



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRCC/41/2018

CITATION: MARK BUSHURU ANGATIA VS FRODAK KENYA LIMITED

RULING

ON 2021-06-25 BEFORE HON. JUSTICE J. N. ABUODHA

1. By a Motion dated 15th March, 2021 the respondent sought orders among others that there be a stay of execution of the ruling of this Court delivered on 6th November, 2020 and further that the same be set aside and warrants of attachment and sale issued be recalled.
2. The applicant further sought injunction barring execution of the decree pending an appeal to the Court of Appeal.
3. The application was based on the grounds that the execution proceedings had been commenced irregularly and in breach of the law and the respondent had lodged a notice of appeal against the ruling of the Court and would suffer substantial loss if the orders sought were not granted.
4. The application was supported by the affidavit of Fredick Otieno Onyango who deponed among others that:
 - (i) THAT I am the Managing Director of the respondent and duly authorized under its corporation seal to swear this affidavit.
 - (ii) THAT on the 10th March, 2021 the Claimant through Eshikoni Auctioneers did proclaim the respondent's property.
 - (iii) THAT the respondent immediately enquired from its erstwhile Advocates namely Okung's, Wandago and Company Advocates about the status of the matter and was informed that the motion for review had been dismissed with costs.
 - (iv) THAT the respondent was not aware of the decision taken on its application until the proclamation arose.
 - (v) THAT the respondent is desirous of lodging an appeal against the decision of the court it has lodged a notice of appeal and applied for certified proceedings.
 - (vi) THAT the respondent applies for a stay of execution and /or injunction pending the hearing of this application in the first instance and subsequently pending the hearing and determination of the intended appeal to the Court of Appeal.
 - (vii) THAT the respondent will suffer substantial loss in the event the appeal is successful as the claimant's means are unknown and based on the evidence on record, he is a man of humble means who will not be able to refund the decretal sum and costs.
 - (viii) THAT the intended appeal raises germane matters for consideration by the appellate Court which are:
 - (a) Whether wide settled jurisdiction to review its orders and judgement as conferred upon the Honourable Court by dint of section 16 of the Employment and Labour Relations Court Act. Cap. 2348 as read with rule 33 of the Employment and Labour Relations Court (Procedure)
 - (ix) THAT the respondent is ready and willing to deposit the entire decretal sum plus costs in court or in a joint interest earning account in the names of the Advocates on record pending the hearing of the appeal.
 - (x) THAT the respondent has acted without undue delay since learning of the decision dismissing the motion for review.
 - (xi) THAT the respondent also challenges the executing proceedings in this matter and entitlement to charge auctioneers upon the

respondent for the reasons:

(a) The Claimant never filed a written application for execution as required by the provisions of Order 22 rule 7 of the Civil Procedure Rules 2010.

(b) The execution is premature and irregular as the judgement in this matter is more than one year old having been delivered on 29th June, 2018 thus the Claimant ought to have commenced execution by way of notice to show cause as provided for in Order 22 rule 18 of the Civil Procedure Rules 2010.

(xii) THAT in view of the irregularity in the execution proceedings and the need to avoid the appeal being rendered nugatory the respondent prays that the application be allowed in the first instance under certificate of urgency and thereafter pending the hearing and determination of the appeal.

5. In support of the application Mr. Kisuya for the respondent submitted among others that the Claimant never filed a written application for execution as required by the provisions of Order 22 rule 7 of the Civil Procedure Rules, 2010. The execution was therefore premature and irregular since the judgement in the matter was delivered more than one year back on 29th June, 2018. The Claimant ought to have commenced execution by way of Notice to Show cause under Order 22 rule 18(1) of the Civil Procedure Rules. On this point Counsel relied on the case of *Securex Agencies Kenya Ltd. Vrs. Otieno Wambedha* (2019) eKLR and *Grand Creek LLC and Another V Nathan Chesangmoson* (2015) elkR. Where it was held that in all cases where Order 22 rule 18(1) of the Civil Procedure Rules applies a Notice must be served upon the person against whom execution is applied requiring him to show cause on a date to be fixed why the decree should not be executed against him.

6. On the issue of injunction, Counsel submitted that the jurisdiction of the Court was guided by Order 42 rule 6 of the Civil Procedure Rules. On substantial loss, the test in a money decree was that the decree-holder in the event the decree is reversed would be unable to refund the decretal sum. The respondent had raised reasonable apprehension that the Claimant would be unable to refund the money if it is paid as the appeal progresses. The onus was therefore placed on the Claimant to show he would be able to refund the money. The Claimant annexed nothing in the affidavit to show his means. In support of the contention, Counsel relied on the case of *National Industrial Credit Bank Ltd. V. Aquinas Francis Wasike and Another* (2006) eKLR.

7. On sufficient cause, Counsel submitted that matters taken up in the intended appeal raised genuine matters for consideration by the Appellate Court where the stay is sought. They were on whether the *vide* settled jurisdiction to review its orders and judgments as conferred by section 16 of ELRC Act as read with rule 33 of ELRC Rules can be fettered or outed by the act of the parties entering into a consent agreement on party and party costs.

8. On the question of unreasonable delay Counsel submitted immediately upon proclamation, the respondent enquired from its erstwhile advocates namely *Okong'o Wandago & Company* about the status of the matter and was informed that the Motion for review had been dismissed with costs. The respondent was not aware of the decision taken on its application until the proclamation arose. The respondent had acted without undue delay since learning of the decision dismissing the Motion for review and hence prayer that the Court should not visit the mistakes of its advocates upon it.

9. In conclusion Mr. Kisuya submitted that the respondent was ready and willing to deposit the entire decretal sum plus costs in Court or in a joint interest earning account in the names of the advocates on record pending the hearing of the Appeal.

10. Kagunza for the Claimant on the other hand submitted that the respondent was guilty of material non- disclosure in that the respondent omitted to disclose to the court that there was a consent on the costs of the claim dated 24th October, 2019 recorded between the applicants' previous advocates on record and the Claimant's advocate which consent had not been disputed, a clear indication that the applicant was satisfied with the judgment herein. Counsel further submitted that the respondent filed a similar application dated 28th November 2019, through *Ken Omido & Company Advocates* to set aside the judgement which application was dismissed with costs on 28th January, 2020. Mr. Kagunza submitted that the applicant had not come to Court with clean hands since it had perfected the art of changing advocates for purposes of filing numerous applications of similar nature and shifting the blame to frustrate the Claimant.

11. Counsel further submitted that setting aside of judgement is a matter of declaration of the Court and like all discretionary powers, a party seeking to benefit from that discretion must come to Court with clean hands, must move the court diligently and must be ready and willing to abide by the preconditions the Court may impose.

12. Mr. Kagunza further submitted that where there is a regular judgement as was the case here the Court will not usually set the same aside unless it is satisfied that there is a defense on merits. Further, the judgement was entered on 29th June, 2018 hence the proposed setting aside of the judgement was in bad faith and calculated at sabotaging and delaying lawful execution process.

13. Regarding contention by the respondent that they were not aware that the application for review had been dismissed, Mr. Kagunza submitted that this was a lame excuse. There was no evidence by the applicant/respondent of the action taken as a litigant to follow up on the matter and it was not enough to blame its former advocate for all manner of transgressions. To this extent Counsel relied on the case of *Rajesh Rughani V Fifty investment and Another* (2016) eKLR.

14. The Motion before the Court sought stay execution of the judgement of the Court pending appeals against the ruling of the Court delivered on 6th November, 2020.

15. The ruling of 6th November, 2020 sought to be appealed against was delivered in respect of an application dated 21st December, 2019 which sought orders among others that there be a stay of execution of the judgement of the Court passed against the respondent on 29th June, 2018.

16. The Court was not persuaded about the bona fides and merit of the said application and declined to grant the same for reasons elaborately stated in that ruling.

17. The application dated 21st December, 2019 which the Court heard and rendered its ruling on 6th November, 2020 raised no issue at all about the consent dated 24th October, 2019 upon which Counsel for the parties then, agreed that party and party costs be assessed at Kshs. 130,000/=. The issue whether the Court's discretion to review or set aside can be ousted by consent of the parties before the Court was never canvassed before the Court in the application dated 21st December, 2019 and in respect of which the Court rendered its ruling on 6th November, 2020.

18. The Court merely referred to the said consent while wondering why the firm of Okongo and Wandago should bring the application dated 21st December, 2019 seeking to set aside the judgement delivered by Mbaru J on 29th June, 2018 yet they had consented to party and party costs on 24th October, 2019.

19. Counsel for the respondent however now submits that the questions whether the Court's power to review or set aside a judgement can be ousted by consent of the parties is an important matter and has become an arguable subject on appeal. That may be so but where a matter was never the subject of the application before the Court, was never canvassed for the court to render its judgement or opinion thereon, can the same be a ground of appeal? I think not.

20. This matter has had a rocky history since Mbaru J delivered her judgement over the same on 29th June, 2018. The Court cannot help seeing various attempts by the respondent to postpone or frustrate the execution of the decree of the Court. The Court cannot be a party such a process.

21. This application lacks merit and is hereby dismissed with costs.

22. It is so ordered

DATED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021

DELIVERED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021

GIVEN under my hand and Seal of this Court on 2021-10-03 12:13:13

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-10-03 12:13:13