Ndunda & 5 others v Habo Group of Companies Limited (Cause 768 of 2015) [2024] KEELRC 439 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 439 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 768 OF 2015

M MBARŨ, J

FEBRUARY 29, 2024

BETWEEN

OLIVER MUTUKU NDUNDA & 5 OTHERS ..... CLAIMANT

AND

HABO GROUP OF COMPANIES LIMITED ..... RESPONDENT

RULING

1. The respondent, Habo Group of Companies Limited filed application dated 15 December 2023 seeking for orders that;

   This court be pleased to stay the execution of the orders given on 25 July 2023 pending hearing and determination of this application.

   The court be pleased to set aside the orders given on 25 July 2023.

2. The application is supported by the Affidavit of Hezron Awiti Bollow on the grounds that the respondent company was wound up by Gazette Notice No 666 dated 29 January 2021 and hence ceased to exist with effect from such date. by the time the Notice of Motion dated 28 June 2022 was filed, the respondent did not exist or hold any assets by reason of being would up. The orders obtained were through falsehoods and concealment of material facts all of which were within the knowledge of the claimants.

3. In his Affidavit Mr Bollo aver that the named respondents, Augustine Omondi Awiti, Hezron Bolo and Monica Anyango Awiti were not served with the subject application dated 23 June 2023 and could not have responded to the same. The applicants live separately in Mombasa with Augustine Omondi Awiti and Hezron Awiti Bolo being in Mombasa and Monica Anyango Awiti resident in Kendu Bay. It is not clear how each was served.

4. Mr Bollo also aver that the respondents were not aware of application dated 23 June 2023 and hence the orders issued on 25 July 2023 were obtained without full disclosure of material facts and should be set aside.

5. In reply, the claimants filed the Replying Affidavit of Kitonga O Kiiva Advocate and who aver that he is in the conduct of this matter for the claimants. Judgment herein was delivered on 15 December 2020 for a sum of Kshs 1,560,230 plus costs and interest. A copy of the judgment was sent to the respondent on 22 January 2021 but there was no payment and execution proceedings commenced.

6. The claimants moved the court through application dated 28 June 2022 seeking to compel Augustine Omondi Awiti, Hezron Awiti Bollo and Monica Anyango Awiti, Mamba Village Centre Limited, Silver Dust Limited and HABO Agencies Limited to attend and be examined as to the business affairs of the respondent. despite service, the respondents and its directors failed to attend.

7. The claimant also avers the respondent and its directors were served with judgment herein, summons issued to cross-examine them but they failed to attend court and warrants of arrest issued on 25 July 2023.

8. Instead of attending court, the respondent filed application dated 4 September 2023 seeking stay of execution which was allocated for hearing on 31 October 2023 but they failed to attend court to prosecute the application, the court extended the Warrants of Arrest to 14 November 2023 when both parties attended and the advocate for the respondent submitted that parties were negotiating over the payment of the judgment sum and an offer of Kshs 200,000 had been made. On 23 November 2023 parties had not made any agreement on due payments and the matter was fixed for mention on 19 December 2023 when the Warrants of Arrest were extended.

9. The respondent has relied on Gazette Notice No 666 but the subject documents does not show the alleged details or dates of issue. There is no effort to settle the judgment delivered on 15 December 2020 way before the alleged winding up matter. The instant application is another measure by the respondent to stall the matter and avoid payment of the judgment sum and in abuse of court process. The security deposit by the respondent for the due performance of the judgment and upon which the Warrants of Arrests issued should be released to the claimant.

   During the scheduled hearing, the respondent did not attend.

Determination

10. The conduct of the respondent in these proceedings has not placed them in good standing with the court. The record is replete with orders and failure to attend and address despite various dates being allocated by consent.

11. The last such attendance was on 23 November 2023 when both parties attended court and it was agreed that a settlement would be explored to arrest the Warrants of Arrest issued against the directors of the respondent. the matter was placed for mention of 30 November 2023 for recording a consent.

12. The consent was not achieved. The respondent failed to attend court. there was no payment of the judgment sum.

13. The instant application remained pending and the respondent failed to attend to prosecute it.

14. One of the directors of the respondent was arrested and produced in court on 17 January 2024. Upon his submissions, he was released on a security deposit of Kshs 200,000. Parties were allowed to

negotiate over the due judgment sum. Matter was placed for mention on 23 January 2024. There was no resolution.

15. On the pending Notice of Motion dated 15 December 2023, parties took hearing direction to address the same by way of written submissions and to attend court on 5 February 2024 to confirm exchange of written submissions.

    The respondent did not attend or file any written submissions.

16. The lack of interests in addressing the judgment herein lay bare against the respondent. The orders sought relates to stay of execution of orders issue don 25 July 2023 requiring the respondent's directors to attend and be cross-examined on the status of the respondent company. The failure to attend and prosecute the instant application defeats the very purpose of seeking discretionary orders form the court. It is sheer abuse of court process. To file an application under Certificate of Urgency and when allocated a hearing date, there is no show or attendance to prosecute the application.

17. In the case of *Nyarangi v Musyoki Mogaka & Co. Advocates* (Civil Appeal 80 of 2020) [2022] KEHC the court in addressing a case of abuse of court process held that;

    > The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -
    >
    > a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
    >
    > instituting different actions between the same parties simultaneously in different court even though on different grounds.
    >
    > b. where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
    >
    > c. where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
    >
    > d. where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
    >
    > e. where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
    >
    > f. where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
    >
    > g. where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent

18. Various aspect outlined above can directly and indirectly be related herein. Abuse of court process is not only time consuming but a waste of judicial time.

19. Without the respondent attending to prosecute its application dated 15 December 2023, the same is hereby dismissed. The security deposit of Kshs 200,000 shall be released to the claimant forthwith. Execution proceedings remain active.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF FEBRUARY 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....