



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

ELRC CAUSE NO. 5 OF 2020

CONSOLIDATED WITH

ELRC CAUSE NOS. 4 OF 2020, 6 OF 2020 AND 8 OF 2020

SAMMY CHERUIYOT KORIR

JERUSHA CHEPWOGEN ROTICH

JANE NALONJA RUTTO

LEONARD KIPYEGON CHIRCHIR.....CLAIMANTS

-VERSUS-

NEW KENYA COOPERATIVE CREAMERIES LTD...RESPONDENT

RULING

1. This ruling is in respect of KERICHO ELRC CAUSE NO.5 OF 2020 consolidated with KERICHO ELRC CAUSE NOS.4, 6 & 8 of 2020 in respect of the Respondent/applicant's application dated 5th February, 2021 filed under certificate of urgency on 9th February, 2021 via the firm of Gitonga Mureithi & Company advocates seeking the following orders;

- 1. That this application be certified urgent and shall be hear ex parte in the first instance.**
- 2. That there be a temporary stay of execution of the Judgment and consequential action flowing from it pending the hearing of this application inter partes.**
- 3. That there be a temporary stay of execution of the judgment and consequential actions flowing from it pending the hearing and determination of this Application.**
- 4. That the judgment of the court dated 30th September, 2020, all consequential orders and execution proceeding be set aside.**
- 5. That the respondent be granted unconditional leave to defend this suit.**
- 6. That costs be reserved.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Respondent's Legal officer, **Nyathira Mutuma** on 5th February, 2021 on the following grounds: -

- a. That, on 3rd February, 2021, the respondent was informed of proclamation of goods at their Eldoret factory allegedly culmination from suits that proceeded virtually in Nakuru ELRC Court.
- b. That, the Respondent and their advocates on record was never served. Though the return of service filed indicate that they were served via email, the respondent avers that they closed their office on 18th March, 2020 in line with keeping up with the COVID-19 regulations then in place.
- c. That, the matter was never subjected to pre-trial conference but proceeded virtually in Nakuru away from Kericho Court where the

matter was filed therefore exercise of diligence could not have discovered the same.

d. That, the threatened execution is against core assets of its company that are critical in running of the company.

e. That, the respondent has an arguable case.

3. In opposing the application, the claimant, Sammy Cheruiyot Korir, swore a replying affidavit dated 23rd February, 2021 and filed in this Court on 24th February, 2021 on the following grounds;

a. The Respondent was served with summons, statement of claim and all other accompanying documents on 12th February, 2020 at 3:30 pm which was received and duly stamped by the Respondents per the summons and affidavit of service marked as annexure SCR-1 & 2 respectively.

b. That the Respondent through its advocates on record herein entered appearance on 20th February, 2020 and served her advocates on record on 24th February, 2020 as per annexure SCR-3.

c. That the claimant through their advocates served the said advocates with subsequent documents through the email provided therein as per Order 5 Rule 22B of the civil procedure (Amendment) Rules 2020 and clause 13 of the electronic case management directions 2020.

d. That the respondent has failed to explain why it failed to file a defence to the claim after filing a memorandum of Appearance for over a year.

e. That pre-trial directions were carried out on 13th July, 2020 and the matter was confirmed for hearing on 28th July, 2020 after the Court was satisfied with service of the hearing Notice and pleadings as per annexures SCR-4-8.

f. That the matter proceeded for formal proof hearing on 28th July, 2020 and mentioned on 17th September, 2020 to confirm filling of submissions. She annexed an affidavit of service and mention notice and emails confirming service marked as SCR -9 to 11. Further that judgment was reserved for 30th September, 2020 which was also served upon the respondent as per annexure SCR 12 to 14.

g. That on 29th September, 2020, the Respondent advocates via an email (mkforjustice@gmail.com) indicated that they have filed an application setting aside the judgment and promised to serve the same before close of business. The email is marked as annexure SCR-15.that the said judgment had not yet been delivered as such the email was without any basis neither did the said advocate file the alleged application.

h. That the respondent was informed of the outcome of the judgment on 5th October, 2020 and a party to party Bill of cost filed on 13th October, 2020 as per annexure SCR 16 to 21. That the Respondent failed to act and the matter was mentioned before the Deputy Registrar on 25th November, 2020 who fixed the Bill of cost for hearing on 20th January, 2021 all this while the respondent was duly informed as per annexure SCR-22 to 30. Consequently, a ruling was delivered and the certificate of costs served upon the respondent which failed to act culmination to the retaining of Lister auctioneers to execute the decree of behalf of the claimant.

i. That, from the foregoing, the respondent was duly served in throughout the hearing of this suit and failed to participate only to resurface a year later seeking stay of execution. Further that the respondent has not satisfied all the conditions required in setting aside and or varying Orders and judgment.

j. He thus urged this Court to dismiss the application herein since it has been brought in bad faith.

4. I have examined the averments of the parties herein. From the pleadings on record, various claims were filed by the claimants Sammy Cheruiyot Korir (Cause No. 5 of 2021), Jerusha Chepwogen Rotich (Cause No. 4 of 2020), Jane Nalonja Rutto (Cause No. 6 of 2020) and Leonard Kipyegon Chirchir (Cause No.8 of 2020).

5.All the above claims were filed on 31/1/2020. The respondents were duly served and they entered appearance on 20/2/2020.

6. The respondents never moved to file any other documents. On 5/1/2020 the matter was heard exparte in absence of respondent who had not filed any defence despite service of the summons in February 2021.

7. From the record however I note that before the hearing of this claim, no pre-trial directions were ever taken before court as envisaged under Rule 15 of the ELRC (Procedure) Rules 2016.

8. The respondent having entered appearance it was in my view fair to allow them to appear for pre-trial directions which step was omitted and matter proceeded exparte.

9. This happened in all the 4 causes. The respondent was thus condemned unheard.

10. I find that the application before me is merited. I therefore allow it and set aside stay of execution.

11. I also set aside the Judgments of the court dated 30th September, 2020 and all consequential orders thereto on condition the respondents pay 10,000/= in each file as thrown away costs.

12. The respondent is now granted leave to file defence in all the suits within 14 days.

13. In default the Judgment of 30/9/2020 will stand reinstated.

14. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF MAY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kirwa for claimants – present

Kigera holding brief Gitonga for applicants – present

Court Assistants – Fred and Makori