



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. NO. 134 OF 2016

EVANS IKAP.....RESPONDENT

-VERSUS-

VERO INVESTMENTS LIMITED.....1ST APPLICANT

WESTERN STEEL MILLS LIMITED.....2ND APPLICANT

RULING

[1] The Notice of Motion dated **2 November 2018** was filed herein under a Certificate of Urgency by the Applicants for various orders, namely:

[a] That the application be certified as urgent and service be dispensed with in the first instance;

[b] That the firm of **Mogire Nyamwaya and Associates Advocates** be allowed to come on record for and on behalf of the Respondent in place of **Gicheru and Company Advocates**;

[c] That there be a stay of sale of the 2nd Applicant's movable properties namely motor vehicle **Registration No. KCM 166G Isuzu Pickup, KCG 922G Tata Lorry and KCL 209S Lorry** pending the hearing and determination of this application *inter partes*;

[d] That the 2nd Applicant's motor vehicles **Registration Numbers No. KCM 166G Isuzu Pickup, KCG 922G Tata Lorry and KCL 209S Lorry** be released to the 2nd Applicant on a running attachment pending the hearing and determination of the application *inter partes*;

[e] That there be a stay of execution and/or further execution against the Judgment and Decree delivered on **21 September 2018** in **Eldoret CMCC No. 189 of 2017** and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of this application *inter partes*;

[f] That the Court be pleased to enlarge time to lodge the appeal against the lower court's Judgment and Decree delivered on **21 September 2018** in **Eldoret CMCC No. 189 of 2017**;

[g] That the Warrants of Attachment of Movable Property in execution of the decree be set aside or lifted unconditionally;

[h] That the Auctioneers do tax their bill in the event the same is not agreed upon;

[i] That there be a stay of execution and/or further execution against the Judgment and Decree delivered on **21 September 2018** in **Eldoret CMCC No. 189 of 2017** and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of the appeal;

[j] That the costs of the application be in the cause.

[2] Although Learned Counsel for the Applicant, **Mr. Oduor** was of the view that Prayers [a], [b] and [c] above are spent, the record shows that only Prayers [a] and [c] have been granted. In respect of Prayer [b], this being a separate matter from the suit that was before the lower court, my understanding of **Order 9 Rule 9** of the **Civil Procedure Rules, 2010**, is that an order in the nature of Prayer [b] above would only

obtain where there has been a previous advocate in the same suit. Thus, there having been no previous advocate acting for the applicants herein, that prayer is misconceived.

[3] The Court has been addressed specifically in respect of Prayer [d] above, and therefore this Ruling is confined to that prayer and the question as to whether the attached motor vehicles, particularly **Registration No. KCG 922G, Tata Lorry**, ought to be released on a running attachment pending the hearing of the substantive application *inter partes*. Counsel for the Applicants relied on the Grounds set out in the Notice of Motion and the Supporting Affidavit and the Further Affidavit sworn by **Jackson Ominde** on **2 November 2018** and **13 November 2018**, respectively. The main argument advanced by the Applicants is that they will suffer loss and damage in the event that execution takes place before the determination of this application. It was further deposed that the above-mentioned motor vehicle is ordinarily used by the Applicants in their day to day business dealings and its disposal at this stage is bound to render the instant application and the intended appeal nugatory.

[4] **Mr. Kwang'a** for the Respondent opposed the application arguing first and foremost that the Court lacks the requisite jurisdiction to entertain the application granted the provisions of **Section 52(1)** of the **Work Injury Benefits Act, 2007**. According to him, the matter should have been filed before the **Employment and Labour Relations Court**. He also read malice in the Applicants' move to pay the Auctioneer's charges without any reference to the Respondent; and without making any proposal for the settlement of the Decree by way of security.

[5] I have given due consideration to application, the grounds set out therein as well as the averments in the affidavits filed herein with particular focus on Prayer [d] aforementioned. I have also paid attention to the submissions made herein by learned Counsel. Starting with the question of jurisdiction, as I must, I have looked at the relevant provisions of the **Work Injury Benefits Act (WIBA)** and in particular **Section 52** thereof and noted that, whereas it identifies the **ELRC** as the Court with jurisdiction for purposes of the Act, it is explicit that the appeals envisaged by Part VIII thereof are appeals from the decision of the Director under Part III and other pertinent provisions of the Act. This is an application for, *inter alia*, stay of execution and leave to appeal out of time, in respect of a decision by the Chief Magistrate, Eldoret. Hence, technically, this Court has the requisite jurisdiction to entertain the same.

[6] However, there is no denying that the claim arose from work injury and was hinged on the employer-employee relationship between the parties. I would therefore be of the view that the application ought to have been filed before the **ELRC**. In this respect I would agree with the viewpoint taken by **Hon. Ngugi, J**, in **Julius Oseya Nyende & 2 Others vs. Antoine Refrigeration Engineering Co. Ltd [2017] eKLR** that:

A workplace injury claim is predicated firstly on the employment relationship between the parties. Section 87 of the Employment Act expressly envisaged that such matters will fall under the jurisdiction of the ELRC. Both for reasons of comity, the need for consistency and predictability in legal decisions as well as independent reasoning, I am persuaded to follow the reasoning by Justice Mabeya in the Francis Mutunga Case. I therefore hold that this Court does not have jurisdiction to entertain this matter."

[6] Accordingly, I have no option but to down my tools at this point without further ado and direct that this matter, as well as **Eldoret HCMA No. 133 of 2018** and **Eldoret HCMA No. 134 of 2018** be and are hereby transferred to the **Employment & Labour Relations Court, Eldoret**, for hearing and determination.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF DECEMBER, 2018

OLGA SEWE

JUDGE