



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION- MILIMANI
WINDING UP CAUSE NO. 21 OF 2005
IN THE MATTER OF KENYA BUS SERVICES LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT
RULING
THE PRELIMINARY OBJECTION

The Claimant/ Decree holder raised a **Notice of Preliminary Objection** dated 18th June 2019 and filed on the 19th June 2019 on the following grounds: -

1. **The Application is a non starter, baseless, frivolous, scandalous, lacks merit offends mandatory provisions of the law and the same is an abuse of Court process.**
2. **The Application dated 20th May 2019 is spent and no other orders can flow therefrom.**
3. **The Court cannot be moved under the provisions of the Companies Act (Cap 4860 now repealed).**
4. **This court cannot sit on appeal against the decision by the Employment and Labour Relations Court dated 14th May 2019 in Notice of Motion dated 5th October 2018.**
5. **This court lacks jurisdiction to interfere with the decision made by Hon. Justice Riika in ELRC No. 68 of 2006 dated 17th January 2013.**
6. **Any attempt to grant any orders not pleaded is tantamount to violation of what is espoused under Article 47 & 50 of Constitution of Kenya.**
7. **The Application herein ought to be dismissed with costs *in limine*.**

It was thus the Claimant's prayer that the Application dated 18th May 2019 be dismissed with costs *in Limine*.

APPLICATION DATED 20TH MAY 2019

The Company/ Applicant approached the court through a notice of motion for the orders that;

- a. A stay of execution be granted against the Company's assets in respect to the decree issued in ***ELC No.68 of 2006, Transport & Allied Workers vs Kenya Bus Ltd***

The orders were based on the followings grounds;

- a. **That there is a winding up against Kenya Bus Services Ltd that is pending hearing and determination**
- b. **That the provisions of the Companies Act under which the Petition was filed operate as an automatic stay of execution**

against the Company's assets which provision was upheld by several court decisions

c. That a judgment has been obtained against the company for a sum of Kshs 526,326,540 after which the decree holder applied for warrants of attachment

d. That in ELC No 68 of 2006, *Transport & Allied Workers vs Kenya Bus Ltd* the court declared itself *functus officio*

e. That the company is apprehensive that unless restrained, the decree holder will apply for warrants of attachment and place the creditors at a disadvantage

BACKGROUND OF THE APPLICATION

Kenya Bus Services Limited is a limited liability company incorporated in Kenya and is involved in passenger and parcel conveyance service in Kenya. It entered into various contracts of goods and services with various companies which it was unable to pay its debts. Consequently, various companies instituted legal proceedings against Kenya Bus services Limited in the Chief Magistrates Court and High Court for recovery of the debt owed plus interest accrued therefrom.

BP Kenya Limited, one of the creditors, made an application to the company for payment of **Kshs. 103,888,407** being money due and owing for supply of fuel and fuel products pursuant to a Supply Agreement dated 16th October 2003. The company failed or neglected to pay the same or any part thereof. Consequently, BP Kenya Limited and other 221 Interested parties, filed a Winding Up Petition dated 21st June 2005 for orders that Kenya Bus Services Limited is wound up as it is insolvent and unable to pay its debts.

Kenya Bus Services Limited suspended operations and sent staff on unpaid leave on 10th June 2005, which ended up being indefinite compulsory unpaid leave, when all its fleet buses were repossessed by the various creditors as the company lacked tools of trade and were thus unable to operate.

The staff were aggrieved by the compulsory unpaid leave and raised the dispute with Transport and Allied Workers Union who have signed a Recognition Agreement and Collective Bargaining Agreement with Kenya Bus Services Limited. The Union moved the court through ELRC Cause No. 68 of 2006 against Kenya Bus services Limited seeking for payment of salary arrears, allowances as accrued during the time they were serving the company and unpaid leave. Justice Paul Kosgei entered an award dated 6th September 2007 ordering Kenya Bus Services Limited to pay the grievants all their wages for the period they had been on compulsory leave. A Decree dated 4th September 2012 was then issued for the payment of Kshs. 526,326,540 against Kenya Bus Services Limited. A further Decree was passed on 29th September 2017 ordering Kenya Bus Services Limited to pay the Union Kshs. 526,328,990. Consequently, the Union applied for warrants of attachment against Kenya Bus Services Limited's movables.

The Company filed a Notice of Motion dated 5th October 2018 in ***ELRC No. 68 of 2006 Transport & Allied Workers v Kenya Bus services Limited*** in response to the warrants of attachment, seeking to stay execution on grounds that a Decree-Holder cannot attach goods belonging to a Company after the commencement of its winding up proceedings. Upon reading the said Application, Hon. Justice Abuodha issued an Order dated 14th May 2019 stating that the court declares itself *functus officio* and directed that if there are any legal challenges concerning the execution of the Court's decree premised on the Winding Up Cause No. 21 of 2005, the same be raised in that cause.

