



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 111 OF 2011 (UR. 72/2011)

BETWEEN

SIMBA COLT MOTORS LIMITED.....APPLICANT

AND

JAMES GITAHU MWANGI.....RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the award and decree of the Industrial Court at Nairobi (Mukunya, Udoto & Alumande, JJ.) dated 1st February, 2011

in

IND. COURT CAUSE NO. 448 (N) OF 2009)

RULING

On 9th May, 2011, I declined to certify as urgent, the motion filed herein on the same day as it did not occur to me that there was any danger of execution of the lower court's decree before the motion was heard.

The motion was taken out under **rule 5 (2) (b)** of the rules of this Court seeking an order for stay of execution of an award made by the Industrial Court on 1st February, 2011. Before that court, the respondent herein had claimed that he was an employee of the applicant between the years 2000 and 2003 on terms appearing in documents executed between them. In June 2003, the respondent threatened to leave the employment owing to breaches committed by the applicant but the applicant decided to re-engage him on fresh terms. In the year 2009, however, the respondent resigned from employment on account of breaches of the new terms. He demanded payment in excess of Shs.126 million as unpaid dues and when no payment was made, he submitted the claim to the Industrial Court in August, 2009. The applicant denied the claim and pleaded that part of it was time barred, while the rest was duly paid upon the respondent's resignation from employment. It averred that the respondent was seeking fraudulent enrichment by demanding payments he was not entitled to, and counterclaimed one month's salary in lieu of notice.

The Industrial Court heard the parties and considered their written memoranda as well as submissions of counsel. In the end it issued an award in the cause holding that part of the claim was time barred; that the respondent should pay one month's salary in lieu of notice; that the applicant should pay the respondent for days worked, leave, some incentives and commissions. It also found that some payments were due to the respondent for a period of 3 years but ordered that the applicant do calculate such payments and pay within 30 days. Those orders were made on 1st February, 2011. The applicant was dissatisfied with the findings and orders made and it filed a notice of appeal on 15th February, 2011. Instead of awaiting the calculations from the applicant as ordered by the court, the respondent appears to have made his own calculations and demanded payment of about Kshs.70 million inclusive of interest which the applicant resisted. It instead calculated the payment at Shs.6.4 million and offered to deposit it in court if it was not acceptable by the respondent. There would appear to have been a stalemate whereupon the respondent extracted a decree on 5th April, 2011 and proceeded to levy attachment on various motor vehicles lying at the premises of the applicant to recover a decretal sum of about Shs.71.6 million inclusive of auctioneers' charges. The attachment was levied on 6th May, 2011 and the property was still *in situ* when the applicant obtained a temporary order of

stay from the Industrial Court lasting up to 10th June, 2011. In the meantime the applicant also filed the motion herein invoking the original jurisdiction of the court, pending the hearing of an intended appeal.

At the *inter partes* hearing on urgency learned counsel for the respondent Mr. Wamaasa protested that the applicant should not be heard at all since it was pursuing the application for stay when the Industrial Court had already issued a similar order, and therefore the application was in abuse of court process. He further confirmed that the respondent was intent on carting away the attached goods as soon as the temporary order of the Industrial Court expires on 10th June, 2011, the pendency of the motion herein notwithstanding. That eventuality according to Mr. Oraro, who appeared with Mr. Nyaoga for the applicant, would cause substantial loss to the applicant which has a legitimate right of appeal to pursue. The decretal sum being sought, they submitted, was also substantial and cannot be paid without damage to the applicant's operations, a claim discounted by the respondent who asserted that he is a man of substance and can refund the decretal amount.

There are certainly substantial issues of fact and law to be unraveled in this dispute and it is not in my province at this stage to do so. My limited mandate is to decide whether it is meet and just to fast track the applicant's application in view of the circumstances they state in their application, and I think upon hearing both sides of the argument, it is appropriate that the matter be certified urgent. Let the full Court decide without further delay, at any rate before the execution process is completed, whether there ought to be an order of stay as sought in the motion, and if so on what terms. It is so ordered. Costs shall be in the motion.

Dated and delivered at Nairobi this 3rd day of June, 2011.

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR