



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CIVIL APPEAL NO E065 OF 2020**

**AFRICA APPARELS EPZ LIMITED.....APPLICANT**

**VERSUS**

**JULIUS MUTUNGA MUINDI.....RESPONDENT**

*(An application for stay of execution pending the hearing and determination of an appeal from the Ruling of Hon. Obura in CMEL. No. 64 of 2018 delivered on 27<sup>th</sup> August 2020)*

**RULING**

1. The subject of this ruling is the Notice of Motion dated 19<sup>th</sup> October 2020 and filed in court on 21<sup>st</sup> October 2020, by which the Applicant seeks the following orders:

- a) An order setting aside the Warrants of Attachment issued by the lower court on 9<sup>th</sup> October 2020 pending the hearing and determination of this application and the appeal;
- b) A temporary injunction restraining the Respondent, his servants and/or agents from proclaiming, attaching and/or interfering with the Applicant's assets whatsoever pending the hearing and determination of this application and the appeal;
- c) An order setting aside the judgment delivered on 3<sup>rd</sup> August 2019 and the decree issued on 18<sup>th</sup> November 2019 pending the hearing and determination of this application and the appeal.

2. The Motion is supported by an affidavit sworn by the Applicant's Counsel, Ateko Ingati and is based on the following grounds:

- a) On 5<sup>th</sup> December 2019, the Respondent, through his Advocates, Waweru Maina and Company Advocates, served the Applicant with a decree emanating from a default judgment;
- b) The Applicant, on 17<sup>th</sup> December 2019, filed an application to set aside the judgment and on 9<sup>th</sup> April 2020, the lower court dismissed the Applicant's application;
- c) The Applicant, on 22<sup>nd</sup> April 2020, emailed the Court its Notice of Appeal against the ruling delivered on 9<sup>th</sup> April 2020, for assessment;
- d) On 4<sup>th</sup> June 2020, the Applicant filed another application, which was dismissed by the lower court on 27<sup>th</sup> August 2020;
- e) On 8<sup>th</sup> September 2020, the Applicant filed its Notice of Appeal against the ruling of 27<sup>th</sup> August 2020;
- f) On 10<sup>th</sup> October 2020, the Respondent's Auctioneers affixed Warrants of Attachment and a Proclamation Notice at the Applicant's gate. The Applicant is apprehensive that the Respondent will attach and sell its property;
- g) The Applicant will suffer prejudice if the Warrants of Attachment are not set aside to allow this Court make a determination on the appeal;
- h) No prejudice will befall the Respondent if the Warrants of Attachment are set aside and execution of the default judgment is stayed;

i) The present application has been presented without inordinate delay and the Applicant is willing to offer security within reasonable time as may be ordered by the Court;

j) The Applicant has an arguable appeal;

k) If execution of the default judgment delivered by the lower court is not stayed, it will render the intended appeal nugatory and academic.

3. The Respondent's response is by way of his own affidavit sworn on 30<sup>th</sup> October 2020.

4. The Respondent terms the present application as an afterthought calculated to deny him the fruits of a proper and regular judgment.

5. The Respondent depones that the suit giving rise to the application is *Milimani CMEL No 64 of 2018* wherein he was the Claimant and the Applicant was the Respondent.

6. He further depones that the Applicant did not respond to his claim which was filed on 10<sup>th</sup> August 2018. The matter therefore proceeded by way of formal proof on 15<sup>th</sup> July 2018 and an *ex parte* judgment was entered in his favour on 20<sup>th</sup> September 2019.

7. The Respondent adds that the said judgment has never been set aside nor appealed against by the Appellant.

8. The Respondent states that on 17<sup>th</sup> December 2019, the Applicant filed a first application to set aside the *ex parte* judgment dated 20<sup>th</sup> September 2019 on the ground that the Applicant was not served with the Summons.

9. The application was dismissed by the trial Magistrate by a ruling dated 9<sup>th</sup> April 2020. According to the Respondent, this ruling has never been appealed against by the Applicant.

10. On 4<sup>th</sup> June 2020, the Applicant made a second application for stay of the ruling dated 9<sup>th</sup> April 2020. This application was dismissed by the trial Magistrate by a ruling dated 27<sup>th</sup> August 2020.

11. The Respondent states that no Memorandum of Appeal has been served on his Advocates on record.

12. The Respondent counters the Applicant's averment that the Auctioneers affixed Warrants of Attachment and Proclamation Notice at the Applicant's gate on 10<sup>th</sup> October 2020 which fell on a public holiday. The Respondent points out that the Applicant's own annexure AII-5 shows that the Proclamation Notice was served upon the Applicant on 14<sup>th</sup> October 2020.

13. The Respondent goes on to state that the Warrants of Attachment issued by the lower court relate to the judgment dated 20<sup>th</sup> September 2019, which was never appealed or set aside, while the Applicant's intended appeal relates to the ruling dated 27<sup>th</sup> August 2020.

14. Rule 8 of the Employment and Labour Relations Court (Procedure) Rules provides the following with regard to appeals before this Court:

## **8. Appeals**

***(1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.***

***(2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.***

***(3) A memorandum of appeal shall be in Form 1 set out in the First Schedule with necessary modifications.***

***(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.***

***Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.***

15. On the face of the Applicant's application, it is evident that the subject of the intended appeal is the ruling delivered by the trial Magistrate on 27<sup>th</sup> August 2020.

16. There is no appeal against this ruling on record and there is no prayer for extension of time within which to file the appeal. The effect is that the present application which is premised on the intended appeal is incompetent.

17. That being the case, there is nothing more to do except to strike out the said application with costs to the Respondent.

18. It is so ordered.

**DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Ingati for the Applicant

Mr. Maina for the Respondent