



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

ELRC CAUSE NO. 35 OF 2019

STEPHEN MUNENE WAITITU.....CLAIMANT/RESPONDENT

LEGACY AUCTIONEERING SERVICE LTD.....RESPONDENT

VERSUS

KENYA TEA PACKERS LIMITED.....1ST RESPONDENT/APPLICANT

KENYA TEA DEVELOPMENT AGENCY

HOLDINGS LIMITED.....2ND RESPONDENT/APPLICANT

RULING

1. This ruling is in respect of the Respondents/applicants' application dated 13th April, 2021, filed under certificate of urgency on 14th April, 2021 via the firm of Momanyi and Associates advocates pursuant to Order 40 Rule 1 (a)(b), 2(2) (3) (1) 3(3) 4(1), Order 42 Rule 6(1)7(1) of the Civil Procedure Rules and sections 1A, 1B, 3A , 63(e) , 99 and 100 of the Civil procedure Act and all other enabling provisions seeking the following orders;

1. Spent.

2. Spent.

3. That there be stay of execution of the decree and Order issued on the 3rd February, 2021 and certificate of costs issued on the 29th of January, 2021 and all consequential Orders emanating therefrom pending the hearing and determination of this Application.

4. That there be stay of Execution of the Decree and Order issued on the 3rd of February, 2021 and Certificate of costs issued on the 29th January, 2021 and all consequential Orders emanating therefrom pending the hearing of the Applicants Appeal.

5. That Costs of this application be provided in the cause.

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 13th April, 2021 by **Judy Kinyanjui**, the head of Human Resource and Administration at the 1st Respondents and based on the following grounds: -

a. That, judgment in this matter was delivered on 2nd June, 2020 and the decree issued on 29th January, 2021 in favour of the Claimant as against the Respondents.

b. That the Respondents were dissatisfied with the judgment thereto and filed a Notice of Appeal on 17th June, 2020 and drafted a memorandum of Appeal however the memorandum and the record of Appeal was not filed on time due to restriction brought about by COVID-19 and the country lock down. further that they have obtained a certificate of delay to that effect.

c. That on 10th April, 2021 the Claimant through Legacy auctioneers proclaimed several vehicles some of which do not belong to the 1st Respondent herein and have given the Applicants 7 days to pay the decretal sum failure to which the said vehicles are to be sold by public auction.

d. That the Appeal raises serious triable issues of law and of fact with overwhelming chances of success.

e. That if the stay Orders are not granted in the interim then the Appeal will be rendered nugatory.

f. That the Applicants are willing to abide by any conditions this Court may deem fit to grant.

3. In opposing the application, the claimant, **Stephen Munene Waititu**, swore a replying affidavit dated 26th April, 2021 based on the following grounds;

a. That the application herein is bad in law, an afterthought and a feeble attempt by the Applicants to deny the claimant the chance to enjoy his fruit of judgment.

b. That the application as filed does not meet the threshold for grant of stay orders as sufficient cause has not been shown to convince the court to exercise its discretion.

c. That the Applicants were aware that taxation proceedings had commenced and concluded and failed to act during that time.

d. That there is no Appeal lodged by the Applicants, therefore the prayers sought are incapable of being granted and that the application is an abuse of Court process.

e. That the revelation by the Applicants that the goods proclaimed are not theirs make the prayers sought mute as no prejudice will be occasioned on them.

f. That the annexed Memorandum of Appeal is not in strict sense an Appeal when seeking orders of stay Under Order 42 Rule 6. Further that only a Record of Appeal can confirm that indeed an appeal exists.

g. He thus prayed for the Application to be dismissed.

4. On 20th May, 2021 the Respondents/Applicants filed a supplementary Affidavit attaching a copy of the now filed Memorandum of Appeal filed on 29th April, 2021 and also stating the vehicle that was proclaimed and is not theirs is motor vehicle registration number KBL 870w Toyota Pickup.