Kenya Bus Services Limited filed an Application dated 20th May 2019 in **Winding Up Cause No. 21 of 2005** seeking for orders that pending hearing and determination of this Application, there be a stay of execution against the Company's assets in respect of the Decree issued in **ELRC No. 68 of 2006 Transport & Allied Workers v Kenya Bus Limited**.

PROCEDURAL FACTS

According to the Court record, this matter was last before L.J Ngetich on 18th October 2018; **Mr Nyamu** learned Counsel for decreeholder in Industrial Court case 68 of 2006 informed Court that the Petitioner who filed the petition in 2005 was no longer interested and it ought to be withdrawn with no orders as to costs. Mr Gitau learned Counsel for the Company objected to the application; he contended that there are other Creditors who would take up the Petition. He explained that the matter delayed for various reasons; there was a mixup of documents filed winding up cause 20 & 21 where the Trial Court ordered the pleadings be filed properly before the matter was heard. Thereafter, the Court file(s) disappeared /were lost. Despite several letters to the Registry the Court files were not recovered. In 2018 the Court file was reconstructed and now housed in the Strong Room. The Petitioner would be allowed time to withdraw and another Creditor file another petition, The Company wished to rely on the Insolvency Act and pursue administration.

Mr Nyamu reiterated that these were NTSC proceedings and any Creditor could take up the matter. In Winding /up **Cause 20 of 2005 Bustrack Ltd** was wound up pursuant to Court orders by L.J.Kasango.

The Court granted parties time to withdraw petition and/or file another petition.

The Deputy Registrar mentioned the matter on 18th January 2019, the parties had not complied; no withdrawal of the Petition was done. On 28th January 2019 similarly, the petition was not withdrawn. On 8th April 2019, the petitioner sought 30 days to file application to withdraw which this Court granted.

On 21st May 2019; the Company filed certificate of urgency, which application sought stay of execution, it was to be served and parties file replies for directions on 10th June 2019.

On 10th June 2019, after lengthy submissions by respective Counsel for the parties; the hearing of the application could not commence because the parties served had not filed Replying Affidavits. This Court granted the said parties 7 days to file Replies through Deputy Registrar Commercial Division and hearing of the application would be on 19th June 2019.

On 19th June 2019, the Applicant Counsel for the workers raised issue of being served with a Court order which was not properly extracted. That was to be rectified.

Thereafter the instant Preliminary Objection was filed and heard on 24th June 2019.

The Union responded to the Application by filing a Replying Affidavit dated 18th June 2018 stating that the orders sought had already been granted and the only order pending is a prayer of costs and hence, a party cannot be granted orders not sought.

DETERMINATION

This court on perusal of the Court file confirmed that there was once a mix up in filing of documents in. BusTrack Limited is an affiliate of Kenya Bus Services Limited but their matters were filed as two separate and distinct companies.

Owing to the mix up, from 2005 when the court issued orders for the two files to be re organized, it proved to be difficult to do so as the court files went missing but were later traced only for them to go missing again shortly thereafter. In 2014, after almost 10 years, the court ordered reconstruction of this file and the same be kept in the strong room. This court therefore takes recognizance of the fact that this is a reconstructed file and some documents are missing.

In the proceedings; There is mention of Lady Justice Kasango's ruling of 9th March 2006 in Winding Up Cause No. 20 Of 2005 (**In the matter of BusTrack Limited**). The Company was to be wound up and costs of the Petition be visited on the company. However, there is no copy of that Ruling in this court file or existence of the other Court file. Furthermore, in the court file there is a copy of an incomplete ruling on an application to set aside the decision of this court to wind up the company in **Winding Up Cause No. 20 Of 2005 (In the matter of BusTrack Limited)**.

The issues for determination before this court are;

1. Whether the application dated 20th May 2019 is a non-starter, baseless and is an abuse of the court process
2. Whether the court should stay execution pending the hearing of the petition/applications in Winding up petition no.21 of 2005
3. Whether this court has jurisdiction to interfere against the decision made in ELRC No. 68 of 2006 dated 17th January 2013

Whether the application dated 20th May 2019 is a non-starter, baseless and is an abuse of the court process

The Union was directed by Justice Abuodha to pursue execution of the Decree in **Winding Up Cause No. 21 of 2005** which is a Petition of **Winding Up Kenya Bus Services Limited by BP Kenya Limited and 221 other Interested Parties**.

