUR CONSULTANT dated 29<sup>th</sup> June 2010 and the letter is in record as Appendix JGG3 and the Respondent has accepted visiting their office for discussion at Quran House, 6<sup>th</sup> Floor, Mfangano Street before aforementioned A.O. JACOB KENYA LABOUR CONSULTANT moved to SAMIMA HOUSE, 4<sup>TH</sup> FLOOR, ROOM 5, for further negotiations which the Respondent did not agree amicably for basis settlement before this case is filed before this Honorable Court.*

h. *THAT the claims of Memorandum of Claims were based in Employment Act Legal Notice No. 24 THE REGULATION OF WAGES (PROTECTIVE SECURITY SERVICES) ORDER 1988 and Legal Notices attached in the Memorandum of Claim and Employment Act 2007.*

i. *THAT a demand letter made by M/S A.O. JACOB KENYA LABOUR CONSULTANT is not quark as alleged by the Counsel for the Respondent and adds that that is why the true photocopy of the License No. 38910 is attached for this Honorable Court to verify the Truth of the origin.*

j. *THAT M/S A.O. JACOB KENYA LABOUR CONSULTANT does not have any connection with the Ministry of Labour, Nyayo House and adds that the said Labour Consultant is registered under Business Act.*

*(k) THAT the Claimant insists that the 14 days given by this Honorable Court to appeal against the claim on 8<sup>th</sup> May 2013 had expired.*

- *THAT the Claimant should be granted an option to execute the properties of the Respondent without delay of justice.*

*(m) THAT the Claimant adds that he did not come to Court with unclean hands with intention to exhort money unfairly and illegally at the Respondent's expense and adds that the Claimant is being guided by the Employment Act aforementioned.*

*(n) THAT it is a duty of an Employer to keep written records for all his/her employees as per Employment Act 2007 paragraph 74.*

- *THAT the Order awarded in favour of the Claimant on 28<sup>th</sup> August 2012 was in order and the Claimant should be granted an Order to proceed with execution since the Respondent has got no ground to Appeal against the award and judgement.*

*(p) THAT this application has been brought without undue delay and warrant of Execution is to be drawn without delay.*

It is purportedly supported by the affidavit of John Gachau Gitonga but no such affidavit indeed is annexed or on record in such support.

The respondent in defense raises and files Grounds of Objection dated the 27th June, 2013 and filed on the following day. These are;

1. *THAT the application is incompetent and fatally defective since the Order being sought to be reviewed is not attached to the application as required by law and the rules of Procedure.*
2. *THAT application is fatally defective as it is not supported by an affidavit.*
3. *THAT the applicant ought to appeal against the order of court given on 8<sup>th</sup> May 2013 and not seek its review, uplifting and or setting aside of the same order.*
4. *THAT the application does not satisfy the conditions of review of a court order.*
5. *THAT the application is otherwise frivolous, vexatious and an abuse of the process of this Honourable Court.*
6. *THAT the Claimants/Applicants application has no merit.*

She further raises and files a Notice of Preliminary Objection of the same date and filing as follows;

1. *That the application is fatally defective as it offends the Provisions of Order 51 rule 4 and 13(2) of the Civil Procedure Rules.*
2. *That the applicant ought to appeal against the order of court given on 8<sup>th</sup> May 2013 and not seek its review, uplifting and or setting aside of the same order.*
3. *That the application is frivolous, vexatious and an abuse of the process of this Honorable Court.*

The application came for hearing on 3rd July, 2013 when counsel for the respondent opposed the same on the following grounds;

- i. *That the applicant has not established new and important evidence that existed at the time of hearing to warrant a review.*
- ii. *That the applicant has not attached the order for review, and*
- iii. *That the application has been filed with unreasonable delay this being after thirty (30) days of the delivery of the ruling sought to be reviewed.*

Counsel also argued that the Notice of Motion does not have an affidavit laying down the grounds and evidence in support of review and is therefore totally defective.

The respondent further submits that the application does not have legs of its own in that it lacks compliance with S.5 of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya and also Order 19 rules 3 and 5 of Civil Procedure rules on the input and effect of affidavits in applications.

*Rule 3;*

*3(1) Affidavits shall be confined to such facts as the deponents is able of his own*

*knowledge to prove:*

*Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.*

*(2)The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter of copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the property filing the same.*

*Rule 5; Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.*

The annexures to the application are speculative and mere complaints against Judicial Officers to the Ombudsman. They are incredible and not useful to the application.

The applicant prayed that the application be allowed to enable him pursue execution of decree in this cause. The respondent has not appealed and the time for such appeal is over. The ruling is hostile and only favourable to the respondent.

The respondent further seeks to rely on the authority of **Macdonald Vs Ngumbi & another [2004] eKLR** where the learned Judge R.V. Wendoh laid down the law on the need of affidavit in suits of this nature.

“Before going to the merits of this application, I think it is pertinent that I deal with the issues raised regarding the affidavit sworn by the applicant. The said affidavit by the applicant clearly offends the provisions of order 18 Rule 3 and 5. Rule 3 provides that an affidavit should be confined to facts that the deponent is able of his own knowledge to prove or with the leave of the court; it may contain statements of information and belief showing the sources and grounds. The affidavit at paragraph 3 of the application contains arguments; it does not show the source of some for the information or beliefs. The same affidavit offends provisions of Order 18 Rule 5 in that it is not drawn in the first person as required.”

In the absence of an affidavit in support and evidence of the facts of the case, I would agree with the respondent that this application is totally defective and cannot stand. Further, the application does not come out as a display of serious issue based litigation worthy of consideration but is frivolous, vexatious and an abuse of the process of court. It does not even meet and or satisfy the conditions for review as clearly expressed under rule 32 of the Industrial Court (Practice) Rules, 2010 or the Order 45 of the Civil

Procedure Rules, 2010. This application would therefore not stand and crumbles from the onset. It is dismissed with costs to the respondent.

Dated, delivered and signed the 1st day of October, 2013.

**D.K. Njagi Marete**

**JUDGE**

**Appearances:**

1. Claimant/Applicant in person
2. Mr. Kimunya instructed by Mitey & Associates for the respondent.