5. The Claimant in response filed a further Affidavit sworn on 24th May, 2021 contending that the Applicants application is an afterthought since the Memorandum of Appeal was filed after the claimant/ Respondent raised the issue in its replying Affidavit of 26th April, 2021. Further that the Notice of Appeal annexed to the Applicants affidavit has not been authenticated by the deputy registrar as per procedure. Also that the only document that can confirm that indeed an appeal has been lodged is a record of Appeal which is not filed by the Applicants herein.

Applicants Submissions.

6. The Applicants submitted that the delay in bringing the application has been explained in its affidavits filed which was caused by the lock down of the county pursuant to the emergence of Covid-19 in Kenya, a fact which he submitted the court ought to take judicial notice.

7. On whether the application herein is an afterthought, the Applicants submitted that it had desired from the time Judgement was entered to appeal the decision of the trial Court and even filed a Notice of Appeal and that while in the process of filing the Memorandum of Appeal and the Record therefore they were faced with execution proceeding necessitating this application before the Appeal could be filed.

8. The Applicants submitted further that they are willing to furnish the Court with security for due performance and relied on the case of **Focin motorcycle Co. Ltd –v- Ann Wambui Wangui & Another [2018] eKlr.**

9. It was submitted that the Respondent/Claimant has attached the Applicants properties worth over 30 Million to satisfy his decree, which action if allowed to proceed will occasion the Applicants substantial loss owing to the operations of the Applicant's company and the pending appeal and cited the case of **Butt –v- Rent Restriction Tribunal [1979] eKlr.**

Respondent's Submissions.

10. It was submitted on behalf of the Respondent/ Claimant that there is no valid Notice of Appeal lodged by the Applicant as the Notice of Appeal marked as **JK-1** annexed to their application shows that the same was not signed and endorsed by the deputy registrar of ELRC court as provided for under Rule 75 of the Court of Appeal Rules. He argued further that even if there was a notice of appeal duly filed then the same lack anchorage. He therefore submitted that where there is no proper Notice of appeal, an appeal cannot lie.

11. He reinforced his arguments by citing a 3 judge bench decision in **Mistry Premji Ganji (Investments) Limited –v- Kenya National Highways Authority [2019] Eklr.** Which court found a Notice of Appeal which lack endorsement by the Registrar of High court to be fatally defective.

12. It was also submitted that under Rule 77 of the Court of Appeal Rule, the Appellant ought to have served the Notice of Appeal within 7 days of filing the same a fact which the claimant contends was never served with the Notice of Appeal.

13. It was therefore submitted that since the Notice of Appeal is defective, there is no basis upon which the Application under Order 42 Rule

6 can be allowed and prayed that the same be struck off for being incompetent.

14. The respondent on a without prejudice to the foregoing basis, submitted that the Applicant have failed to demonstrate what loss it will suffer if the stay Orders are not granted as was held in **Kenya Shell Limited –v- Kabiru & Another [1986] KLR 410** and argued that the applicants’ confession that the goods proclaimed do not belong to them is a clear indication that they will not suffer any loss further that the execution is for a sum of Kshs. 604.531/- only.

15. The respondent submitted that the Applicants have not offered any security for due performance as mandated under Order 42 and cited the case of **Arun C Sharma –v- Ashana Raikundalia t/a Rairundlia and co advocates [2014] eKLR**.

16. It was submitted also that the delay in filing this application was inordinate considering that judgement was delivered on 2nd June, 2020 and the applicants were aware of taxation proceedings culminating to the execution proceeding that they seek to stay. Further that there is no plausible reason advanced for the delay.

17. I have examined the averments and submissions of the parties herein. I find that the applicant herein has actually lodged an appeal at the Court of Appeal.

18. That in itself would be a deterrent for this court not to grant stay orders which would enable preservation of the matter and not render the appeal a mere academic exercise.

19. I would therefore allow stay of execution pending appeal on the condition that the applicant respondent deposits the entire decretal sum in an “interest earning account” held in the joint names of counsels on record within 30 days.

20. In default execution to proceed.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kibet for claimant – present

Momanyi for respondent – absent

Court Assistants – Fred and Wanyoike