



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.150 OF 2016

KENYA LONG DISTANCE TRUCK DRIVERS AND

ALLIED WORKERS UNIONCLAIMANT

VERSUS

MALVA COACH BUILDERS LIMITED.....RESPONDENT

RULING

The respondent, Malva Coach Builders Limited filed application dated 26th January, 2021 pursuant to the provisions of Rule 33(1) (d), 17 ad 28 of the Employment and Labour Relations Court (Procedure) Rules, Order 42 Rule 16(1), Order 50 Rule 4, 5, Order 22 Rule 18, Order 21 Rule 8 of the Civil Procedure Rules and section 3!, 75, 78, 79G of the Civil Procedure Act and seeking for orders that;

- a) *There be stay of proceedings pending hearing and determination of the pending appeal.*
- b) *There be stay of execution pending hearing and determination of the pending appeal.*
- c) *Costs be in the cause.*

The application is supported by the affidavit of Anthony Kilonzo and on the grounds that judgement herein was delivered on 21st September, 2018 and the respondent filed an appeal to the Court of Appeal. The claimant has applied herein seeking for the decree for ksh.4,059,934 which sum was not awarded in the judgement and the application seeking execution of judgement and the decree is made more than 1 year after judgement.

The claimant's application dated 3rd December, 2020 was served on 9th December, 2020 and came up for hearing on 20th January, 2021 and which was deemed unopposed as the respondent had not filed a response. By allowing prayers for the issuance of a decree for an amount not in the subject judgement, the court allowed the claimant to bypass Order 21 Rule 8 regarding preparation, dating of decree and orders. The decree amount was not part of the judgement contrary to Order 50 Rule 4 of the Civil Procedure Rules.

There is a pending appeal which will be rendered nugatory if the orders sought are not issued.

In his affidavit, Mr Kilonzo avers that there is Appeal No.108 of 2020 filed at the Court of Appeal and hearing directions have been issued.

In reply, the claimant filed the Replying affidavit of Nicholas Mbugua the secretary general of the claimant union and who avers that in the judgement of the court delivered on 21st September, 2018 the court held that the respondent as the employer reserved the right to dismiss employees who had participated in the unprotected strike save the non-payment of transport allowance amounted to revision downward of the work terms. The reinstatement of the dismissed employees be done except that they should not be paid for the period they were out of employment and subject to availability of positions held before dismissal. In the alternative, the respondent was directed to pay the dismissed employees all terminal dues not paid at the time employment terminated plus 5 months' salary in compensation for unfair termination of employment.

The respondent was also directed to sign the CBA.

Mr Mbugua also avers that the respondent has since filed an appeal which is pending determination.

The judgement delivered herein did not compute the exact amount of monies to be paid to the 54 employees as per the Memorandum of Claim and this court be because clause (b) of the decree with regard to reinstatement was subject to availability of positions held by the dismissed employee was available.

The 54 employees were reinstated with 9 had their positions not available and which matters are within the knowledge of the respondent as the employer.

It took time to have the employees recalled back to work and the delay in filing application and seeking for a decree. The respondent has refused to pay the terminal dues and application made in this respect dated 3rd December, 2020 was allowed for being unopposed.

Both parties and agreed to file written submissions.

The respondent as the applicant submitted that the claimant in making application dated 3rd December, 2020 failed to comply with Order 22 Rue 18(1) of the Civil Procedure Rules which requires that where an application for execution is made more than a year from the date of the decree, a notice to show cause be issued to the judgement debtor before execution. This was not followed in this case.

The respondent also submitted there is a pending appeal with regard to the subject judgement herein. Such should be allowed to conclude before execution herein as held in **Teachers Service Commission v Kenya National Union of Teachers & 3 others [2015] eKLR** that that while there is a pending appeal, stay of execution should be allowed. The unilateral tabulation of dues owing to the claimant and employees dismissed by the respondent has been done without notice and the application herein should be allowed as prayed.

The claimant submitted that under Order 42 Rule 6(2) of the Civil Procedure Rules the principles governing stay of execution are addressed and the court must be satisfied that there shall be substantial loss and damage to be occasioned upon the application and that there is security for the due performance of the judgement is the appeal is not allowed. These conditions have not been met by the respondent as held in **James Wangalwa & another v Agnes Naliaka Cheseto [2020] eKLR**. Judgement herein was delivered on 21st September, 2018 and decree applied for on 3rd December, 2019 and the respondent has not applied for any stay of execution until after 3 years since.

The claimant also submitted that no security for the due performance of the judgement has been offered and the orders sought should be dismissed with costs.

Determination

It is common cause that there exists Civil Appeal No.108 of 2020 before the Court of Appeal with regard to the judgement herein delivered on 21st September, 2018. Such appeal before the Court of Appeal is pending and hearing directions have since issued on the hearing and determination of the Appeal.

It is also apparent to the court that the judgement delivered herein on 21st September, 2018 had the main order and directing for reinstatement of the dismissed employees subject to availability of the positions held before the dismissal and in the alternative such employees be compensated and paid terminal dues. the compensation and terminal dues were not quantified.

The claimant then filed application dated 3rd December, 2020 seeking for orders that the deputy registrar to draw and issue a decree to the respondent for the quantum total Kh.4,059,934 payable to the grievants as per the computation following judgement of the court.

Mr Kilonzo for the respondent at his paragraph 10 of the Supporting Affidavit sworn on 26th January, 2021 avers that the respondent was served with the application dated 3rd December, 2020 and issued with hearing notice for the 20th January, 2021. There was no attendance, reply and the court proceeded to allow the application for being unopposed. Save to add that the court failed to consider the application of Order 50 Rule 4 of the Civil Procedure Rules with regard to computation of time.

Whereas the court should allow proceedings before the Court of Appeal and relating to the subject matter herein to stop pending determination by the appellate court, such application ought to be done immediately and without delay for the applicant to secure his/her rights. Diligence and expedited application is imperative.

Judgement herein was delivered on 21st September, 2018. Application for stay of proceedings ought to have been filed without inordinate delay. This court has since heard application dated 3rd December, 2020 and despite the respondent being served and well aware of the pending appeal did not respond to the application. Such application has since been allowed for being unopposed. There exists no reason(s) for this court to review such an order allowing application dated 3rd December, 2020.

Stay of execution orders should be issued on good foundation. Following judgement herein on 21st September, 2018 it is now over 3 years and 6 months. The delay apparent, to issue stay of execution at this stage would be to visit injustice upon the claimant who has since moved and secured a decree with the full knowledge of the respondent and who failed to file any responses and the court has since allowed such application for the issuance of the decree herein.

Accordingly, application dated 26th January, 2021 is found without merit and is hereby dismissed with costs to the claimant.

DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF MAY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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