



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL APPEAL NO. E007 OF 2020

RADIO AFRICA LIMITED..... APPLICANT

- VERSUS -

DEWDROP ENTERPRISE LIMITED.....1ST RESPONDENT

ANDREW KIBE MBURU.....2ND RESPONDENT

(Being an Appeal of the Ruling of the Chief Magistrate's Court at Nairobi (Hon. Mrs. G.A. M'MASI , SPM) dated 2nd March, 2020 in MCCC No. 6403 of 2012)

RULING

1. **RADIO AFRICA LIMITED** (hereinafter RAL) has filed this appeal against the Ruling made on 2nd March 2020 by Hon G. A. Mmasi (Mrs.) Senior Resident Magistrate at Milimani Law Courts. RAL filed, before this Court, a Notice of Motion application dated 20th March 2020 (hereinafter RAL application). By that RAL application the order sought is for stay of the Ruling of the Magistrate's court of 2nd March 2020 pending the hearing and determination of this appeal. This court on considering that application granted an *ex parte* order of stay on 24th March 2020. At the hearing of that application *inter partes*, this court also entertained the Notice of Motion dated 14th April 2020 which application was filed by **DEWDROP ENTERPRISE LIMITED** the 1st Respondent. The 2nd Respondent, **ANDREW KIBE MBURU** did not participate with the hearing of those two applications for reasons that will become clear later in this Ruling.

BACKGROUND

2. The 1st Respondent sued the 2nd Respondent before the Milimani Law Courts, the Magistrate's court, in case CMCC NO. 6403 of 2012 and obtained *ex parte* judgment in its favour, on 12th June 2013 for, Ksh. 236,691 plus interest and costs. The 2nd Respondent is an employee of RAL. In execution of that judgment 1st Respondent applied and obtained an order for attachment of 1/3rd salary of the 2nd Respondent. RAL made an application before the Milimani Law Courts seeking review of the order for attachment of 1/3rd salary of the 2nd Respondent. The main ground for the prayer for review was that the 2nd Respondent had prior deductions to his salary, which deductions included repayment of his loans to RAL. The learned Magistrate dismissed the said application on 2nd March 2020. This appeal is directed at that dismissal.

RAL'S APPLICATION

3. By its application RAL has raised the grounds that it was served with the order for the attachment of 2nd Respondent's salary on 30th January 2020; that apart from the statutory deductions that RAL is effecting from the 2nd Respondent's salary the said 2nd Respondent is also repaying loans granted by RAL and if RAL was to deduct 1/3rd of 2nd Respondent's RAL would be in breach of Section 19 (3) of the Employment Act which forbids the employer from deducting more than a 1/3rd salary, additionally that Order 22 Rule 42 (3) of the Civil Procedure Rules (hereinafter the Rules) RAL was at the risk of being held liable if it did not comply with the order of Milimani Law Courts for the attachment of 2nd Respondent's salary.

4. As stated before RAL was granted on 24th March 2020 an *ex parte* order of stay.

1ST RESPONDENT'S APPLICATION

5. The 1st Respondent's application is dated 14th April 2020. By it the 1st Respondent seeks the orders that this Court do peruse the appeal

and do proceed to summarily reject it under Section 79B of the Civil Procedure Act and; an order that this Court do strike out the proceedings in this matter conducted on 24th March 2020.

6. That application, the supporting affidavit and the replying affidavit to RAL's application all essentially raise the same subject matter. Those, the application and the affidavits, present the argument that RAL is regarding the *ex parte* order of 24th March 2020, made by this Court, as a "licence disobey the Milimani Law Court's order; that RAL has failed to comply with Order 42 Rule 11 of the Rules; that RAL has no legal right to refuse execution of a lawful Court order; that the *ex parte* order issued by this Court conflicted with the order of Milimani Law Courts and therefore is *res judicata*; that the jurisdiction to hear this appeal falls with the Employment and Labour Court as provided under Article 162 (2) of the Constitution and; that RAL was estopped from seeking stay orders having made an offer, before the Milimani Law Courts, to remit an amount of Ksh. 56,090 to 1st Respondent, which it has not done.

