



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1237 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 10th February, 2020)

DAVID ITHAU WAMBUA.....CLAIMANT

VERSUS

LIBERTY KENYA HOLDINGS LIMITED.....RESPONDENT

RULING

1. Pending before me for determination is the Notice of Motion Application dated 6th September, 2019. The same is brought under Certificate of Urgency under the Judicature Act, Sections 3A, 63 (c) and (e) of the Civil Procedure Act, The High Court (Practice and Procedure Rules (Part 1 Rule 3), Sections 3, 12 and 13 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relation Court (Procedure) Rules, 2016 seeking Orders that:-

- 1. This Honourable Court be pleased to certify this matter as urgent and admit the same for hearing during the Court's Vacation (Spent).*
- 2. This Application be certified urgent and heard ex-parte in the first instance. (Spent).*
- 3. An Order to partly review, vary and/or set aside the Judgment and decree of this Honourable Court made on 30th April, 2019 directing the Respondent herein to release the log book in respect of the Claimant's Motor Vehicle.*
- 4. The said Order be substituted with directions that the parties do resolve the dispute on the car loan amicably or through Court proceedings.*
- 5. The Court makes such further and/or alternative orders as necessary to meet the ends of justice.*
- 6. Costs of this Application be provided for.*

2. The Application which is premised on the grounds that:-

a) The Order issued against the Respondent for release of the logbook to the Claimant's motor vehicle is incapable of performance for the reason that:-

- i. Pursuant to a loan application dated 5th July, 2013 the Claimant was advanced a facility of Kshs. 1,350,000 by Liberty Life Assurance Kenya Limited.*
- ii. The said facility was for the purchase of a motor vehicle registration number KBV 836J which was registered in the joint names of the Claimant and Liberty Life Assurance Kenya Limited.*
- iii. The amount advanced was payable within 36 months at a monthly instalment of Kshs 48,960.70 that was to be deducted from the Claimant's salary with the Respondent herein.*
- iv. The Claimant subsequently left the Respondent's employment on or about 31st May, 2015 and the amount unpaid at the time was Kshs. 564,093.61. The Claimant duly acknowledged the debt and promised to pay but failed to honour his*

promise.

v. The Claimant failed to clear the outstanding facility with Liberty Life Assurance Kenya Limited despite being paid his terminal dues amounting to Kshs. 1,566,574.18 and Further following entry of judgment in this matter he (the Claimant) was awarded the sum of Kshs. 3,810,240, which amount was also settled by the Respondent.

vi. The respondent and Liberty Life Assurance Kenya Limited are separate and distinct legal entities with the latter being a subsidiary wholly owned by the Respondent herein.

b) The Applicant seeks to have the latter part of the Judgment reviewed as it does not hold the said logbook. It further contends that the logbook is the property of Liberty Life Assurance Kenya Limited, which holds a valid Claim against the Claimant herein.

c) The Applicant contends that the issue of the loan could not be canvassed at the hearing of this matter Liberty Life Assurance Kenya Limited having not been a party hereto.

d) The balance due to Liberty Life Assurance Kenya Limited as at 1st August, 2019 is Kshs. 1, 056, 789.43 which amount Liberty Life Assurance Kenya Limited is claiming from the Claimant herein. The Applicant avers that the amount continues to accrue interest until payment thereof.

e) The Applicant is apprehensive that the Claimant would cite its officials for contempt of Court yet he is the one who has failed to settle the outstanding loan on the Motor Vehicle Registration Number KBV 836J.

f) Liberty Life Assurance Kenya Limited has filed suit or intends to recover monies owing to it as an ordinary debt. The Applicant contended that it is in the interest of justice and fairness that the instant Application be allowed as prayed.

3. The Application further supported by the Affidavit of **JACKSON MBUTHIA** sworn on 6th September, 2019, in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the Claimant filed a Replying Affidavit deposed by **DAVID ITHAU WAMBUI** on 23rd September, 2019, in which it is contended that the instant Application is intended to avoid the release of his logbook as Ordered by this Honourable Court vide its Judgment dated 30/4/2019.

5. He contended that on 29/6/2016 the Respondent sent its agents to repossess the Motor Vehicle Registration Number KBV 836J on the Claim that he had failed, refused or neglected to make repayments on the loan issued.

6. The Claimant averred that as a result he filed a Notice of Motion Application seeking for orders inter alia restraining the Respondent either directly or through its agents from harassing, intimidating or communicating to the Claimant in its efforts to repossess the said Motor Vehicle.

7. He further contended that the Application was heard and Ruling delivered in his favour, where the Court ordered the release of the Motor Vehicle KBV 836J.

8. The Claimant further averred that the main Claim was successfully prosecuted and Judgment entered in his favour on 30/4/2019 and that the Respondent subsequently filed an Application for stay of execution and a notice of appeal, which it subsequently withdrew.

9. It is further contended that the Respondent has since paid the decretal amount but failed to release the logbook despite several demands and reminders made by the Claimant's Advocates.

10. The Claimant states that the Applicant does not have a case to warrant the grant of the Orders sought herein. He further insists that the matter is res judicata, the issue of the logbook and payment having been heard and determined in the main claim.

11. The Claimant contended that the instant Application is an abuse to the Court process, is unmerited, frivolous, vexatious and is only meant to frustrate his efforts of realizing the fruits of his Judgment.

12. He therefore urged this Honourable Court to dismiss the same in its entirety with costs to the Claimant.

13. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

Respondent/Applicant's Submissions

14. The Respondent/Applicant submitted that the instant Application is properly before this Court as the issue of the outstanding loan was not subject to the main suit and no evidence was led on the issue. It is for this reason that the Respondent contended that the order directing the Respondent to release the logbook was made in error and urged this Honourable Court to allow its Application filed herein.

15. The Applicant further submitted that the doctrine of res-judicata could not apply to this matter since the loan was issued by a different

entity and not the Respondent and further the same issue was not raised in the main Claim. For emphasis the Applicant cited the case of **The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (2017) eKLR.**

16. The Applicant further submitted that the doctrine of estoppel similarly does not apply in the circumstances of this case as it did not succeed with the issue of the ownership of the Motor Vehicle KBV 836J and the car loan as it lacked *locus standi* to the claim. To buttress this argument the Applicant cited and relied on the case of **Triton Gas Station Limited & Another Vs Kenya Commercial Bank Limited & 2 Others (2015) eKLR.**

17. The Applicant further contended that the fact that it had withdrawn its notice of Appeal filed on 6th May, 2019 is not a bar to seeking for the review of the Court's Judgment.

18. The Applicant stated that it could not direct deduction of the loan facility from the Claimant's terminal dues or the Court Order without his consent by dint of Section 19 of the Employment Act, 2007.

19. The Applicant further submitted that it has met the threshold for grant of the orders sought in their instant Application and urged this Honourable Court to allow the same as prayed.

Claimant's Submissions

20. The Claimant on the other hand submitted that the Respondent/Applicant has not met the threshold for grant of the orders sought in its Application herein as provided under Rule 33(1) of the Employment Act, 2007. To fortify this argument the Claimant cited and relied on the Court findings in the cases of **Abasi Belinda Vs Frederick Kangwamu and Another (1963) E.A 557** and **Pancras T. Swai Vs Kenya Breweries Limited (2014) eKLR.**

21. The Claimant further submitted that the instant Application violates the doctrine of *res judicata* as provided for under Section 7 of the Civil Procedure Act, as the issues raised herein have been handled during the hearing of the main Claim and Judgment delivered on 30/4/2019. For emphasis the Claimant cited the Authority of **John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport & Infrastructure & 3 Others (2015) eKLR.**

22. The Claimant stated further that the Respondent is guilty of forum shopping as it filed a case in the Chief Magistrates' Court being Liberty **Life Insurance Assurance Kenya Limited Vs David Ithau Wambua CMCC No. 550 of 2019** which was dismissed on the grounds that it was both *res judicata* and *sub judice*.

23. It is further the Claimant's assertion that the Respondent further filed an Appeal in the **High Court being Civil Appeal 660 of 2013** on the same issues as raised in the instant Application.

24. The Claimant urged this Honourable Court to be guided by the decision in the Case **of Charles Mwangi Ringuru Vs Nancy Wangaru Mathenge (2014) eKLR** and find that the Applicant's acts amount to an abuse to the Court process and proceed to dismiss the instant Application with costs.

25. In conclusion, the Claimant urged this Honourable Court to dismiss the instant Application with costs to the Claimant.

26. I have examined the averments of both Parties. The Applicant/Respondent's contention is that the order of this Court directing them to release the log book of motor vehicle KBV 836J be reviewed as they are not capable of releasing the said log book it being in the hands of a 3rd party.

27. They therefore submit that this order was made in error and seek review of the same. I note that the reason why I ordered release of the motor vehicle log book was canvassed before this Court and a ruling read accordingly.

28. The Claimant established that he had paid off the loan and that the Respondent had kept harassing him wanting to repossess the motor vehicle in question.

29. For me to sit again and make orders contrary to the orders already made would be tantamount to sitting on appeal on my own orders. I find no merit in this application and I dismiss it accordingly with costs.

Dated and delivered in open Court this **10th day of February, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Wakiaga holding brief Wambola for Claimant/Respondent

No appearance for Applicant