



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.211 OF 2015

(Before D. K. N. Marete)

PETER OCHOLA OMBURO.....CLAIMANT

VERSUS

INTER-DIOCESAN PROPERTIES LIMITED.....RESPONDENT

R U L I N G

This is an application by the claimant/applicant dated 26th April, 2018 seeking the following orders of court;

1. **THAT** this application be certified as urgent and be heard *ex-parte* and service be dispensed with at the first instance;
2. **THAT** this matter be placed before the Honorable Judge, Employment and Labour Relations Court with instantaneous immediately. (sic)
3. **THAT** pending hearing determination of this application, the Honorable Court be pleased to set aside and/or vacate the proceedings and orders of 23rd March, 2018 and all other subsequent orders made by the Honourable Deputy Registrar, Employment and Labour Relations Court that stayed the judgement and decree of the honorable court dated 15th November, 2017.
4. **THAT** pending hearing and determination of this application the Respondent to comply with the terms of the judgement of court dated 15th November, 2017 and the orders on costs dated 28th February, 2018 by depositing the entire amount in court and further that failure on the part of the respondent to comply by depositing the entire decretal sum and costs within a time frame to be set by the honorable court then execution to issue.
5. **THAT** costs of this application.

It is grounded as follows;

1. The Honourable Deputy Registrar, Employment and Labour Relations Court has since stayed the Judgement and Decree of the Honourable Judge, D.K. Njagi Marete given on the 15th November, 2017.(Copy of stay orders by the deputy registrar has been annexed to the accompanying application)

2. The judgement in this matter was entered on 15th November, 2017 and a decree issued on the same on 6th December, 2017.

3. Consequently and pursuant to Order number four (IV) of the judgment, the Honourable Deputy Registrar, Employment and Labour Relations Court (The Taxing Master) taxed the Bill of Cost dated 22nd November, 2017 and drawn by the firm of Mwakio, Kirwa & Co. Advocates and duly issued his ruling on the 28th February, 2018.

4. Subsequently the Respondent filed a notice of motion application under Certificate of urgency dated 23rd March, 2018 seeking for among others, stay of execution of the decree and judgement of this Honourable Court and which orders were granted by the Honorable Deputy Registrar.

5. The Honourable Deputy Registrar as a taxing master does not have the jurisdiction to issue any substantive orders during and even after judgement has been entered in an Employment and Labour Relations matter.

The respondent in opposition filed her Grounds of Opposition dated 2nd May, 2018 and a Replying Affidavit sworn 9th May, 2018. The latter was filed with leave of court granted on 3rd April, 2018. These Grounds of Opposition are as follows;

1. **THAT** the application is bad in law, misconceived, fatally defective and does not lie.

2. **THAT** the application is bad in law for seeking to overturn an order of the Deputy Registrar of this Court made as such Registrar but without following the right procedure.

3. **THAT** this Honourable Court has jurisdiction to interfere with the merits of a decision made by the Deputy Registrar only in exercise of its appellate or revisionary jurisdiction through a properly filed Judicial Review Application.

4. **THAT** the orders sought cannot be granted under the provisions of law cited on the face of the application as the said provisions do not confer jurisdiction on the court to interfere as requested by the Applicant.

5. **THAT** the Deputy Registrar of this Court has jurisdiction under the Rules of Procedure of this Court as well as under the Civil Procedure Act and Rules made thereunder to deal with an Application for leave to satisfy a decretal amount by way of installments and to issue orders incidental to such an application. Such was the application before the Deputy Registrar that is now sought to be impugned by this application.

6. **THAT** this application is further bad in law for seeking to pre-empt the outcome of a preliminary objection already raised by the applicant regarding jurisdiction and which is still pending adjudication by the Deputy Registrar.

7. **THAT** this application is for dismissing with costs to the Respondent.

This application was originated by way of a Certificate of Urgency. Prayers 1 and 2 of the application have therefore been dispensed with and therefore a case for prayers 3, 4 and 5.

The application came for hearing on 11th May, 2018 when the counsel for the claimant Mr. Kirwa submitted that the bone of contention is the stay of execution order made by the Deputy Registrar on 23rd March, 2018. This, he argues, is contrary to the provisions of section 12 of the Employment and Labour Relations Court Act, 2014 which confers jurisdiction on this subject only to this court.

The applicant further submitted that the functions of the Deputy Registrar are provided for under section 11 of the said Act and these are only administrative in nature. She cannot issue substantive orders on

matters relating to this court as this would be extra judicial. She also cannot vary any orders on matters relating to the court and an application seeking to stay orders of payment of decretal sum should be preserve of the judge not the Deputy Registrar.

The claimant further faults the Grounds of opposition sworn on 9th May, 2018 and dated 2nd May, 2018 respectively on grounds that the Grounds of opposition are defective for lack of compliance with rule 17(9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides that grounds of opposition must be verified by an affidavit.

The claimant/applicant further faults the respondent's case of the applicability of Order 47(7) and 16(9) of the Civil Procedure Rules. These refer to order 21(12) of the Civil Procedure Rules providing for payment of decretal sums by installments. He submits that this is not the subject matter of this application and should be ignored *in toto*. Again, Order 49 (1) is not applicable and in any event, all ways, its referral part, Order 22 (2) refer to the court as the court as opposed to the Deputy Registrar.

The claimant/applicant closes his submission by arguing that the role of the Deputy Registrar is administrative and any variations or the decree can only be made by a judge or an appellate court but not the Deputy Registrar. In any event, Order 49 (5) of the Civil Procedure Rule is explicit that the registrar under reference is that of the high court not this court. Here, the duties of the registrar are clear-cut and do not apply to the subject matter in issue herein. The registrar would be duty bound to refer all disputed issues to the judge but not deal with them.

Miss Bargwasi in opposition sought to rely on her Replying Affidavit and Grounds of Opposition aforesaid. It is her submission that this application is misconceived, unsustainable and devoid of merit and ought to be struck out. The Deputy Registrar has jurisdiction under the Employment and Labour Relations Act (Procedure) Rules and the Civil Procedure Rules to hear this application.

The respondent further submits that section 11 of the Employment and Labour Relations Act provided that the Deputy Registrar has powers to perform duties conferred by the Act, the Employment and Labour Relations Court (procedure) Rules and any other written law. The last limb, *any other written law* brings in and includes the Civil Procedure Act and rules thereof.

Section 13 of the Employment and Labour Relations Act provides that after judgement, awards and decrees shall be enforceable under rules made under the Act. Rule 32 (2) provides that rules of execution of an order or decree shall be enforceable through the Civil Procedure Rules. The application before the Deputy Registrar was under Order 22(12), (22) and (52) of the Civil Procedure Rules, 2010. Order 49 awards special powers to the Registrar to hear applications under Order 21 (2) and 22 with the exception of sub rules 28 and 75.

The respondent further submits that this application seeks to pre-empt a preliminary objection filed before the Deputy Registrar and further, there is an application the basis of this application before the Deputy Registrar. She further submits that this application is misguided for want of process in that on 23rd March, 2018, the Deputy Registrar only issued interim orders. The applicant should have a determination of the issues before the Deputy Registrar. The application is therefore premature and an abuse of the process of court and should be dismissed.

