



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 2181 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

TRAILINK GROUP LIMITED.....CLAIMANT

VERSUS

KENYA LONG DISTANCE TRUCK DRIVERS

AND ALLIED WORKERS UNION.....RESPONDENT

RULING NO. 7

1. Before me for determination is an Application dated 14th August 2020. The Applicant seeks orders THAT:

(i) Spent

(ii) THAT the Court be pleased to grant interim orders of stay of execution of the decree arising from the ruling of Hon Lady Justice Maureen Onyango delivered on 20th December 2019 pending the filing of an Application for review against the said Ruling.

(iii) THAT the Court be pleased to grant an order of stay of the orders issued by the Hon Deputy Registrar in her ruling dated 7th August 2020 pending filing of a reference.

(iv) THAT the Court be pleased to grant a stay of any further execution proceedings pending the hearing and determination of both review and Reference.

(v) THAT the Court be pleased to set aside and or vary the Taxation proceedings and Ruling by the Hon Deputy Registrar Ms. Mutai.

(vi) THAT the Court be pleased to remit the Application for Taxation dated 10th May 2018 before another Deputy Registrar other than Hon Mutai.

(vii) THAT costs be provided for.

2. The application is supported by the affidavit of PETER NJENGA the Applicant's Manager, Human Resource Service annexed hereto and based on the following grounds:

a. THAT there is imminent execution arising from Taxation proceedings which were held on zoon [sic] without the participation of the Applicants counsel on record due to technical hitches on the part of the Applicant's Counsel.

b. THAT the Applicant is ready to file an application of Review the ruling of Hon Lady Justice Maureen Onyango dated 20th December 2019 on the aspect of a monetary award as the same was not disclosed therein and which is the basis of the purported Taxation.

c. THAT neither the court nor the Respondents issued and/or served a Taxation Notice on the Applicant's counsel.

d. THAT the Respondents only served the Applicant with Mention Notice for 10th July 2020 which Notice did not disclose the purpose of the mention.

e. THAT subsequently the Applicants Advocates were served with a notice of Ruling on Taxation scheduled on 31st of July 2020 which date fell on a Public Holiday.

f. THAT neither the Court nor the Respondent served the Applicant's counsel with the next Ruling date or cause of Action.

g. THAT upon receipt of Taxation Notice from the Respondent's counsel the Applicant's counsel wrote to the Court expressing surprise as to how Taxation was conducted in our absence and without our knowledge since no Taxation Notice was served on the Applicants Counsel.

h. THAT Applicant's counsel upon enquiry from the Court on the status of the case was informed that the Ruling on Taxation was delivered on 7th August 2020.

i. THAT there was no notice of ruling on Taxation issued to the Applicants counsel issued by the Court.

j. THAT the Applicant is dangerously exposed to imminent execution process of over 22 Million and the Applicant will suffer substantial loss and damage.

k. THAT the proceedings on this matter namely the Judgment of Hon Justice Mathews Nderi Nduma dated 27th May 2017 and the Ruling of Hon Lady Justice Maureen Onyango dated 20th December 2019 are subject of Civil Appeals No 87 of 2018 and 389 of 2019 which Appeals revolve on the same subject matter and unless stay is granted the pending appeals aforesaid will be rendered nugatory.

l. THAT in view of the colossal sum involved namely over Kshs 22 Million it is fair and just that the orders sought be granted.

3. The Respondent via a replying affidavit sworn on 27th August 2020 by Nicholas Mbugua states that the application lacks merit and is incompetent ab initio since there is nothing to be stayed. He avers that the Court already rendered its judgment and various Rulings thereafter on same prayers of stay of execution. That the Applicant knows best that a conditional stay of execution was granted on the 24th November 2017 with the said Court orders which the Applicant has failed to obey

4. The Respondent argues that this Court is thus *functus officio* and the said application is an abuse of the court process and should be dismissed with costs.

5. With respect to the Bill of Costs, the Respondent avers that on the Bill of Costs, the Deputy Registrar delivered her ruling in which she held that she was not able to tax the Bill of Costs dated 10th May 2018 as computation of the final judgment figure had not been done as directed by Nduma J. hence she directed the parties back to the Judge for directions on the 6th June 2019.

6. He adds that on the 30th July 2020, the Deputy Registrar informed parties that the ruling was not ready and the same was stood over to the 7th August 2020. The same was delivered in the absence of the Applicant herein on the said date. That eventually a certificate of costs was issued on the 12th August 2020.

7. The Respondent contends that the intention of the Applicant's application for review on the Ruling issued on 20th December 2019 is already overtaken by events as a final decree has already been issued as elaborated above. Further that there is a lot of inordinate delay on the part of the Applicant. It is about 9 months since the delivery of the ruling on 20th December 2020 and the Applicant is time barred for filing an application for review.

