



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1427 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 30th April, 2019)

RITA MWENDE MUTUNE.....CLAIMANT

VERSUS

GIGI MOTORS LIMITED.....RESPONDENT

RULING

1. The Application before the Court is an application dated 21st December, 2018, brought under Rule 28 and 31 of Industrial Court (Procedure) Rules 2010, Order 43, Order 22 Rue 22 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act seeking for Orders:-

1. That this matter be certified as urgent and the same be heard ex parte in the 1st instance.

2. That this Honourable Court be pleased to grant leave to the firm of Ngugi Mwaniki & Company Advocates to come on record and represent the Appellant/Respondent in place of K.N. Mburu & Associates Advocates.

3. That this honourable Court be pleased to issue an Order of stay of execution of the judgment delivered on the 6th December 2018, pending the hearing and determination of this Application.

4. That this Honourable Court be pleased to stay the execution of the Judgment and decree herein pending the hearing and determination of the appeal.

5. That the costs of this application be provided for.

2. The Application is premised on the grounds:-

1. That the Applicant/Appellant has commenced the process of appeal.

2. That there is a risk that execution may commence which shall heavily.

3. That if execution is to proceed the appeal shall be rendered nugatory.

4. That the appellant is a person of straw who shall not be in a position to reimburse the judgment sum if the decision of the superior Court is overturned.

5. That the appellant is willing to give security for the satisfaction of the decretal sum herein.

6. That it is in the interest of justice that the orders sought be granted.

3. The Application is supported by the affidavit of Moses Githiri Gicho a director of the Applicant who avers that the Respondent has good grounds of appeal and they are apprehensive that pending the hearing of the appeal the Respondent shall commence execution, which shall be prejudicial to the Appellant.

4. It is also the Applicant's position that during the trial it come out clearly that the Respondent is someone without a stable income who cannot be in a position to reimburse the decretal sum in the event the appeal is successful. That the Applicant is ready and willing to abide

with the conditions on security that the Court may impose as a condition for stay pending appeal.

5. The Applicant also avers that they have come to Court without delay and undertake to proceed and endeavour to have the appeal set down for hearing expeditiously.

6. The Claimant/Respondent has opposed the application and filed a Replying Affidavit wherein he states that the application is an abuse of Court process as it has been made to frustrate him. Further that no Notice of Appeal has been served upon the Claimant proving that the Applicant has ill motives by not disclosing to the Claimant all the pleadings in its possession.

7. It is also the Claimant's contention that the Application does not meet the threshold for granting of the Orders sought. That the Claimant is a person of means capable of recouping and refunding the amount awarded by the Court should the appeal succeed.

8. It is also the Claimant's position that the Respondent shall not suffer any prejudice if the Orders sought are denied. She avers that the application is premature as no decree has been extracted and as such the Application should be dismissed.

Submissions

9. It is submitted on behalf of the Applicant that in the appeal they are contesting the whole judgment of the Court which appeal has great chances of success and if the orders sought, are not granted the appeal would be rendered nugatory.

10. That the Respondent has not satisfactorily demonstrated that if she was paid the decretal amount how she would be able to refund. That the share certificate produced is suspect for the reason it ought to have been issued by a company but the one on record is issued by one Lumen enterprises. Further that the value of the said land has not been disclosed which would have assisted the Court to satisfy itself that the property would sufficiently cover the decretal sum herein.

11. It is submitted that the Applicant has offered to provide security for the satisfaction of the decretal sum by way of bank guarantee or any other condition the Court may direct. They urge the Court to allow the application as drawn.

12. The Claimant/Respondent did not file submissions and opted to rely on her pleadings.

13. I have considered the application before me. I note that the application is irregularly before Court as Counsel filing the application Ngugi Mwaniki is not properly on record, judgement having been entered against the Respondent herein when Counsel on record was K.N. Mburu and Associates Advocates.

14. This Counsel was never served with this application nor was the Court moved to allow the intended Counsel to be given leave to come on record as provided for under Order 9 Rule 9 of the Civil Procedure Rules 2010 which provide as follows:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court:-

a) upon an application with notice to all the parties; or

b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

15. Indeed this provision is couched in mandatory terms and so there are no two ways about it. The Applicant's Counsel proceeded to file this application without seeking leave of the Court to come on record 1st and so this Court could not delve into the merits of the application as the firm of Ngugi Mwaniki & Company Advocates are not properly on record.

16. I now proceed to strike out this application for being incompetent with costs to the Claimant.

Dated and delivered in open Court this 30th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant – Present in person

Respondent – Absent