



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR REALTIONS COURT**

**AT MOMBASA**

**APPEAL NO. 80 OF 2021**

**TWaweza APPAREL [EPZ] LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**REHEMA KAHINDI**

**HANTEX GARMENTS [EPZ] LIMITED.....RESPONDENTS**

*(Being an appeal against the Ruling and Order of Hon. M.L.*

*Nabinya [PM] delivered on 26<sup>th</sup> August 2021 in CM ELR Cause No. 160 of 2019)*

**R U L I N G**

1. The 1<sup>st</sup> Respondent/Applicant was the plaintiff whereas the 2<sup>nd</sup> Respondent was the defendant in Mombasa Chief Magistrate's Court ELR Case No. 160 of 2019 whereby the 1<sup>st</sup> Respondent sought several reliefs against the 2<sup>nd</sup> Respondent based on allegations of unfair termination of employment.

2. The Lower Court delivered its Judgment on the suit before it on 25<sup>th</sup> February 2021 and concluded the same as follows:-

***“...this hearing proceeded in the absence of the Respondent who, though aware of the hearing date, failed to show up. They even failed to prosecute an application dated 11/11/2020 seeking to set aside the ex parte proceedings. The said application was therefore dismissed.***

***The claimant's suit remains unchallenged and I proceed to allow it as presented. Right of appeal 30 days.”***

3. Thereafter, execution is shown to have issued for recovery of the decretal sum and auctioneers charges, amounting to a total sum of 632,693. Proclamation of attachment of movable property is shown to have been undertaken by Makuri Auctioneers on 3<sup>rd</sup> May 2021, and the exercise is shown to have been witnessed by a representative of the Appellant herein, Twaweza Kenya Apparel EPZ Limited, and the Appellant's rubber stamp is affixed on the Auctioneer's proclamation form dated 3<sup>rd</sup> May 2021.

4. Vide a Notice of Motion dated 4<sup>th</sup> May 2021, the Appellant/Applicant herein, not being a party to the suit in the Chief Magistrate's Court, initiated Objection Proceedings under Order 22 Rule 51 of the Civil Procedure Rules and sought the following orders, among others:-

**a) that the warrants of attachment and the proclamation dated 30/4/2021 be set aside.**

**b) a permanent injunction restraining the judgment creditor from attaching or otherwise interfering with the property of the Applicant/Objector in the execution of or in relation to the judgment delivered (in the suit) on 25<sup>th</sup> February 2021.**

5. The application was supported by a supporting affidavit sworn by one AYE AYE SOE, the General Manager of the Applicant company, wherein it was deponed, *inter-alia*:-

**a) that the plaintiff/judgment creditor was demanding, and was through a proclamation of attachment threatening to execute a decree of ksh.632,693.00 against the Objector.**

**b) that the Objector was an Export Processing Zone operating at Warehouse Nos.1 to 10 on LR No. 1043/111/54/Mazeras**

Kenya (EPZ) Limited under Licence No. 002743.

c) that among the properties proclaimed are trade goods namely sewing machines, compressors, backup generator, office equipment, sewing and operating machines, assorted clothes and others as per the proclamation.

d) that the Objector was operating under a lease with its landlord, Mazeras Kenya (EPZ) Limited for a term of five (5) years and three (3) months through an offer letter dated 25/8/2020.

e) that the suit (attached properties named in the proclamation) became the property of the Objector on 23/11/2020 upon a consideration of ksh.20,000,000 in (vide) a Deed of Assignment dated 23/11/2020 between the Objector and the Judgment Debtor.

f) that the attachment and threatened sale was unlawful because:-

(i) the Objector was not a party to the suit proceedings.

(ii) the Objector had no obligation under the decree to pay any money

(iii) there was no judgment against the Objector.

(iv) that it would be manifestly unjust to attach or sell the properties of the Objector who did not owe any money to the judgment creditor.

(v) that the Objector was a separate legal entity from Hantex Garments (EPZ) limited, the judgment Debtor.

6. The Appellant (Objector) is shown to have annexed to the said supporting affidavit copies of the proclamation dated 3<sup>rd</sup> May 2021, Licence No. 002743, a letter of lease offer, a Deed of Assignment dated 23/11/2020 and the Objector's (Appellant's) Certificate of Incorporation.

7. A copy of the affidavit filed by the 1<sup>st</sup> Respondent (the plaintiff/decreed holder) in the Lower Court in response to the Appellant's Objector Proceedings has not been placed before this Court, but the Lower Court's Ruling dated 26<sup>th</sup> August 2021 shows that a Replying Affidavit was filed. Suffice to say that the Lower Court considered the Appellant's Objection (Notice of Motion dated 4<sup>th</sup> May 2021) and delivered a Ruling on 26<sup>th</sup> August 2021, dismissing the application with costs.

8. Aggrieved by the said Ruling, the Appellant filed a Memorandum of Appeal on 27<sup>th</sup> August 2021, and contemporaneously filed the Notice of Motion dated 27<sup>th</sup> August 2021 under the Court's Vacation Rules. The application was on 30<sup>th</sup> August 2021 certified as urgent by the Duty Judge and an interim order of injunction was granted pending hearing and determination of the application.

9. The Appellant at this stage seeks orders:-

a) that pending the hearing and determination of the appeal, an injunction be issued restraining the Respondents by themselves, their servants and/or agents or anyone under their authority from attaching or otherwise interfering with the property of the Appellant/Applicant in the execution of or in relation to the judgment delivered in CM ELR 160 of 2019 on 25/02/2021.

b) Costs of the application.

10. The application, which is expressed to be brought under Sections 12(3) (i) (viii) and 16 of the Employment and Labour Relations Court Act, Rule 17(3)(4)(5)(6)(8) and 28(1)(a)(b) & (g) of the Employment and Labour Relations Court (Procedure) Rules 2016 and Article 159(2)(a)(b) and (d) of the Constitution of Kenya, among other provisions, is supported by an affidavit of AYE AYE SOE, the Appellant's General Manager, sworn on 27<sup>th</sup> August 2021.

11. The deponent of the said supporting affidavit basically repeats the facts presented to the Lower Court by way of Objector Proceedings under Order 22 Rule 51 of the Civil Procedure Rules, and which I have set out at paragraph 5 of this Ruling.

12. The Appellant has further deponed, *inter-alia*:-

a) that the Appellant/Applicant has a *prima facie* case on appeal with every chance of succeeding.

b) that the Appellant/Applicant will suffer irreparable loss and damage unless the Respondents are restrained by an order of injunction as removal of the proclaimed goods will bring its business to a halt as the said goods are the Appellant's tools of trade.

c) that no amount of compensation or order of the Court will revive the distracted business or otherwise compensate the Appellant/Applicant for the irreparable loss it will suffer from the stoppage of production and loss of business even if the appeal finally succeeds.

13. The application is opposed by the 1<sup>st</sup> Respondent, whose Counsel swore and filed a detailed Replying Affidavit on 14<sup>th</sup> September 2021. The Replying Affidavit is sworn by KITONGA O. KIIVA ADVOCATE on 13<sup>TH</sup> September 2021. It is deponed in the said affidavit, *inter alia*:-

**a) that the Appellant herein (the Objector in the Lower Court case) and the 2<sup>nd</sup> Respondent herein (the Respondent in the Lower Court case) are intractably intertwined with the Deed of Assignment dated 23<sup>rd</sup> November 2020 seemingly suggesting that the (2<sup>nd</sup>) Respondent has ceased all its operations in favour of the Appellant (Objector) through a buy out and consideration of ksh.20,000,000, though the assignment curiously caveats transfer of liabilities, contrary to the Companies Act and Transfer of Business Act Cap 500 Laws of Kenya.**

**b) that the firm of Messrs Ndegwa, Sitonik Advocates, and specifically Mr. Simon Karina, who are on record for the Appellant, is also the same Firm that drew the Deed of Assignment dated 23<sup>rd</sup> November 2020, where Mr. Simon Karina witnessed the said document by appending his stamp and signature. That the said firm of advocates owed a duty to inform the Court and the Claimant (the 1<sup>st</sup> Respondent herein) of the developments as early as 23<sup>rd</sup> November 2020 or soon thereafter, considering the impending liability against the Respondent (the 2<sup>nd</sup> Respondent herein).**

**c) that according to information availed to the 1<sup>st</sup> Respondent's Counsel by Makuri Auctioneers, the said executing agents did not witness any change of name at the (2<sup>nd</sup>) Respondent's business on 30<sup>th</sup> April 2021, nor was there any other business operating from the said premises.**

**d) that the Deed of Assignment dated 23<sup>rd</sup> November 2020 fails in form and substance and lacks legitimacy. That if, indeed, the Appellant (Objector) had purchased the equipment on consideration of ksh.20,000,000, credible evidence on payment such as RTGS payment advice slip would have been produced. That no receipt to prove payment was produced.**

**e) that the lease agreement produced by the Appellant(Objector) are merely desktop documents deliberately created by the (2<sup>nd</sup>) Respondent and the Appellant (Objector) for purposes of misleading the Court and consequently defeat the interests of various decrees against the Judgment debtor, including the Claimant (1<sup>st</sup> Respondent) herein. That the purported lease cannot be admitted as evidence against claims by a third party for lack of stamp duty under the Stamp Duty Act.**

**f) that the Applicant (Objector) has failed to provide any proof of ownership of the list of assets proclaimed by the auctioneer.**

**g) that the Appellant(Objector) and the judgment Debtor are colluding to defeat execution, and that the present application is an abuse of the Court's process only aimed at frustrating and ultimately preventing execution of the subject decree while on the other hand assisting the judgment Debtor (2<sup>nd</sup> Respondent) to completely strip and transfer its assets.**

**h) that registration of the Objector (Appellant) Company was only effected to defeat any form of liability attached to the Assignor/2<sup>nd</sup> Respondent herein, since registration of the company took place on 7<sup>th</sup> August 2020 when pleadings had closed and matter already slated for judgment.**

14. The 2<sup>nd</sup> Respondent herein, which is the Defendant/Judgment Debtor in the Lower Court suit, did not file any response to the Appellant's application herein. The 2<sup>nd</sup> Respondent's Counsel informed this Court on 20<sup>th</sup> September 2021 that the 2<sup>nd</sup> Respondent did not wish to participate in these proceedings, though a party.

15. On 20<sup>th</sup> September 2021, I directed the Applicant and the 1<sup>st</sup> Respondent to file written submissions on the Appellant's Notice of Motion and to appear in Court on 14<sup>th</sup> October 2021 for highlighting of the same. Highlighting of submissions was not done on 14<sup>th</sup> October 2021 as scheduled, as both parties did not file their respective written submissions within the timelines set on 20<sup>th</sup> September 2021. They eventually did.

16. When the matter finally came up for highlighting of the filed written submissions on 16<sup>th</sup> November 2021, Counsel for the 1<sup>st</sup> Respondent informed the Court that he wished to reply on this submissions as filed, and would not highlight on the same. On his part, Counsel for the Appellant went ahead and orally highlighted on his filed written submissions, upon which the Court reserved a date for Ruling and extended the interim orders referred to in paragraph 8 of this Ruling till the date of delivery of the Ruling.

17. I have considered both the application before me, the 1<sup>st</sup> Respondents replying affidavit referred to in paragraph 13 of this Ruling, and the rival submissions by the Appellant/Applicant and the 1<sup>st</sup> Respondent.

18. It is not in dispute that the Appellant/ Applicant, a limited liability company shown to have been incorporated on 7<sup>th</sup> August 2020 after closure of proceedings in the Lower Court, was not a party to the said suit.

19. It is further not in dispute that the Lower Court's decree passed on 25<sup>th</sup> February 2021 was against the sole Defendant/Respondent in the Lower Court suit, the 2<sup>nd</sup> Respondent herein, who is the judgment Debtor.

20. It is also not in dispute that the Appellant came into the picture in the Lower Court's suit at execution stage vide Objector Proceedings instituted under Order 22 Rule 51 of the Civil Procedure Rules, after its alleged property/tools of trade were on 3<sup>rd</sup> May 2021 proclaimed by

auctioneers in execution of the Lower Court's decree. The Lower Court dismissed the Appellant's Objector Proceedings/Application vide a Ruling delivered on 26<sup>th</sup> August 2021 and gave a thirty (30) days right of appeal, giving rise to the present appeal and application, both of which were filed on 27<sup>th</sup> August 2021, a day after delivery of the Lower Court's said Ruling.

21. The Record of Appeal is yet to be filed, and therefore the Lower Court's proceedings and all pleadings and documents filed in the said Court and relied on by the Lower Court in making the orders contained in the Ruling delivered on 26<sup>th</sup> August 2021 are not before this Court. This notwithstanding, however, and from the documents so far filed in this Court, including the Memorandum of Appeal dated 27<sup>th</sup> August 2020 and filed on the same date, matters raised by both parties, and which I have substantially set out in paragraphs 1 to 13 of this Ruling, cannot be determined without determining the merits of the appeal herein.

22. There is, before this Court a valid appeal which is not, in any way, frivolous. Under Rule 28(1) (a) of the Employment and Labour Relations Court Procedure Rules 2016, this Court may, at any time in the conduct of its proceedings, issue an injunctive order. This Rule echoes the provisions of Section 12(3)(i) and (viii) of the Employment and Labour Relations Court Act which empower this Court to grant preservation orders including injunctions in cases of urgency or any other appropriate relief as the Court may deem fit to grant.

23. Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016 saves the application of the Civil Procedure Rules on execution of an order or decree in proceedings before this Court. Order 42 Rule 6 (6) of the Civil Procedure Rules 2010 provides as follows:-

***“notwithstanding anything contained in subrule(1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from a Subordinate Court or tribunal has been complied with”.***

24. Counsel for the Appellant/Applicant referred the Court to the case of Patricia Njeri & 3 others –vs- National Museum of Kenya [2004] eKLR where Visram J, (as he then was) pronounced the principles applicable in considering an application for an injunction pending appeal as follows:-

a) *“an order of injunction pending appeal is a discretionary which will be exercised against an Applicant whose appeal is frivolous.*

b) *The discretion should be refused where it would inflict greater hardship than it would avoid.*

c) *The Applicant must show that to refuse the injunction would render the appeal nugatory.*

d) *The Court should also be guided by the principles in Giella –vs- Cassman Brown [1973] EA 354.”*

25. In the case of Giella –vs- Cassman Brown (supra), the Court of Appeal set out the conditions necessary for grant of interlocutory injunctions as follows:-

*“the conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide an application on the balance of convenience.”*

26. As already stated in this Ruling, the Appellant/Applicant has a valid and arguable appeal on record, which is not in any way frivolous. The proviso to Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rule 2016 provides that where copies of proceedings of the matter being appealed against are not filed with the Memorandum of Appeal, the Appellant shall file such copies as soon as possible, and within a reasonable time.

27. The Appellant/Applicant alleges ownership of the proclaimed movable property and has exhibited a Deed of Assignment dated 23<sup>rd</sup> November 2020 shown to have been signed by the Appellant/Applicant and the 2<sup>nd</sup> Respondent herein (the Judgment Debtor), vide which ownership of the proclaimed property is shown to have been passed and vested in the Appellant/Applicant. The 1<sup>st</sup> Respondent (decree holder) disputes the validity and legality of the alleged Deed of Assignment and maintains that the Appellant/Applicant has not proved ownership of the proclaimed property. This is one of the issues to be determined in the appeal herein.

28. The Appellant/Applicant has, in my view, established a *prima facie* case. The Court of Appeal defined a *prima facie* in the case of Nguraman Limited –vs- Jan BondeNielsen & 2 others [2014] eKLR as follows:-

*“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.” (Emphasis added).*

29. If the order of injunction pending appeal sought by the Appellant/Applicant is not granted, the proclaimed properties/goods will be removed and sold by public auction in execution of the Lower Court's decree, and the appeal herein will be rendered nugatory. At the same time, the 1<sup>st</sup> Respondent, who holds a valid decree of the Lower Court, will suffer irreparably if, as she alleges, the 2<sup>nd</sup> Respondent is stripped of all its property in favour of the Appellant/Applicant which was not a party to the Lower Court suit as the appeal pends hearing

and determination. Care must, therefore, be exercised to ensure that the injunction sought, if granted, does not inflict grater hardship than it would avoid.

30. Consequently, I allow the Notice of Motion dated 27<sup>th</sup> August 2021 in the following terms:-

**a) an order of injunction is hereby issued pending hearing and determination of the appeal herein restraining the Respondents, either by themselves or their servants and/or agents or anyone under their authority from attaching or otherwise interfering with the property of the Appellant/Applicant on the execution of or in relation to the judgment delivered on 25/02/2021 in Mombasa CM ELR Case No. 160 of 2019.**

**b) the order of injunction is issued on condition that the Appellant/Applicant and the 2<sup>nd</sup> Respondent jointly and severally deposit the entire decretal sum of ksh.632,693 into an interest earning bank account jointly held by Counsel for the three (3) parties herein within twenty one (21) days of this Ruling, failing which the injunction order shall lapse.**

**c) the Appellant/Applicant shall compile, file and serve a complete Record of Appeal in accordance with Rule 8(4) of the Employment & Labour Relations Court (Procedure) Rules 2016 within forty five (45) days from the date of this Ruling.**

**d) the appeal shall be mentioned in Court on 16<sup>th</sup> March 2022 for fixing of a hearing date or for further directions.**

**e) costs of the application shall be in the appeal.**

31. Orders accordingly

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>th</sup> DAY OF JANUARY 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

**In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.**

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr. Karina for Appellant/Applicant.

Mumbi for 1<sup>st</sup> Respondent