



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 28 OF 2020

[FORMERLY MOMBASA HIGH COURT CIVIL APPEAL NO 103 OF 2020]

MAGOT FREIGHT SERVICES LIMITED.....1ST APPELLANT

MAUREEN TERESA OKACH.....2ND APPELLANT

VS

SAMSON MWAKENDA MANGALE.....RESPONDENT

RULING

1. This appeal was originally filed in the High Court at Mombasa as *Civil Appeal No 103 of 2020*.
2. By an *ex tempore* ruling delivered on 25th September 2020, the High Court (**P.J.O Otieno J**) declined to assume jurisdiction, on the ground that the suit giving rise to the appeal was on employment and labour relations. The appeal was therefore transferred to this Court for hearing and determination.
3. What is before me now is the Appellants' Notice of Motion dated 25th November 2020 and filed in court on 26th November 2020, seeking the following orders:
 - a) That the warrants of attachment of moveable property in execution of a decree for money issued on 24th July 2020 be set aside upon such terms and conditions that the Court would find just and reasonable;
 - b) That the Court be pleased to order stay of execution of decree for costs passed on 18th June 2020 and all consequential orders pending the hearing and determination of the appeal.
4. The application is supported by an affidavit sworn by the 1st Appellant's Director, Michael Okatch Omondi and is based on the following grounds:
 - a) That the Respondent proclaimed the Appellants' goods on 30th July 2020 and their removal will grossly interfere with and affect the Appellants' business and cause them irreparable loss and damage;
 - b) That the Appellants filed an application for stay on 30th August 2020;
 - c) That the lower court delivered its ruling on 22nd October 2020, in the absence of the parties;
 - d) That the Appellants' Advocate on record at the time did not inform the Appellants about the ruling until 11th November 2020;
 - e) That at the time the Appellants' Advocate informed the Appellants about the ruling, 21 days set for the deposit of the decretal sum in a joint account of the Advocates had expired and subsequently the orders of stay were deemed vacated;
 - f) That failure to comply with the terms and conditions of the stay was not the Appellants' mistake but the mistake of their Advocate;
 - g) That the Respondent had, prior to the filing of the lower court matter being *CMCC No 1730 of 2020: Samson Mwakenda Mangale v Magot Freight Services Ltd & Maureen Teresa Okatch*, filed a matter in the Magistrates' Court for a claim of wrongful dismissal being *CMCC No 200 of 2018: Samson Mwakenda Mangale & Barrack Opondo Odhiambo v Magot Freight Services*

Ltd which was dismissed by the court on the ground that there was no employer/employee relationship;

h) That no prejudice will be caused and/or suffered by the Respondent, if the orders sought are granted, which cannot be compensated in costs.

5. The Respondent's response to the application is contained in a replying affidavit sworn by his Counsel, Clemence Masinde on 2nd December 2020.

6. Counsel states that the Appellants' application is a waste of judicial time as the Appellants have filed two appeals being ***High Court Appeal No 103 of 2020: Magot Freight Services Limited & another v Samson Mwakenda Mangale*** and ***ELRC Appeal No 28 of 2020: Magot Freight Services Limited & another v Samson Mwakenda Mangale***

7. Counsel further states that the Appellants filed Notice of Motion dated 3rd August 2020, which was heard and a ruling delivered on 23rd October 2020 where the Appellants were directed to deposit the entire decretal sum in an interest earning account held jointly by the Appellants' former Advocates and the Respondent's Advocates.

8. Counsel depones that upon the Advocates filling in the joint account opening forms, the Appellants declined to release the funds as directed by the Court.

9. The Respondent's Counsel holds the view that the Appellants' application does not raise any triable issues as the Appellants are seeking orders for stay of execution, despite having filed a similar application on 3rd August 2020 upon which orders were issued.

10. Regarding ***CMCC No 1730 of 2020: Samson Mwakenda Mangale v Magot Freight Services Ltd & Maureen Teresa Okatch*** and ***CMCC No 200 of 2018: Samson Mwakenda Mangale & Barrack Opondo Odhiambo v Magot Freight Services Ltd***, Counsel for the Respondent states that the Appellants are misleading the Court since the two cases involve different parties and causes of action.

11. The prayer sought by the Appellants in this application, being stay of execution pending appeal, was considered by the learned trial Magistrate, who gave a conditional stay of execution.

12. The condition attached by the learned Magistrate was that the Appellants would, within 21 days from the date of the ruling, deposit the entire decretal amount in an interest earning account to be opened in the joint names of the parties' Advocates.

13. The Appellants state that their Advocate then on record, did not inform them of the ruling by the Court and that the 21 days given had lapsed.

14. Order 42 Rule 6(1) of the Civil Procedure Rules allows an appellate court to consider an application for stay of execution even after consideration of a similar application by the trial court.

15. In my estimation, the terms for stay of execution granted by the trial court were fair and reasonable. However, since the conditions set by the trial court were not met, the order of stay thereby granted has lapsed.

16. As to the question whether the Appellants were made aware of the terms of stay of execution granted by the lower court, this Court will grant the Appellants the benefit of doubt.

17. And because the Appellants are now appearing in person, I direct that the entire decretal sum be deposited in Court within the next 21 days from the date of this ruling.

18. The Appellants will pay the costs of this application.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY DECEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Appellants in person

Miss Masinde for the Respondent