



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2181 OF 2014

TRAILINK GROUP LIMITED

CLAIMANT

v

KENYA LONG DISTANCE TRUCK DRIVERS

& ALLIED WORKERS UNION

RESPONDENT

RULING NO. 3

1. In a judgment delivered on 26 May 2017, Nduma J found, and held that the dismissal of some Grievants employed by the Claimant was unfair.
2. The Court ordered the Claimant to pay each of the Grievants the equivalent of 8 months wages as compensation (terminal benefits were also awarded among other orders).
3. The Claimant was directed to compute the compensation and serve the Respondent within 30 days. The Respondent was to confirm/reply to the computations within 14 days of service after which the Court was to approve the computations.
4. The Claimant was however dissatisfied with the judgment and on 5 June 2017 it filed a Notice of Appeal against the whole judgment.
5. On 9 June 2017, the Claimant moved Court seeking stay of execution of the judgment pending appeal, and in a ruling delivered on 24 November 2017, the Court ordered
 1. **THAT** an order for stay is issued in respect of the award of the equivalent of eight (8) months' salary to the grievants provided the judgment sum is deposited in an interest earning account in the joint names of the advocates for the parties within 14 days of this ruling, failing which the order for stay of execution will abate and execution to issue immediately.
 2.
6. On 14 December 2017, the Claimant again moved Court under certificate of urgency seeking
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 2. **THAT**, leave be and is hereby granted to the firm of M/s Wamwayi Advocates, to take over the conduct of this matter on behalf of the Claimant herein in place of Chigiti & Chigiti Advocates and the Notice of Change of Advocates annexed herein be deemed as duly filed and served upon the payment of requisite Court fees.

3. **THAT**, this Honourable Court be pleased to review, vary and/or set aside the ruling and orders of Hon. Justice Mathews Nderi Nduma delivered on 24/11/2017.

4. **THAT**, this Honourable Court be pleased to substitute order NO. (a) of the ruling delivered on 24/11/2017 with a deposit of bank guarantee pending the hearing and determination of this application and the intended appeal in the Court of Appeal.

5. **THAT**, this Honourable Court be pleased to set aside the execution of order NO. (b) of the ruling delivered on 24/11/2017 pending the outcome of an intended appeal in the Court of Appeal.

6.

7. When the motion was placed before Abuodha J on 14 December 2017, he declined to grant any of the orders sought and directed that the application be served for *inter partes* hearing.

8. The application next came up before Ndolo J on 19 December 2017 for *inter partes* hearing. After hearing from the counsels on record, the judge declined to grant any orders because the firm of Wamwayi & Co. Advocates had not secured the consent of Chigiti & Chigiti to come on record for the Claimant.

9. On 28 December 2017, Mbaru J allowed the firm of Wamwayi & Co. Advocates to come on record after it secured the consent of Chigiti & Chigiti Advocates.

10. The Respondent through its Secretary General Nicholas Mbugua filed a replying affidavit in opposition to the motion on 18 January 2018, and arguments were taken on 25 January 2018.

11. The Court has given due consideration to the material placed at its disposal by the parties including the oral addresses.

12. Among the key arguments presented by the Claimant in seeking the orders of review, setting aside and vacation of the ruling of 24 November 2017 are that it is facing financial difficulties, the Grievants who were awarded compensation and terminal benefits were no longer its employees, that the recognition agreement entered into with the Respondent was obtained under duress and had since been revoked by it, and that the interest of justice tilted in favour of allowing the application.

13. In opposing the application, the Respondent contended that since the Claimant had preferred an appeal, it was not open to the Claimant to seek review, that conditional stay pending appeal had been granted but the Claimant had not complied with the condition, that stay pending appeal is ordinarily granted on terms including provision of security, that this Court was *functus officio* and that the application was a delaying tactic.

14. It is not in dispute that the Claimant filed a Notice of Appeal on 5 June 2017. It is also not in dispute that the Claimant moved Court on 9 June 2017 seeking stay of execution pending appeal and that the stay was granted on condition.

15. The Claimant is also not disputing that it has not complied with the condition upon which the stay of execution was granted.

Financial difficulties

16. Although asserting that it was facing financial difficulties, the Claimant merely made a bare assertion without any evidential proof to back up that claim.

17. The Court cannot therefore accept that the Claimant is going through financial difficulties, and that is the cause of its failure to comply with the condition upon which the stay was granted.

Review and Appeal

18. What the Claimant is now seeking is a review of the conditions upon which the stay pending appeal was granted and the limb of the order which declined stay on the question of recognition agreement.

19. The question therefore begs whether it is open to the Claimant to pursue the two different processes (appeal to the Court of Appeal and review application before the Court whose decision was being appealed when conditional stay had been granted and condition not complied with).

20. In *Orero v Seko* (1984) KLR 238 the Court of Appeal held that the review remedy is only available to a party who is not appealing.

21. A similar position was reached in *Kisya v Attorney General* (1986) eKLR where the Court held that a party who has filed a Notice of Appeal cannot apply for review, but if the application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending.

22. It is apparent that the application for review/setting aside is a delaying tactic as suggested by the Respondent. For there is no explanation tendered why the Claimant has not complied with the order of the Court in the judgment that it was to compute the 8 months compensation due to the Grievants within 30 days of the judgment.

23. In the view of the Court, the Claimant in presenting and urging the present application was also tactically seeking to achieve what they failed to achieve when the stay of execution application was allowed on condition, which it does not intend to comply with. The Court cannot allow that.

24. The instant motion, it can be concluded is also an abuse of the Court process.

25. The Court in the event finds no merit in the application dated 13 December 2017 and orders that it be dismissed with costs to the Respondent.

Delivered, dated and signed in Nairobi on this 16th day of February 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Wamwayi instructed by Wamwayi & Co. Advocates

For Respondent Ms. Chepngeno instructed by F.N. Kimani & Associates

Court Assistant Lindsey