The Application dated 20th May 2019 is not a non-starter, neither is it baseless as it is anchored on the Petition filed in 2005 in Winding Up Cause 21 of 2005; where although it was intimated the Petitioner wished to withdraw, it is still pending and on record.

Furthermore, the Company through a Chamber Summons dated 7th June 2019, sought to be granted leave to join Transport Allied Workers Union as creditors/interested party to the Winding Up Petition dated 21st June 2005. Before the said application is determined, there is an interim stay of execution to allow the workers Union to be joined to the Winding Up Cause.

Whether the court should stay execution of decree in Labour Case 68 of 2006 pending the Winding up petition no.21 of 2005

The Company/ Applicant approached the court through a Notice of Motion for stay of execution against the Company's assets in respect of the Decree issued in **ELRC No. 68 of 2006 Transport & Allied Workers v Kenya Bus Services Limited**. They based their request upon **Section 225 of the Companies Act, Chapter 486 (repealed)**

In the case of ***In re Mugoya Construction & Engineering Company Limited [2015]eKLR*** which the Court reiterated the case of ***Receiver and Provisional Liquidator Nyayo Bus Service Corporatin vs. Firestone E.A (1969) Limited (1999) eKLR*** the court held that attachment for execution pending winding up was void

“.....Section 225 of the Act provides in no uncertain terms that any attachment after commencement of the winding up ‘shall be void’

The court concluded as follows;

“Our conclusion is that the attachment of the appellant's goods was void and that the warrants of attachment were issued in error and should be set aside and that the respondents must bear the costs of attachment (execution).”

It is not in dispute that there is a judgment on record obtained against the company in **ELC No.68 of 2006 for Kshs. 526,326,540**. However, the court maintains by virtue of **Section 225 of the Companies Act**; there can be no attachment after commencement of winding up proceedings. Therefore, this court maintains the position as ordered on 10th June 2019 of interim orders to stay execution against the Company's assets in respect of the Decree issued in **ELC No. 68 of 2006** pending hearing of the application **that was slated to be heard on 19th June 2019**.

As I have outlined above on perusal of the instant Court file; there is a pending petition for Winding up filed in 2005 that has not been prosecuted to date. There are Rulings that are incomplete and hence in spite of intimation that BUSTRACK LTD an affiliate of KENYA BUS SERVICES LTD was wound up there is no Court order to the effect in the Court file. In the absence of these relevant documents/Court orders this Court cannot firmly confirm what became of the Winding Up proceedings. However, by virtue of the Petition of Winding Up in the Court file then the Winding up process commenced but is not completed in the absence of a Winding up order appointing the Official Receiver. Hence the need to stay execution pending the way forward.

Whether this court has jurisdiction to interfere with the decision made in ELC No. 68 of 2006 dated 17th January 2013

The court notes that the application before it is one of staying execution against the Company's assets in respect of the Decree issued in **ELC No.68 of 2006, Transport & Allied Workers vs Kenya Bus Ltd** and this Court granted interim stay of execution pending hearing of application or petition and therefore there is no appeal raised but the preliminary objection.

The Judgment Debtor filed a **Notice of Appeal in ELC No.68 of 2006** dated 27th May 2019. Before this Court there is no appeal as Memorandum of Appeal and Record of Appeal as prescribed by **Order 42 of the Civil Procedure Rules** is not before this Court. Furthermore, no such Notice of Appeal, Record of Appeal or Memorandum of Appeal is before this court for determination. The orders from **ELC No.68 of 2006** are for execution only and this Court lacks jurisdiction to entertain any appeal from Courts of competent jurisdiction.

Therefore, what is before this court is not an appeal but an application dated 20th May 2019 which is pending as the Court granted interim stay of execution pending hearing of the application on 19th June 2019. Parties are at liberty to have the application compromised by the existing orders and pursue hearing of the Petition.

Similarly, this Court's attention was drawn to the letter of 26th July 2019 and annexures thereof with regard to Court orders in/from **ELR Court Cause 68 of 2006** where a Court order NTSC is issued on examination of Directors of the Judgment Debtor Company to be served to the Directors and is for mention on 26th September 2019. This Court lacks jurisdiction to consider, comment or deal in any way with the same as it is an order from a Court with competent jurisdiction.

DISPOSITION

- 1. The preliminary objection of 18th June 2019 is dismissed.**
- 2. The Matter to proceed for hearing of Winding up petition on a date to be obtained in the Registry in the New Term.**
- 3. All Creditors shall be served with hearing Notices.**
- 4. The application of 20th May 2019 is compromised.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 7TH AUGUST 2019

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR NYAMU FOR ALLIED WORKERS UNION CREDITOR

MR. SINGH FOR KENYA BUS COMPANY LTD

COURT ASSISTANT OTIENO.