



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO E021 OF 2021

UNIGROUP TRANSPORTERS LIMITED.....APPELLANT

VS

JOSEPH KINYAE KITEKE.....RESPONDENT

RULING

1. By its Notice of Motion dated and filed in court on 6th April 2021, the Appellant seeks the following orders:

- a) Stay of proceedings in *Cause No 458 of 2018: Joseph Kinyae Kiteke v Unigroup Transporters Limited*, pending at the Chief Magistrate's Court at Mombasa and/or the arrest or stay of delivery of any judgment in the matter;
- b) Stay of any judgment in the matter until the hearing and determination of the Appellant's appeal.

2. The Motion is supported by an affidavit sworn by the Appellant's Counsel, Shitakha Tom Ambwere and is based on the following grounds:

- a) That the matter in the lower court was heard *ex parte* without the participation of the Appellant;
- b) That the trial court set a date for filing of submissions, without the participation of the Appellant;
- c) That the Appellant filed an application to set aside the *ex parte* proceedings, which was dismissed;
- d) That the Appellant has filed an appeal against the said ruling;
- e) That the Appellant is apprehensive that the matter will continue to judgment, to its detriment;
- f) That the legal principle of due process is fundamental to the rule of law;
- g) That the appeal should be heard promptly to avoid filing of another appeal to set aside judgment;
- h) That the Appellant has an arguable appeal and it is only fair that the application be allowed.

3. The Respondent's response is found in his replying affidavit sworn on 23rd April 2021. He depones that the Appellant's Advocates were served with a hearing notice dated 17th September 2020 for hearing on 19th January 2021.

The Respondent adds that the trial court, being satisfied that proper service had been effected, directed that the hearing proceeds, since there was no explanation for the absence of the Appellant and its Advocates.

4. The Respondent states that the present application is made in bad faith as the Appellant was not properly on record and the documents that it wanted to rely on had not even been filed in court and were only being sneaked in through the impugned application.

5. The Respondent further states that the Appellant's Counsel had written to the Respondent's Advocates on 15th January 2021, informing them of his intention not to proceed. The Respondent accuses the Appellant's Counsel of conveniently failing to annex a reply from the Respondent's Advocates informing him of the intention to proceed with the matter as scheduled.

6. The Respondent goes on to state that the Appellant's Counsel was clearly aware of the hearing as he had even called the Respondent's

Advocates to inform them that the Court was not sitting and that matters would be mentioned before Hon Ndegwa.

7. The Respondent adds that his Advocates called the Appellant's Counsel and informed him that the matter had been scheduled for hearing at 12.30PM before the trial court but the Appellant's Counsel stated that he had left the office and he would therefore not attend the trial.

8. The Respondent states that the Appellant's Counsel was served with the hearing notice dated 17th September 2020 and that the Appellant had 2 years and 4 months to file its documents.

9. The Respondent's position is that the Appellant has not advanced any valid reason to warrant the orders sought in the application. He adds that he has a right to have his claim heard and determined timeously.

10. The issue for determination in this Motion is whether the Appellant has made out a case for stay of proceedings in *Cause No 458 of 2018: Joseph Kinyae Kiteke v Unigroup Transporters Limited*, pending at the Chief Magistrate's Court at Mombasa.

11. In the written submissions filed on behalf of the Respondent, reference was made to the following excerpt from the Halsbury's Laws of England, 4th Edition, Vol. 37, 330 & 332:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.....”

This is a power which, it has been emphasised, ought to be exercised sparingly, and only in exceptional circumstances.”

12. In *Global Tours & Travels Limited: Nairobi HC Winding Up Cause No 43 of 2000 Ringera J* (as he then was) stated the following:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.....the sole question is whether it is in the interest of justice to order stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

13. In urging their respective positions in this application, the parties gave rival arguments as to whether the Appellant and its Advocates were properly on record before the trial court. I think however, that the critical question is whether the Appellant and its Counsel were aware of the hearing date and if so, whether they had a valid reason for failure to attend court.

14. In his affidavit in opposition to the Appellant's application, the Respondent states that the Appellant's Advocates were served with a hearing notice dated 17th September 2020 for hearing on 19th January 2021.

15. The Respondent further states that there was communication between his Counsel and the Appellant's Counsel, both before and on the actual date of the hearing. In his affidavit in support of the application, the Appellant's Counsel did not counter the Respondent's averments in this regard.

16. The only conclusion to draw therefore is that the Appellant and its Counsel were aware of the hearing date and the trial court, being satisfied of due service, determined that there was no valid reason for their absence and proceeded to hear the Respondent *ex parte*.

17. As acknowledged in the foregoing part of this ruling, stay of proceedings is a grave and fundamental interruption of litigation and the Court will only allow such a disruption in exceptional circumstances, which have not been established in this case.

18. The Appellant's Motion dated 6th April 2021 is therefore declined with costs to the Respondent.

19. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ambwere for the Appellant

Miss Okeyo for the Respondent