8. That the ruling date of 30th July 2020 was posted on the Kenya Law Reports website contrary to the allegations by the Applicant and it has itself to blame for not following up on the matter. That neither the Court nor the Respondent herein is at fault.

9. The Respondent contends that a conditional stay of execution was granted way back in 2017 but to date, about 3 years down the line, the Applicant has been bringing application after application as a delaying tactic. He posits that the law is a double edge sword that cuts across all parties and justice should thus be seen rendered to the Respondent who has suffered a lot of anguish by not enjoying the fruits of its judgment.

10. The Respondent argues that the law provides that if a party chooses to appeal on a decree/judgment/ruling/order then the said party cannot come back to court seeking for a review of the said decree or order that it has appealed against. In this case as admitted by the Applicant it has already appealed against the Ruling of the 27th May 2017 and 20th December 2020. This Court is thus *functus officio* in that regard as rightly put by Radido J. in his ruling.

11. The affiant avers that the said ruling dated 20th December 2020 is self-explanatory and the allegations by the Applicant are just but a delaying tactic.

12. He states that the Deputy Registrar was not wrong in any way in issuing a ruling date on the Bill of Costs dated 10th May 2018 as

taxation had already been done with full participation of all parties. Further that if at all the Applicant is not satisfied with the Ruling of the Deputy Registrar, he knows best what next cause of action should be taken. That this application in itself is misconceived and should be dismissed with costs.

13. That the Applicant herein has also come to court with unclean hands and should not be heard, the Applicant having refused to heed and obey the court orders directing it to honour the Recognition Agreement entered on 15th December 2014 which to date it has refused and or neglected to do. Also the Applicant did not obey the conditional stay of execution issued by this court and thus the applicants has no right to come to the same Court for relief of any sort.

14. The Respondent states that this application is thus frivolous, scandalous and an abuse of court process which is being used to delay justice being rendered to the Respondent who has suffered a lot of anguish.

15. He concludes that if the Applicant's application is allowed, the Respondent will be highly prejudiced and stands to suffer irreparable loss as this matter was determined on merit and subsequent delay on enjoyment of its fruits is a great prejudice on the Respondent's side.

Applicant's Submissions

16. At the time of delivery of this ruling, the Applicant had not filed its submissions.

Respondent's submissions

17. On whether this court should grant the Applicant's prayer for stay of ruling and subsequent order of this court delivered on 20th December 2019, pending the filing of an application for review against the said ruling, the Respondent relied on the

provisions of Section 80 of the Civil Procedure Act.

18. Additionally, the Respondent noted that the Applicant had filed an appeal against the said ruling and submitted that as a result thereof, it did not have a right to seek review of the said ruling. It relied on the ruling delivered by Radido J. in an application in this matter where the Learned Judge relied on the case of **Orero v Seko KLR 238** where the Court of Appeal held that the review remedy is only available to a party who is not appealing.

19. A similar position was reached in **Kisya v Attorney General (1986) eKLR** where the court held that a party who has filed a notice of appeal cannot apply for review. It therefore submitted that the Applicant does not have any right to file a review of the said ruling and order as it has already filed an appeal, and thus the order for stay as prayed should not issue as the court is already *functus officio*.

20. The Respondent submitted that the law does not aid the indolent but the vigilant; the Applicant is guilty of inordinate delay; it has been over 9 months since the said ruling of 20th December 2019 was rendered and no reason has been tendered forth explaining the delay.

21. On the issue of whether the Court should stay the ruling and subsequent order of the Deputy Registrar delivered on 7th August 2020 pending the filing of a reference; the Respondent made reference to paragraph 11 of the Advocates (Remuneration) Order which provides a detailed process of objection to taxation.

22. It submitted that the procedure is clear that where a party is aggrieved by the decision of a taxing master they have 14 days to file a reference to the High court and not file such an application as herein. It relied on the case of **B. M. Mungata & Co. Advocates v Peter Mwangi Wanjohi [2020] eKLR** where Kemei J. in dismissing an application seeking for review and setting aside of Deputy Registrars proceeding on taxation gave its rationale that;

- *The application was brought under the wrong provisions of the law.*
- *That the Applicant had not sought reasons for the taxation as stipulated by the law and*
- *That no reference had been filed as should be in the said matter.*

23. The Respondent submitted that the above grounds apply in this application.

24. It was submitted that the instant application is thus fatally defective and incompetent and should be struck out and or dismissed with costs to the Respondent.

25. The Respondent submitted that the Applicant herein has not even sought for extension or enlargement of time to file a reference. In the already quoted case of **B. M. Mungata & Co. Advocates v Peter Mwangi Wanjohi (supra)**, the Court held that;

“Under Paragraph (4) of the Advocates Remuneration Order, the court has powers to enlarge time. The applicant ought to have included it as one of the prayers in the instant application so that the application that is evidently out of time may be allowed. See Njagi Wanjeru & Co. Advocates v Ben Momanyi t/a Momanyi & Co Associates (2014) eKLR. The client did absolutely nothing to approach the court all that time. Even if for argument's sake I were to consider the application, in view of my reasoning above, there is evidence of service and the taxing officer was satisfied with service. I place reliance on the case of Alfred Ochienq Opiyo t/a

Ochienq Opiyo & Co Advocates v Export Hydro Pump & Services (Africa) Ltd (2018) eKLR that dealt with presumption of service in favour of the process server and therefore I find that there is no reason to set aside the Certificate of taxation dated 26.4.2018. I note that the application dated 20.9.2019 is too vague and is brought under incorrect provisions of the law.

The client in his affidavit in support of the application made no attempt to explain away the delay, but insisted that he was never served with notice. However, in the absence of a specific prayer to enlarge the time to file the application, I am commended to dismiss the application dated 20.9.2019 for being incompetently before court.”

26. In conclusion, the Respondent submitted that the application is indeed an abuse of the court process and that applicant does not deserve to be issued with any stay orders.

Analysis and Determination

27. I have considered the application and the replying affidavit in opposition thereof. I have further considered the submissions by the Respondent.

28. As has been pointed out above, the Applicant did not file submissions on the application even though the Court directed parties to do so on 16th November 2020. The ruling was reserved for 22nd January 2021.

29. Before the ruling could be delivered, the Applicant filed another application dated 27th August 2020 and yet another one dated 18th December 2020. The two applications seeking my recusal and stay of execution pending my recusal respectively, they took priority over the instant application dated 14th August 2020.

30. The two applications were disposed of together by way of written submissions and a ruling delivered on 5th March 2021.

31. It is on the date of the ruling that directions were given for the disposal of the instant application by way of written submissions.

32. It is noteworthy that the application dated 18th December 2020 sought the following orders –

(i) Spent.

(ii) Onyango J. be pleased to hear and determine the Applicant’s Application for recusal dated 27th August 2020 on a priority basis before further hearing and determination of the Applicant’s Application for stay of execution dated 14th August 2020 and scheduled for delivery of ruling on 21st January 2021

(iii) The Court be pleased to stay the delivery of the ruling in the Applicant’s Application for stay of execution of final decree dated 14th August 2020 and scheduled for delivery on 21st January 2021 pending hearing and determination of this Application.

(iv) The interim orders of stay of execution granted pursuant to the Application dated 14th August, 2020 be extended pending the hearing and determination of the recusal Application.

(v) Costs be provided for.

33. The instant application again seeks stay of execution of my ruling of 20th December 2019.

34. The said ruling of 20th December 2019 was in respect of an application dated 3rd October 2019 seeking the following orders:

(i) Spent.

(ii) That the un rebutted quantum of the Respondent’s/Applicant’s computation following the order in the judgment delivered on 26th day of May 2017 served upon the Claimant/Respondent on 18th January 2018 be and is hereby adopted as a decree for execution purposes.

(iii) That the Deputy Registrar draw and issue the decree to the Respondent/Applicant for the quantum meruit total of Kshs.32,616,329 payable to the grievants as listed in the computation appearing as annexure C attached herewith.

(iv) That the Respondent pay the total amount with interest at court rate from 26th May 2017, the date of delivery of judgment till payment in full.

(v) That the costs of this application be borne by the Claimant.

35. In the ruling of 20th December 2019, I confirmed the tabulation of the Respondent in respect to notice pay and compensation but excluded names of grievants who were not named in Exhibit 8 and 10 of the affidavit of Peter Njenga sworn on 23rd January 2015, and grievants who were re-employed as per Exhibit 7 of the said affidavit of Peter Njenga. I further ordered that interest be paid to date of full

payment and that the Respondent applies to the Deputy Registrar to issue a decree in terms of the assessed tabulation after making adjustments made in the ruling.

36. It is this decision that the Applicant wishes to stay.

37. The issue for determination is therefore whether the Applicant is entitled to the orders sought in its application of 14th August 2020.

38. As has been pointed out, the Court has rendered several rulings on similar prayers before, notably the ruling dated 5th March 2021 wherein the application for stay of execution dated 18th December 2020 seeking similar orders was dismissed.

39. Similarly, in a ruling dated 16th February 2018, Radido J. dismissed an application dated 4th November 2017 seeking an order of stay of execution of the judgment of this Court.

40. I would therefore agree with the Respondent that the instant application is an abuse of Court process. Perhaps the Applicant having lost the last application seeking stay of execution, has abandoned this application and perhaps this is the reason it did not file submissions in support of the application in spite of being in Court when directions were taken for filing of submissions.

Conclusion

41. Based on the findings above, I find the application dated 14th August 2020 to be devoid of merit and proceed to dismiss the same with costs.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE