



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 142 OF 2013

DILPACK KENYA LIMITED.....APPLICANT

VERSUS

WILLIAM MUTHAMA KITONYI.....RESPONDENT

RULING

Background

1. The ruling relates to two applications, one filed on 20.9.2018 and another on 2.10.2018.
2. The first application has its roots in two rulings, one delivered on 2.11.2017 and the second delivered on 6.8.2018. On 2.11.17 a ruling was delivered wherein an appeal filed by the applicant against the judgment and ruling delivered on 18.6.2013 was dismissed for being filed out of time. On 6.8.2018 a ruling was delivered dismissing the application dated 14.12.2017 seeking stay of execution pending hearing of an application seeking leave to file an appeal out of time.
3. The applicant is aggrieved with the said rulings and thus filed a Notice of Motion Application dated 20th September 2018, brought under the provisions of Section 1A, IB and 3A of the Civil Procedure Act, Order 45 of the Civil Procedure Rules 2010 and Articles 50 and 159 of the Constitution.
4. The Applicant is seeking for orders that;-
 - a. Pending the inter partes hearing of this application this honorable court be pleased to stay the execution proceedings relating to the judgement entered in **Civil Suit No 1045 of 2011 at the Chief Magistrates Court at Machakos** in 2011 on 17th January, 2013;
 - b. This honourable court be pleased to review its ruling delivered on 2nd November, 2017 and 6th August, 2018 and let the appeal filed herein proceed to hearing and determination on it's merits;
 - c. This honourable court be pleased to stay the execution of the judgement entered in the Chief Magistrates at Machakos in CC No.1045 of 2011 on 17th January, 2013 pending the hearing and determination of the appeal;
 - d. This honourable court be pleased to issue any order it deems fit and just in the circumstances;
 - e. The costs of and incidental to this Application be costs in the Appeal.
5. The second application is in response to a proclamation of the applicant's goods that is said to lapse on 3rd October, 2018. The applicant filed the application dated 2nd October, 2018 under the provisions of Section 1A, IB, 3A 79G and 95 of the Civil Procedure Act, Order 42 Rule 6(1) of the Civil Procedure Rules 2010 and Articles 50 and 159 of the Constitution.
6. In this application, the Applicant is seeking for orders that;-
 - a. Pending interpartes hearing of the application the court be pleased to issue an order staying the execution proceedings therein;
 - b. The honourable court be pleased to stay execution of the Judgement in **CMCC No. 1045 of 2011** pending the hearing and determination of the Application for review dated 20th September, 2018;

c. The honourable court be pleased to direct that the instant application be heard together with the application dated 20th September, 2018;

d. Any order it deems fit and just in the circumstances

e. Costs incidental to this application be provided for.

The Pleadings

7. The First Application is premised on the grounds on the face of it and a Supporting Affidavit dated 20th September 2018, sworn by Zach Gichane, indicated as the Director of the Applicant herein together with unmarked annexures thereto. He averred that, the Respondent herein instituted civil proceedings against the applicant vide Machakos CMCC 1045 of 2011 wherein upon service of the pleadings the applicant raised a preliminary objection to the jurisdiction of the honourable court. He avers that interlocutory judgement was obtained against the applicant and being aggrieved by the said judgment filed an application to set aside the said judgment that was dismissed vide ruling on 18th June, 2013. Being dissatisfied with the said ruling, the applicant filed a memorandum of appeal on 15th July, 2013 and subsequently vide application dated 20th January, 2015 sought stay of execution pending the hearing and determination of the appeal. The said application for stay was allowed, and on 2nd November, 2017 the appeal was dismissed for having been filed out of time and without leave of court. The applicant avers that the court gave directions to file an appeal out of time wherein they filed an application dated 8th November, 2017 seeking leave to file out of time and because the execution process was commenced, they filed another application dated 14.12.2017 seeking stay of execution pending the hearing and determination of the application for leave to file the appeal out of time; the application was dismissed. The applicant depones that the two rulings were based on an error on the face of the record for the appeal therein sought to challenge the ruling delivered on 18.6.2013 and not the interlocutory judgement entered on 17.1.2013 as was held by the court. The applicant further deponed that execution is imminent and if the orders sought are not granted, then execution will commence and indicated willingness to abide by the conditions set by the court.

8. The application was opposed vide a replying affidavit dated 8.10.2018 sworn by William Muthama Kitonyi, the Respondent. He averred that the applicant's notice of motion and affidavit contain false and misleading statements. He depones that he was the plaintiff in **Machakos CMCC No. 1045 of 2011** and the applicant was served with summons and plaint but they never filed any defence and as a result the respondent made a request for interlocutory Judgment that was duly entered and formal proof notices were served on the applicant who never attended court thus judgement was delivered on 17.1.2013; and the applicant was served with a notice of intention to execute and thereafter the applicant filed an application to set aside the said judgement on grounds of non-service, which allegation was not correct. The application was dismissed vide ruling delivered on 18.6.2013 and on 15.7.2013 the applicant lodged a memorandum of appeal and on 20.1.2015 the said applicant filed an application seeking stay of execution pending hearing and determination of the appeal; the application was allowed on condition of execution of a bank guarantee which was issued by Eco Bank. On 24.10.16 the court ordered a replacement guarantee from a reputable bank to be executed and a bank guarantee by Barclays Bank was executed. The court directed that the appeal proceed via submissions and the matter was slated for judgement on 2.11.17 wherein the court did not deliver judgement but made orders that the appeal therein was filed out of time and without leave for it was filed on 5.7.13 and yet judgement in the lower court was delivered on 17.1.2013 thus the applicant was at liberty to apply for leave to file the appeal out of time. As a consequence the stay of execution orders were vacated and the bank guarantee was discharged. The respondent states that he has a valid decree dating to 17.1.2013 and has been denied the fruits thereof on the basis of a non-existent appeal. He avers that the applications dated 8.11.17 and 14.12.17 were rightly dismissed and the instant application does not meet the threshold for issuance of orders for review. Even then, the orders sought are not capable of being granted and ought to be dismissed with costs.

9. The Second Application is premised on the grounds on the face of it and a Supporting Affidavit dated 1st October 2018, sworn by Zack Gichane, indicated as the General Manager of the Applicant herein. He averred that, he filed an application dated 20th September, 2018 seeking the review of the orders of the honourable court, which application is pending before the court. He avers that the Respondent herein has instructed auctioneers to proclaim, attach and sell the applicant's goods with a view to realizing the judgement sum in Machakos CMCC 1045 of 2011 and if not stopped, the instant application and the entire intended appeal shall be rendered nugatory and so will the application for review be rendered nugatory. He avers that the execution if it is permitted to proceed shall render over 30 employees jobless hence the application be allowed and the deponent indicated willingness to abide by conditions set by the court for the grant of the orders.

10. The said application was opposed vide a replying affidavit dated 8.10.2018 sworn by William Muthama Kitonyi, the Respondent. He averred that the applicant's notice of motion and affidavit contain false and misleading statements with the aim of misleading the court to issue undeserved orders. He depones that he was the plaintiff in Machakos CMCC No. 1045 of 2011 and the applicant was served with summons and plaint and they filed a memorandum of appearance but they never filed any defence and as a result the respondent made a request for interlocutory Judgment that was duly entered on 12.4.12 and formal proof notices were served on the applicant who never attended court thus judgement was delivered on 17.1.2013; and the applicant was served with a notice of intention to execute and thereafter the applicant filed an application dated 12.3.13 to set aside the said judgment on grounds of non-service, which allegation was not correct. The application was dismissed vide ruling delivered on 18.6.2013 and on 15.7.2013 the applicant lodged a memorandum of appeal and on 20.1.2015 the said applicant filed an application seeking stay of execution pending hearing and determination of the appeal; the application was allowed on condition of execution of a bank guarantee from a reputable bank which was executed by Eco Bank. On 24.10.16 the court ordered a replacement guarantee from a reputable bank to be executed and a bank guarantee by Barclays Bank dated 21.11.16 was executed. The court directed that the appeal proceed via submissions and the matter was slated for judgement on 2.11.17 wherein the court did not deliver judgement but made orders that the appeal therein was filed out of time and without leave for it was filed on 5.7.13 and yet judgement in the lower court was delivered on 17.1.2013 thus the applicant was at liberty to apply for leave to file the appeal out of time and as a result the stay of execution orders were vacated. The respondent states that he has a valid decree dating to 17.1.2013 and has been denied the fruits thereof on the basis of a non-existent appeal. He avers that the applicant is being dishonest by alluding that the respondent holds a bank guarantee from Eco Bank and yet the same was returned on 24.10.16 and the replacement guarantee was discharged vide orders dated 2.11.17. The respondent avers that the applications dated 8.11.17 and 14.12.17 were rightly dismissed, the appeal has all along been invalid and a nullity and the instant application does not meet the threshold for issuance of orders for review. Even then, the orders sought are not capable of being granted and ought to be dismissed with costs.

11. In response to both replying affidavits, the Applicant swore a further Affidavit dated 6th November 2018, in which he deposed that he is a General Manger of the applicant. He avers that the applicant has sought to prosecute the appeal from the decision of the trial magistrate dated 18.6.2013 that dismissed the application to set aside the default judgement but the rulings that were delivered on 2.11.17 and 6.8.18 have denied him the opportunity for they were based on an error and mistaken belief that the appeal was against the decision made on 17.1.2013 and the appeal was filed out of time. With regard to the discharged guarantee, he avers that the Eco Bank Guarantee was replaced with another from Barclays Bank, the applicant avers that the same could not be discharged unless the original was returned and the said original was returned to him on 30.8.2018. He further avers that the applicant has an arguable appeal against the ruling delivered on 18.6.2013 and ought to be given a chance to prosecute it, for if the appeal succeeds then the judgement entered on 17.1.2013 will be set aside and it will be given a chance to defend the suit against it. In conclusion, he still avers that the court had no geographical jurisdiction to entertain the matter for it arose in Nairobi.

12. The respondent filed a further replying affidavit deponed by William Muthama Kitonyi dated 11.12.18. He avers that he holds no valid bank guarantee regarding the decretal sum owed to him in Machakos CMCC 1045 of 2011, for the same was handed over to the applicant's advocates on 30.10.2018

Submissions

13. On 7.12.18, the court directed that the parties file written submissions and the same would be highlighted on 13.12.18. The applicant has not filed any submissions but had filed authorities on 4.12.18. The respondent filed his submissions and authorities on 13.12.18. In the said submissions, the respondent submits that there has never been a valid appeal before this court for the jurisdiction to entertain appeals in regards to Work-Related injuries after the invalidation of Section 16 of The Work Injury Benefits Act lies with the Employment and Labour Relations Court. Further that the applicant is bound by its pleadings and therefore by the applicant indicating in the Memorandum of appeal that they seek to appeal against a ruling and decree delivered on 16.6.2012 in a Civil Suit 1045 of 2012 and yet there is no ruling and decree that was issued on 16.6.2012 and the suit filed by the Respondent is Civil Suit 1045 of 2011 and not 1045 of 2012; the said rulings are non-existent and so is the Case being referred to.

14. Counsel further submitted that Section 79G of the Civil Procedure Act provides for a 30 days period to file an appeal from a decree or order, and because the judgement and decree that was issued on 17.1.2013 was not appealed against within 30 days the applicant cannot be seen to say that it has appealed against the said decree. She submits that the after the appeal was struck out, there exists no appeal on record, therefore Order 42 rule 6 are not applicable and thus cannot be granted stay orders; further the prayers for stay of execution are res-judicata.

15. Counsel submitted that Under Article 162(2) of the Constitution, the court has no jurisdiction to entertain an appeal thus cannot make an order to grant leave to file an appeal out of time. Counsel opposes the application for review and states that the applications dated 8.11.17 and 14.12.17 were rightly dismissed for the memorandum of appeal was dismissed. Further that the applicant has not demonstrated what error the court occasioned by failing to grant leave to file an appeal out of time. In conclusion, she stated that the respondent has a valid decree that was issued about six years ago that has not been appealed against and litigation must come to an end.

16. When the motions came up for hearing on the 13th December, 2018, directions were given that the counsels proceed with the highlighting of submissions.

17. In his oral submission to Court, **Mr. Kamau Muturi**, learned counsel for the applicant, outlined the background information culminating in the application under review already set out above. He then added that the court has power to review it's orders due to the apparent error on the record.

