



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

AT NAIROBI

CAUSE NO.1184 OF 2010

CLAIRE NJERI MUNGAI.....CLAIMANT

VERSUS

LADY LORI KENYA LIMITED.....RESPONDENT

RULING

1. The ruling herein relates to three applications dated 29th and 27th November, 2017 both filed by the respondent, Lady Lori Kenya Limited. The first two applications relates to an earlier application by the respondent dated 27th April, 2017 seeking stay of execution of decree and judgment pending hearing and determination of the appeal.

2. The substantive orders therefore sought in the application dated 27th April, 2017 are;

*The firm of **Rajab & Mbogo Advocates** is granted leave to come on record on behalf of the applicants herein.*

The court do order a stay of execution of the judgement, decree and warrants of attachment herein pending the heading and determination of the defendant/applicants appeal.

The court be pleased to grant leave to the applicant to appeal out of time against the judgement by the court delivered on the 2nd September, 2016.

3. The application is supported by the affidavit of Adi Vinner, a Director of the respondent and on the grounds that the respondent and applicant herein intends to file an appeal against the judgment of the court. The claimant has proclaimed the respondent's movables pursuant to a decree dated 28th March, 2017 and warrants of attachment issued therefrom. The respondent shall incur great loss and damage if the execution is not stayed and the intended appeal shall be rendered nugatory.

4. In the application dated 27th November, 2017 the respondent is seeking for orders that;

Interim orders issued by the court on 27th April, 2017 of stay of execution and extended on 11th May, 2017 be reinstated to a date when the court will besitting or in the alternative on a date when the matter shall be mentioned to take a ruling date.

A mention date do issue to take a ruling date of the application dated 27th April, 2017.

5. The application is supported by the affidavit of Darius Mbogo, Advocate for the respondent and on the grounds that the respondent moved the court on 27th April, 2017 and obtained interim orders. Such orders were extended by the court on. On the subsequent allocated dates the court was not sitting and the next date was gazetted as a public holiday and as a result the respondent could not seek for the extension of interim orders. The claimant has moved to execute the issued warrants to the detriment of the respondent.

6. On the application dated 29th November, 2017 the respondent is seeking for orders that;

The Warrants of Attachment and the Proclamation thereto by the respondent/claimant and her agents Nairobi Connection Services Auctioneers be and is hereby stayed pending the hearing and determination of the Notice of Motion dated 27th November, 2017.

7. The application is supported by the affidavit of Darius Mbogo, Advocate for the respondent and on the grounds that the claimant has

proclaimed the respondent's movables and tools of trade which are due for attachment while there is pending an application seeking for the reinstatement of the interim orders pursuant to application dated 27th April, 2017.

8. In reply, the claimant filed her Replying Affidavit and on the grounds that the claimant served the respondent with the draft Bill of Costs on 13th September, 2016 and was due for confirmation in court on 4th May, 2016. The respondent had a duty to follow up the matter to know the status and that judgement had been delivered. The application made seven (7) months after judgement is made with inordinate delay and should not be allowed despite the change of advocates.

9. The claimant also avers that despite the respondent being served with a certificate of taxation and warrants of attachment in execution of the decree they failed to attend court. the claimant always made communication with the respondent in this matter vide letters dated 13th September, 2016; served bill of costs on 21st September, 2016; hearing notice and mention notices but failed to attend as directed. The claimant should therefore be allowed to enjoy the fruits of her judgement.

10. In the response, the respondent filed a Supplementary Affidavit sworn by Mohamed Munir Chaudhri and who avers that as the respondent has since changed advocates from Rajab & Mbogo Advocates to Chaundhri & Associates where he is a senior partner. The advocate in conduct of this matter previously Rajab Sumba left the law firm on 31st December, 2017 and due to oversight the file was not reallocated to another advocate. When the matter came up for judgement, counsel was not aware and were not notified of the same by the court or the claimant. The judgement only came to the attention of the respondent when they were served with letter dated 13th September, 2016 enclosing a Bill of Costs and not indicating judgement had been delivered. Due to internal oversights in the law firm and failure to allocate the file to another advocate, the matter was not attended to as required.

11. Both parties filed written submissions.

12. I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated. These have been put into account herein.

13. Change of advocates after judgement is a matter addressed under Order 9 of the Civil Procedure Act and the Rules thereto. Such change should be by consent between the advocate on record and the one proposed to come on record or by the leave of the court to allow such change. The averments made by Mr Chaudhri advocates for the respondent is that advocates in conduct of the matter Mr Rajab Sumba for the respondent left the law firm on 31st December, 2017. That the file was not allocated to another advocate due to internal oversights. See **Kazungu Ngari Yaa v Mistry Versus Naran Mulji & Co. [2014] eKLR.**

14. However, the Supplementary Affidavit by Mr Chaudhri is sworn on 20th June, 2017 sets out that Rajab Sumba left the law firm on 31st December, 2017 this was on a date way before such affidavit was commissioned, taken and filed. Even where this is a mistake, the clear provisions of Order 9 as set out above have not been adhered to. The requisite notices to the other party are not done and there is no effort to demonstrate compliance.

15. Order 9 rule 9 of the Civil Procedure Rules, 2010 provides that;

Where 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 (emphasis mine).

16. The matter should end here due to procedural lapses in change of advocates. However in the interests of justice and noting the three (3) applications now before court will be addressed on the merits. Such will meet the ends of justice.

17. Judgement herein was delivered on 2nd September, 2016 in the absence of the respondent. Pleadings and closed, evidence closed and parties directed to file written submissions on 7th April, 2016 and attend mention on 4th May, 2016 for allocation of a date for judgement. On the due date the respondent was absent and had not filed written submissions. Parties were directed to take new dates at the registry. The claimant attended on 2nd June, 2016 but the respondent remained absent. Mention was placed before the court on 6th June, 2016, on 27th July, 2016 and 28th July, 2017 and on all such occasions the respondent remained absent and failed to file written submissions.

18. As correctly admitted by advocate for the respondent, by letter dated 13th September, 2016 the respondent was notified that the Bill of Costs was due for taxation. No action was taken to secure the respondents interests until application dated 27th April, 2017. Well aware that a bill of costs is only due upon judgement and having received such letter that required the respondent to attend and failed to, nothing stopped the claimant from proceeding with execution in satisfaction of judgement delivered on 2nd September, 2016.

19. On good basis, upon moving the court on 27th April, 2017 the respondent as granted interim orders. Such orders were extended to 11th May, 2017. Matter was placed for mention on 21st June, 2017. Where the court was not sitting, it was the duty of the respondent to have the interim orders extended by the Duty Judge or attend as necessary to ensure such interim orders in their favour did not lapse. On this account, the claimant's representative was in court and caused the matter to be placed for mention on 19th September, 2017.

20. There was no action by the respondent to secure its interests until application dated 27th November, 2017. Such is a time of over five (5) months since the last attendance in court on 11th May, 2017.

21. In the case of **Aviation & Allied Workers Union versus Kenya Airways Limited, & 3 others [2013] eKLR** the court held that;

The granting of stay of execution pending appeal by the Court is granted at the discretion of the court when sufficient cause has been established by the Applicant that:

(a) Substantial loss may result to the Applicant unless the order is made;

(b) The application has been made without unreasonable delay and such security as the court orders for the due performance of the decree has been given by the Applicant.

22. Section 17 of the Employment and Labour Relations Court Act, 2011 give a right to any litigant before this court to lodge an appeal to the Court of Appeal. Therefore, any appeal against any orders of this court lie to the higher court which has its Rules and procedures in addressing appeal filed outside the required timelines. To move this court as the respondent has and seeking for extension of time to lodge an appeal where there is an express right set in statute as to where an appeal belong is to engage this court in matters beyond its jurisdiction. With regard to any appeals against the judgement of this court, this court stands *ex officio*.

23. Nothing the inordinate delays by the respondent since judgement was read on 2nd September, 2016 and by allowing interim orders granted on 27th April, 2017 to lapse and no action was taken for over five months, to reinstate such interim orders through whatever means would be to aid indolence and ovation injustice to the other party.

24. Interim orders are issued to enable the parties have occasion to be heard on the substantive issues. Interim orders are not an end in themselves. Where the respondent obtained such interim orders on 27th April, 2017, vigilance dictated that such be secured by having the main application heard and determined. When the interim orders lapsed, the claimant had the right to move and execute judgement in her favour. Such cannot be faulted by the inaction of the respondent. To reinstate the lapsed interim orders on the face of action taken by the claimant would be to visit grave injustice to her case.

Accordingly, applications dated 29th November, 2017; 27th November, 2017 and 27th April, 2017 have no merit and are hereby dismissed with costs to the claimant.

Read in open court at Nairobi this 20th day of April, 2018.

M MBARU JUDGE

In the presence of:

Court Assistant:.....

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