ANALYSIS AND DETERMINATION

7. RAL's submission is that it is forbidden by the **Employment Act** from exceeding more than 2/3rd deductions to the salary of the 2nd Respondent and yet on the other hand if it fails to remit the deductions ordered by Milimani Law Courts it would be found personally liable to pay the amount of this judgment. RAL relies on Section 19 (3) of the Employment Act which provides:

(3) Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two-thirds of such wages or such additional or other amount as may be prescribed by the Minister either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry. (Emphasis mine)

8. RAL's application is premised on the ground that it is bound to deduct the 2nd Respondent's salary and if it does not Order 22 Rule 42 (3) of the Rules will take effect and RAL will then be liable to pay the judgment amount. That Rule provide:

3) Subject to subrule (2), every order made under this rule shall, without further notice or other process, be binding on the person by whom such salary or allowance is payable while the judgment-debtor is in Kenya and also while the judgment-debtor is outside Kenya if he is in receipt of any such salary or allowance payable by such person; and the person by whom such salary or allowance is payable shall be liable for any sum paid in contravention of this rule. (Emphasis mine)

9. I have considered the submissions made by the parties before me. I begin by making a finding that the application of RAL is not *res judicata*. The Rules provide that a party may file an application for stay in the court appealed to whether or not it is granted by the trial court. This is what is provided under Order 42 Rule 6 (1) of the Rules. That Rule provides:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

10. It follows that RAL cannot be faulted for having filed before this Court an application of stay after the Milimani Law Court's dismissal of a similar application. And that stay having been granted *ex parte* by this Court it indeed stayed the deduction of the 2nd Respondent's salary until otherwise ordered. It was not therefore a case of RAL taking it as a "licence" not to pay as argued by the 1st Respondent.

11. The 1st Respondent submitted, in error in my view, that the jurisdiction to hear RAL's application and this appeal lies in the **Labour and Employment Court**. What is being appeal by RAL is the Ruling on execution, by attachment of the 2nd Respondent's salary, of the Milimani Law Court on a civil matter. In other words, the Ruling being challenged by RAL in this appeal is whether it is obliged to remit 1/3rd salary of the 2nd Respondent in satisfaction of a civil judgment, not a judgment of the nature of employment and labour. The jurisdiction to hear civil dispute lies with this Court.

12. My attention now goes to the application filed by the 1st Respondent. By it, it is sought for summary dismissal of this appeal and the striking out of the proceedings of this Court, presumably during the *ex parte* hearing. In seeking those orders 1st Respondent relies on the ground that RAL failed to seek directions on the appeal within 30 days of filing as set out in Order 42 Rule 11 of the Rules.

13. My response to that is that the record of appeal having not been filed this appeal was not ripe for directions as envisaged in section 79B of the Civil Procedure Act which as it is seen here requires such a record of appeal be before the judge. This is what Section 79B provides:

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily. (Emphasis mine)

14. As it will be seen from that section for the appeal to be summarily dismissed it needs to be ready for hearing. It can only be ready for hearing when the record of appeal has been filed, which is not the case here.

15. I do note however, notwithstanding that finding, that this appeal is bound to be summarily dismissed because it was filed contrary to section 65 of the Civil Procedure act. That Section provides:

(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-

(a) Deleted by Act No. 10 of 1969, Sch.

b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;

(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

16. From the provisions of that Section it will be noted that unless otherwise provided under that Section an appeal does not lie as of right. That is what is provided under sub-section 1 (b) and (c) of Section 65. This appeal is against a Ruling relating to Order 22 Rule 42 of the Rules. Under Order 43 of the Rules an appeal under Order 22 Rule 42, is not one which is as of right. A party who wishes to appeal against an order made under Order 22 Rule 42 of the Rules must obtain leave of the court being appealed from. RAL needed to seek leave of the Magistrate's court to file the present appeal.

17. RAL did not state that such leave was obtained. It follows that this appeal is incompetent having being filed without the leave of the Magistrate's court. On that ground the application of RAL and this appeal will be dismissed and struck out respectively.

18. In addition, I do find on a *prima facie* basis, that considering the provisions of Section 19 (1) (h) of the Employment Act that the Loans granted to the 2nd Respondent do not take precedence over deductions that ought to be made under a court order. RAL on that ground also is not entitled to the prayer of stay sought.

CONCLUSION

19. In the end the orders of the Court are:

- a) This appeal is hereby struck out for having been filed without the leave of the Court.
- b) The application dated 20th March 2020 is hereby dismissed with costs to the 1st Respondent.
- c) The application dated 14th April 2020 is granted in terms of prayer 3 with costs to the 1st Respondent
- d) This file shall henceforth be closed.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Applicant:

For the 1st Respondent:

For the 2nd Respondent:

ORDER

This decision is hereby virtually delivered this 16th day of July, 2020.

MARY KASANGO

JUDGE