



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1679 OF 2015

ZABLON KARIUKI KAHURA.....CLAIMANT

VERSUS

RAGOS TRADING COMPANY LIMITEDRESPONDENT

RULING

The respondent, Ragos Trading Company Limited filed application dated 13th January, 2021 and seeking for orders that;

1) ...

2) ...

3) *This court be pleased to stay execution of the judgement and decree herein on 4th March, 2019 and all consequential orders and attachment of the goods proclaimed on 16th December, 2020 pending the hearing and determination of this application.*

4) *This court be pleased to review and set aside;*

a) *The order made herein closing the applicant's case prematurely on 17th January, 2019.*

b) *The judgement and decree given herein on 4th March, 2019.*

c) *The Warrants of Attachment given to Mbusera Auctioneers on 16th December, 2020 and or any subsequent re-issue of warrants of attachment.*

d) *The taxation and certificate of costs given herein on 3rd December 2020 be set aside.*

5) *Upon the grant of prayers (4) the applicant be granted leave to:*

a) *File and serve a supplementary witness statement and list of documents.*

b) *Call evidence which regard to the said statement and documents to be filed thereto.*

c) *File written submissions.*

d) *Be served and participate in taxation of any bill of costs if any.*

6) *The applicant supplementary witness statement and list and copies of documents exhibited hereto be deemed as duly filed and served upon payment of the requisite court fees.*

7) *Costs of the application be in the cause.*

The application is supported by the affidavit of Mohamed Isack Abdi the managing director and on the grounds that on 4th March, 2019 the court entered judgement against the respondent for the sum of Ksh.308, 000 plus costs and interests and seeks to have the judgement and orders therefrom set aside and be granted leave to tender evident which was not provided by the respondent. Defence was closed before the respondent could be heard.

Mr Abdi also avers in his affidavit that the respondent is keen to participate in these proceedings and seek to be given a hearing. There is an error on the face of the record and where execution is allowed to proceed there will be injustice visited against the respondent. The respondent is willing to deposit security for the due performance for stay of execution.

In reply, the claimant filed the Replying Affidavit of Upendo Ignacious Allan advocate and who avers that the claimant filed suit herein following unfair termination of his employment after he had sent demand to the respondent which was ignored. Summons were served on and on 2nd March, 2016 the respondent entered appearance and filed response and the case was fixed for hearing on 2nd October, 2018 when the matter proceeded for hearing and the respondent requested to call one witness and which was granted and hearing fixed for 17th January, 2019 but the respondent failed to attend leaving the court with no option but to close the hearing and reserved the matter for judgement.

Upendo also avers that the judgement herein was not *ex-parte* as alleged as the respondent was given a chance for a hearing. The judgement is valid and the process of execution is lawful and the application by the respondent is without merit and in abuse of court process and should be dismissed.

Parties filed written submissions which have been put into account and the issues which emerge for determination are whether the court should allow stay of execution; whether there should be a review herein and whether the court should give leave to the respondent to file supplementary documents.

For an applicant to obtain a stay of execution of the orders of the court, a judgement or decree, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss that the application will be denied a right to be heard. There must be empirical or documentary evidence to support such contention.

It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.

Judgement herein was entered on 4th March, 2019 after both parties were given a hearing and an adjournment was allowed on 2nd October, 2018 for the respondent to call another witness on 17th January, 2019.

On the records, despite the respondent being present in court and allowed adjournment, on the due date there was no attendance and the court closed the hearing. There is no explanation by the respondent as to why the respondent failed to attend on the scheduled hearing date. Mr Abdi in his Supporting Affidavit does not address such matter at all.

Fundamentally, an applicant seeking stay of execution must act with diligence, haste and ensure such application is filed without delay.

Judgement herein was delivered on 4th March, 2019 and the instant application is filed on 13th January, 2021 a period of over one year later.

Whereas the respondent and Mr Abid testified for the respondent on 2nd October, 2018 and directed to bring a second witness on 17th January, 2019 there is no explanation as to what the respondent did to secure its rights. The period from 2nd October, 2018 to 12th January, 2021 is not accounted for.

Order 42 rule 6 (2) of the Civil Procedure Rules directs that;

(2) No order for stay of execution shall be made under sub rule (1) unless

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

This threshold is not met. See **Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR** and the case of **Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR**.

The offer to deposit security is not sufficient for the grant of stay of execution. Such is only meant to secure the rights once confirmed that there is good cause and matter to justify stay of execution which is not done in this case.

Even where the court is called to exercise discretion to allow for stay of execution, the court having indulged the respondent with an adjournment to bring a second witness and they failed to attend court, the subsequent closing of the hearing was regular and procedural. There exists no good cause for the court to set aside the judgement herein.

With regard to review of the court orders and to allow the respondent to file supplementary records and documents, on the findings above, the judgement of the court being valid and regular, a review of the judgement or any matter herein is overtaken. Even where a review were to be applied, an applicant must meet the threshold of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. No effort is made at all to meet the conditions therefrom.

The application dated 13th January, 2021 is without any merit and is dismissed in its entirety. Costs to the claimant.

DELIVERED IN COURT AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

M. MBAR?

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: OKODOI

..... AND