



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 21 OF 2017

AL-WAHIM EXPRESS SHUTTLE

COMPANY LIMITED 1ST APPELLANT/APPLICANT

001 INVESTMENT 2ND APPELLANT/APPLICANT

VERSUS

MUNAWAR SHUTTLE COMPANY LIMITED.....RESPONDENT

RULING

The respondent filed Civil Suit No. 42 of 2017 before the Principle Court Malindi on 9th March, 2017. The suit was accompanied by an application seeking orders of temporary injunction against the appellants in respect to stall No. 2B at the Malindi Modern Bus Park. The Magistrate Court granted the interim orders. On 17th March, 2017, the appellants filed an application before the magistrate court seeking to have the orders granted on 10th March, 2017 be reviewed and or set aside pending inter-partes hearing. Both the respondents' application for injunction and the appellants' application to set aside the ex-parte orders were heard by the trial court and the Ruling was reserved for the 26th May, 2017. The trial court extended the interim orders to the date of the ruling.

In view of the extension of the interim orders the appellants filed this appeal together with the amended notice of motion dated 6th April, 2017 seeking orders that the initial orders that had been issued by the trial court and extended to 26th May 2017 be stayed pending the hearing of the appeal. The application also seeks an order to the Malindi OCS to ensure compliance with any stay orders that would be issued by this court. The appellants' application was brought under certificate on 4th March, 2017 and an ex-parte order of stay was granted. The application was amended on 7th April 2017 and similar stay orders were granted. The application was fixed for hearing on 10th April, 2107. It is supported by the affidavit of Mohamed Aziz Ahmed sworn on 4th April 2017 and a further affidavit of the same person sworn on 6th April, 2017. The respondent filed a replying affidavit sworn by Mohamed About Said sworn on 7th April, 2017 and a further affidavit of the same person sworn on 10th April, 2017. The two affidavits are similar save that the one of 10th April, 2017 annexed some documents.

Mr. Mouko appeared for the appellants/applicants. Counsel submitted that there is an appeal which is pending. The appeal is against the orders of injunction granted by the trial court. The Kilifi County Government issued directions on how the transport business at the Bas park is to be conducted. The

dispute has a long history and in November 2106 the County Government issued directives on the operations at the stage. The directives was on a trial basis whereby each transport company was to operate on its own. By January 2017 that trial system had failed and that is why the new directive was issued after consultation with all the stakeholders. The respondent filed the suit before the trial magistrate against the appellants yet the orders were issued by the county government. The respondent has no cause of action against the appellants. The appellants were meant to follow the directions given by the county government and were not the implementers of the directions. The respondent did not inform the lower court that the system that had been existing was temporary and was to last for only two months. The respondent wanted the status quo to be maintained.

It is further submitted that the trial court made a mistake by issuing orders against the wrong parties. The county government of Kilifi was not enjoined in the suit. The appellant filed an application for review but opted to withdraw the application and pursue this appeal. The lower court orders have caused chaos in the business and there is need to have them stayed. From the time this court granted the stay orders the business has normalized. The appellants did not need the leave of the court to file the appeal. Order 40 of the Civil Procedure Rules does not provide for leave of the court before the appeal could be filed. An appeal is an automatic right under Order 40.

Mr. Aboubakar, counsel for the respondent, opposed the application. Counsel appeared together with Mr. Matini. It is submitted for the respondent that the application is an abuse of the court process and the court lacks jurisdictions to entertain the application. The appellants did not disclose to the court the actual facts. The orders of the trial court complained of were issued ex-parte on the 10th of March, 2013. The orders were to lapse on 23rd March, 2017 and were duly served. The appellants filed an application for review of those orders. Both applications were heard on 22nd March, 2017 and a date for Ruling was given as 26th March, 2017. Interim orders were extended to that date. Counsels submit that one cannot appeal against an interim order. Under section 75 of the Civil Procedure Act an appeal does not lie against interim orders. Once the applications for injunction was heard inter-parties the ex-parte orders ceased to exist. An appeal lies as of rights if a temporary injunction has been granted. As of now there is no temporary injunction. The appellants could have applied to strike out the pleadings or seek the supervisory powers of the High Court under Article 165 of the Constitution. The appellants could not have withdrawn the application for review since that application was fully heard and a ruling is pending.

It is further submitted that the respondent filed the suit before the trial court because on the 8th March, 2017 the appellants moved their vehicles to the stage operated by the respondent. Each of the parties operate its own stage. The appellants alleged that there was an order from the County Government of Kilifi which order had not been served upon the respondent. This led to the filing of the suit before the trial magistrate to restrain the appellants from interfering with the respondents' business. The direction from the County Government is to the effect that each company presents one vehicle at a time. The existing position is that each company has its own stage. The respondent has filed Constitutional Petition No. 6 of 2017 against the orders of the County Government. The amended notice of motion was filed without the leave of the court. There was no disclosure of material facts. There is no chaos at the stage because the respondent has opted to abide by the law. The order of the County Government is restricting competition in business and is against fair trading practice.

From the pleadings and the submissions by the counsels for the parties, it is established that the appeal is against the orders of the trial court that were issued on 10th March, 2017. Those orders were issued ex-parte after the respondent moved the court seeking temporary orders of injunction. The trial court was within its powers to grant those orders. I do find that the respondent filed the suit against the two appellants on the strength that it was the appellant who had moved their operations to the respondent's premises. At that time the Kilifi County Government was not enjoined as a party to the suit. The orders were restraining the appellants from accessing stall No. 2B. The directions by the County Government as per the letter dated 9th March, 2017 is to the effect that the passenger vehicles would operate on the ratio of 1:1:1 between the three parties. It is also indicated that all the vehicles will operate from one podium as before. It is not indicated whether that podium is stall No. 2B. According to the respondent, the appellants moved their vehicles to its business premises on the strength of the order of the County

government which order was not served upon them.

The ex-parte orders issued on 10th March, 2017 are the subject of the appeal. The appellants filed their application for review or setting aside of those orders. The application was duly heard together with the respondent's application for injunction on 22nd March 2017. The court reserved its Ruling for the 26th May, 2017. While the Ruling is pending, the appellants opted to withdraw their application for review or setting aside the ex-parte orders. Instead, the appellants filed the current appeal together with an application for stay of the orders. The application was amended to correct the date of the earlier orders to be 10th March, 2017 instead of 9th March 2017. The amendment is not prejudicial to the respondent. In my view the process followed by the appellants to withdraw an application that is pending Ruling and filing an appeal instead is an abuse of the court process. The appellant's application was fully heard by the trial court. They could not withdraw that application without informing the trial court. As of now the trial court is duty bound to deliver a Ruling on the application by the respondent for injunction. The application can be granted or dismissed. The appellants could have applied to the trial court to have those orders vacated and upon refusal of that application they could have filed an appeal. Currently the appeal is against the ex-parte orders. Under Order 40 rule 4 (2) an ex-parte injunction can only be granted once for not more than fourteen (14) days and cannot be extended except by consent of the parties or order of the court for a period not exceeding fourteen (14) days. Under Order 40 rule 4 (4) an application for temporary injunctions and interlocutory orders should be heard within sixty (60) days from the date of filing unless the court extends the time.

Order 40 rule 5 states as follows: -

“In all applications for injunction, the court shall, after inter-partes hearing deliver its Ruling either at once or within thirty days of the conclusion of the hearing with notice to the parties or their advocates;

Provided where the Ruling is not delivered within thirty days, the judge shall record the reason therefor and immediately fix a date for Ruling.”

Under the above rule the court is expected to deliver its Ruling within thirty (30) days after hearing the parties. The trial court heard the parties on 22nd March, 2017. A Ruling was fixed for 26th May, 2017. Under rule 5 of Order 40 the trial court can extend the thirty (30) days period during which the Ruling is to be delivered. It appears that the appellants were impatient as the court gave about sixty (60) days for its Ruling to be delivered. I do find that the trial court gave the date of the Ruling as per its diary and volume of work and it cannot be faulted. Withdrawing the application for review and setting aside and quickly filing an appeal and obtaining orders of stay from the High Court cannot be good practice and should not be entertained. This Court should not be seen to be curtailing the operations of the magistrate court. What would be the case if the magistrate court grants the orders of injunction. The result would be that the respondent will have an order of injunction granted by the trial court presumably on 26th May 2017 yet that order would have been stayed by this court even before it is granted. That cannot happen in civil practice. Under Order 40 rule 7 an order of injunction can be discharged or varied or set aside on an application to the court by the dissatisfied party. The appellant opted not to pursue that line but filed an appeal on the interim orders. There was no attempt to vary those orders as the application for review was withdrawn even after it had been heard. The withdrawal of the application by the appellants was not an attempt to arrest the Ruling of the court. The Ruling will still be delivered.

Given the circumstances of this case, I am satisfied that the appellants did not reveal to this court the proper information relating to the matter. They did not inform the court that the trial court had heard the application for injunction and a Ruling was pending. It is also established that before the ex-parte orders were issued on the 10th March, 2017 the pre-existing business conditions were that each operator was having its own stall. It is alleged that that was a temporary arrangement that lapsed in January, 2017. The main question would be what was the condition before the alleged two months trial period. There is no evidence that prior to that all the operators were using stall No. 2B. I have observed from the pleading that the 1st appellant filed Civil Suit No. 234 of 2016 before the Chief Magistrate's court against the

County Government of Kilifi and the respondent. The suit was filed on 2nd November 2016 and it is seeking an order of injunction restraining the two defendants from enforcing an order issued by the County government on 29th September, 2016. It is also seeking to restrain the 2nd defendant from interfering with the plaintiff's operations from the original platform that was occupied by the respondent herein from 29th September, 2016. As of now I am not in a position to know whether stall No. 2B used to be occupied by the 1st appellant. If that was the case then the 1st appellant ought to have pursued its suit. There is a statement annexed to the affidavit of Mohamed Aboud Said indicating that stall No. B2 is allocated to Al-Waheed Express Shuttle. That tenant is not a party to this suit.

The appellant ought to have been patient enough to wait for the decision of the trial court. Before that decision is made it would be imprudent for this court to grant the orders of stay. Although it can be argued that the orders of stay are against the ex-parte orders of 10th March 2017, it should be noted that the same orders were extended by the trial court on its own to last up to 26th May 2017. The trial court might grant the application by the respondent and in essence confirm those orders. We cannot divide the orders of 10th March, 2017 and the extended orders that are to last up to 26th May, 2017. If we are to separate the two it would mean that the orders of 10th March, 2017 have been stayed by this court while the trial court granted certain orders of injunction which are to last up to 26th May, 2017. I reiterate the fact that if the orders of stay granted by this court are to be allowed to continue it would mean that any order issued by the trial court on 26th May 2017 would have been stayed. That is improper and cannot be allowed to stand.

In the end, I do find that the application dated 4th April, 2017 and amended on 6th April, 2017 lacks merit and is hereby dismissed. The orders of stay granted by this court on 7th April, 2017 are hereby vacated. For purposes of clarity, the orders of the trial court issued ex-parte on 10th March, 2017 and extended on 22nd March, 2017 shall stay in force until the Ruling of the trial court on 26th May 2017. Each party shall bare its own costs.

Dated, signed and delivered in Malindi this 12th day of April, 2017.

S.J. CHITEMBWE

JUDGE