



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MILIMANI

ELC SUIT NO. 698 OF 2015

PAA BROTHERS COMPANY LIMITED.....PLAINTIFF/RESPONDENT

=VERSUS=

QIYE COMPANY LIMITED.....DEFENDANT/APPLICANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 4th March, 2019 which seeks the following orders:-

1. Spent

2. That the Honourable Court be pleased to Review and set aside the orders of Hon. I.N. Barasa (SDR) issued on 12th February, 2019 and thereof do direct Mr. Chen Jiye a director of the Defendant Company to immediately present himself to Court.

3. That the Plaintiff's/Applicant's pending Application dated 30th May, 2018 be placed before a Judge for directions and ultimate disposal.

4. That cost of this application be in the cause.

2. The Applicant herein had sued Qiye Company Limited as a Defendant (the company). On 6th February, 2018 the Applicant was awarded Kshs.48,952,469.35/= as general damages. The decree holder could not execute the judgment as the company had no assets and had been wound up soon after the judgment had been delivered.

3. On 31st May, 2018 the Applicant filed a Notice of Motion dated 30th May, 2018 under Order 22 Rule 35 of the Civil Procedure Rules for examination of the directors of the company. When this application was placed before me on 31st May, 2018, I invoked the provisions of Order 49 of the Civil Procedure Rules and directed that the application be dealt with by the Deputy Registrar.

4. The parties herein appeared before the Deputy Registrar on a number of occasions for hearing of the application dated 30th May, 2018. As the directors of the company were not appearing before Court, the Deputy Registrar was forced to issue warrant of arrest. The Deputy Registrar issued further the orders that the directors of the company who are Chinese Nationals should not leave the country without permission of the Court.

5. In the meantime, the Deputy Registrar directed that the application dated 30th May, 2018 be disposed by way of written submissions. The Applicant filed their submissions on 24th September, 2018. This was after the Applicant had dispensed with his right to have the directors of the company cross-examined.

6. On 30th January, 2019 the Respondent's Advocate filed an application seeking permission for one of the directors of the company to go to China to see his new born child and to attend other Chinese festivals for a period of 3 months. This application was placed before me on 31st January, 2019 when I directed that it be heard by the Deputy Registrar.

7. The Court record shows that on 12th February, 2019 Mr. Kakai appeared before the Deputy Registrar M/s Barasa whereby he indicated that the Application dated 30th January, 2019 had been withdrawn and that they had instead filed another one dated 11th February, 2019 under certificate of urgency. Mr. Kakai proceeded to argue the application dated 11th February, 2019. The Deputy Registrar then granted the prayers sought in the application thereby allowing one of the directors of the company to travel out of the country for 60 days.

8. The Applicant contends that the action by the Deputy Registrar was contrary to Article 50 of the Constitution and Section 4 of the Fair

Administrative Actions Act. The Applicant further contends that the Counsel for the Respondent did not disclose to the Court that the company had been wound up and that the firm of Kakai Mugalo were on record contrary to Order 9 Rule 9 of the Civil Procedure Rules. It is on this basis that the Applicant seeks setting aside of the Deputy Registrar's orders given on 12th February, 2019.

9. The Respondent opposed the Applicant's application through a replying affidavit sworn by one of the former directors of the company on 7th March, 2019. The Respondent contends that the current Advocates are properly on record for him having filed a consent with his previous lawyers to take over the conduct of this matter; that the director who had been allowed to travel out of the country would be back before the date which had been appointed for mention that is 15th April, 2019 and that prayer 2 of the Notice of Motion would have been overtaken by events as the director who was out of the country would have come back. The Respondent argues that instead of the Applicant pursuing this application, directions ought to be taken regarding the application dated 30th May, 2018.

10. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions during the hearing of this application. The issues which emerge for determination are firstly whether the orders of the Deputy Registrar Hon. Barasa should be set aside and an order given that Mr. Chen Jiye a director of the company do present himself to Court and secondly whether the Application dated 30th May, 2018 should be placed before me for directions.

11. Whereas it is clear that the Deputy Registrar was wrong in granting the orders of 12th February, 2019 ex-parte, the question which needs to be answered is whether the setting aside of the said orders will serve any purpose. The Deputy Registrar had allowed Mr. Chen Jiye to be out of the country for a period of 60 days with effect from 12th February, 2019. He was therefore expected back in the country on or before 12th April, 2019. The application herein was brought to my attention on 20th March, 2019 when I assigned it a date for hearing on 4th April, 2019. On 4th April, 2019 the application could not proceed to hearing. The same proceeded to hearing on 10th April, 2019. As at the time of hearing of the application, Mr. Chen Jiye had returned back to the country. This is information given by Mr. Kakai who submitted that he had even shared a copy of his client's passport with the Applicant's lawyer.

12. This ruling is being delivered after the said director has already come back. It will therefore be superfluous for the Court to set aside the orders and direct that the said director appear before Court. To give such orders will be giving orders in vain. The prayer has clearly been overtaken by events. The need for appearance of the director would have been necessary if he was to be cross-examined. The record of proceedings show that the Applicant's lawyer no longer wishes to cross-examine the directors. It is for this reason that the advocates agreed to put in written submission in respect of the Application dated 30th May, 2018.

13. On the second issue, the parties have already taken directions before the Deputy Registrar. The Applicant has already filed their submissions. During the hearing of this application, Mr. Maingi seemed to suggest that the application dated 30th May, 2018 ought to be placed before a Judge for hearing. The said application was brought under the provisions of Order 22 Rule 35 of the Civil Procedure Rules. Order 49 of the Civil Procedure Rules give the Deputy Registrar jurisdiction to handle such applications. The Deputy Registrar has already given directions on the application. One of the parties has already filed their submissions. That application should be heard and disposed of by the Deputy Registrar. The upshot of this is that the Applicant's application is disallowed. Costs of this application shall be in the cause. This file is referred back to the Deputy Registrar to deal with the Application dated 30th May, 2018.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 16th day of May, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Kakai for Defendant and Mr. Maingi for Plaintiff.

Court Assistant Hilda