18. It is **Mr. Kamau Muturi's** further argument on the issue of stay of execution that the respondent has commenced execution proceedings and yet the bank guarantee has not been discharged, and there will be no prejudice occasioned if the applicant is allowed to ventilate it's case thus the application should be allowed.

19. **Mrs Nzei**, Learned Counsel for the respondent, relying on the replying affidavits and submissions filed herein together with the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR** urged the Court to dismiss the applicant's applications. It was **Mrs Nzei's** argument that the learned Judges committed no error in their rulings dated 2.11.17 and 6.8.18 respectively as they simply took cognizance of the fact that the applicant in their memorandum of appeal indicated that they were appealing against a ruling and decree and submitted that the title of the said memorandum combines a ruling and decree that from the record were delivered on different dates; the applicant ought to have filed separate appeals. She submitted that the dates of the ruling or judgement are material facts and there is no ruling dated 16.6.2013; the correct ruling is dated 18.6.2013 and the same has not been challenged; further that the judgement was delivered on 17.1.2013 and in terms of Section 79G, no appeal has been lodged within 30 days and in all the learned judges should not be faulted for their decisions.

20. **On the** issue of jurisdiction **Mrs. Nzei argued** that the suit in the lower court was a work injury claim and following the invalidation of the Work Injury Act No. 13 of 2001, appeals of such matters are to be channelled to the Employment and Labour Relations Court thus the applications ought to be dismissed with costs for the court had no jurisdiction in the first place.

21. In response to the respondents' submission, **Mr Kamau Muturi**, Learned Counsel, accepted that there was an error in the title of the Memorandum of Appeal and that no different ruling has supplied to the court. He further submitted that the body of the memorandum relate to the issue of the ruling of the lower court and not the judgement, thus the error is a technicality that ought to be cured. Further the court is not dealing with the merits of the appeal but the apparent error.

22. On the issue of jurisdiction, counsel submitted that this ought to have been raised at the earliest time in response to the applications and further that there is no preliminary objection on record. The two applications were determined on the basis of time and were based on error on the record; the appeal was lodged within time and if the court has no jurisdiction then it may refer the matter to the relevant court.

Analysis

23. The issues for determination are whether the court has jurisdiction to entertain the applications and whether the applicant should be granted the orders sought.

24. In addressing the issue of jurisdiction, there ought to be clarity in the minds of all parties that there is a difference between the jurisdiction of the court and the powers of the court. I deem it necessary to examine the issue of jurisdiction *in extenso*. In the celebrated case of **The Owners of Motor Vessel Lillian "S" V Caltex Oil Kenya Limited 1989 KLR 1653** the Court of Appeal held as follows:

“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

25. It is not contested that the dispute relates to a work injury and there have been considerable developments with regard to the law that governs such disputes that sought not to be ignored. In the case of **Law Society of Kenya v Attorney General & Another (2009) eKLR**, Section 16 of the Work Injury Benefits Act that barred actions for recovery of damages for occupational accident except as provided for by the Act was declared unconstitutional by Judge J.B Ojwang. The consequence thereof is that appeals in relation to work injuries are handled by the Employment and Labour Relations Court and it is patently clear from the interpretations of this case and I find that this court had no jurisdiction to entertain the appeal in the first place. This was observed in the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR** where the court observed that the Employment and Labour Relations Court has appellate jurisdiction in disputes relating to work injury. Hence the Applicant ought to have lodged its appeal with the relevant court and not this particular court. Due to the lack of jurisdiction this court does not have power to make one step such as to transfer the matter to the Employment and Labour Relations Court.

26. Analysis of the pleadings filed in the instant application reveals that the applicant has previously filed several applications seeking for similar prayers that is of stay of execution and it is the Court’s considered opinion, that this kind of conduct clogs the justice system and may take unnecessary too much of Court’s otherwise unavailable time. This kind of conduct does not encourage expeditious disposal of matters in accordance with overriding objective under the Civil Procedure Act and Rules.

Determination

27. Having found that it is not the function of this court to entertain any appeal in disputes relating to work injury, thus to prevent further abuse of court process I need not delve into the issue of the remedies sought as the same become moot. In view of the realization that this court does not have jurisdiction to entertain in the dispute herein.

28. In conclusion, I find that the court cannot grant the prayers sought and the application is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at **Machakos** this **29th** day of **January, 2019**.

D.K. KEMEI

JUDGE