The orders and proceedings culminating in this application were issued by the Deputy Registrar on 23rd March, 2018 as follows;

1. *THAT this Application be and is hereby certified urgent and be heard exparte in the first instance.*
2. *THAT pending the hearing and determination of the Application interpartes, an order of stay of execution of the decree issued herein on 15th November 2017 be and is hereby issued.*
3. *THAT this Application be and is hereby fixed for inter-parties hearing on 5th day of April 2018.*

The parties did not cite any authorities in support of their respective cases. I however wish to bring in the authority of **Francis Kimutai Bii vs Kaisugu (Kenya Limited) [2016] eKLR** where this court elaborately expressed itself on the subject as follows;

The last but uncanvassed issue is whether the consent judgement as obtained in court is a valid judgement of court. This issue is not canvassed by the parties, or at all. Perhaps, this could be attributed to ignorance on the practice in the area of Employment and Labour Relations as set out by the constitution and statute. This also bears in mind that the inception of the Employment and Labour Relations Court in the Judiciary is a recent development and therefore the lapses in familiarity of law and practice.

It is not in dispute that this court is a creation of Article 162 (2) (a) of the Constitution of Kenya, 2010. Article 162 (3) empowers parliament to determine the jurisdiction and functions of this court. This is as follows;

Article 162 (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b)

Article 162 (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

In exercise of the mandate awarded by Article 162 (3) aforesaid, parliament has enacted the Industrial Court Act, 2011 whose preamble is as follows;

“An Act of Parliament to establish the Industrial court as a superior court of record; to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes.”

Section 5 (1) of the Act provides for the composition of the court as follows;

(1) The Court shall consist of-

(a) the Principal Judge; and

(b) such number of Judges as the President may, acting on the recommendations of the Judicial Service Commission, appoint

This essentially means that proceedings in this court shall be presided over by the Principal Judge or a judge of court as so appointed or elected or both. Section 29 of the Act further provides additional power to the Chief Justice to designate a judge in a county as a judge for the purposes of this Act. This also applies to the appointment of certain magistrates to preside over matters employment and labour relations in any area of the country.

Further, Section 9 of the Act further provides for the appointment of the Registrar of the Court as follows;

“(1) The Judicial Service Commission shall appoint the following officers of the Court-

(a) the Registrar;

(b) the Senior Deputy Registrar, one or more Deputy Registrars and one or

more Assistant Registrars, as the administration of justice requires; and

(c) Such other officers of the Court as may be necessary for the proper functioning of the Court.

(2) The officers of the Court shall perform the administrative functions of the Court under the supervision and control of the Registrar.

(3) The Senior Deputy Registrar, Deputy Registrar or Assistant Registrar of the Court may perform such other functions of the Registrar as the Registrar may delegate generally or specifically.

(4) The Senior Deputy Registrar, Deputy Registrar of the Court or if there is more than one, the most Senior Deputy Registrar shall act as Registrar of the Court whenever-

(a) the Registrar is for any reason, temporarily unable to perform the functions of the registrar; or

(b) the office of the Registrar is vacant.

(5) The Registrar may delegate his or her administrative function to any member of staff of the Court.”

It is notable that the tone of the provisions of the law, particularly at Section 9 (1) (a), (b) (c) and (d) clearly spells out that the function of the office of the registrar is only to undertake the administrative functions of the court. Indeed, this has been and still remains the practice in the Kenya judicial system. This is further enjoined by Section 11 of the Act as follows;

1. In relation to the proceedings before the Court, the Registrar shall act in accordance with the instructions of the Chief Registrar and shall, in particular, be responsible for—

(a) the establishment and maintenance of the Register;

(b) the acceptance, transmission, service and custody of documents in accordance with the Rules;

(c) the enforcement of decisions of the Court;

(d) certifying that any order, direction or decision is an order, direction or decision of the Court, the Chief Justice or a Judge, as the case may be;

(e) causing to be kept records of the proceedings and minutes of the meetings of the Court and such other records as the Court may direct; and

(f) undertaking any other duties assigned by the Court for the benefit of the Court.

(2) The Registrar, the Senior Deputy Registrars, the Deputy Registrars, the Assistant Registrars and other officers of the Court shall exercise such powers and perform such duties as may be conferred upon them by this Act, the rule of the Court or any other written law

The place and role of the Registrar and by inference all Deputy Registrars in this court is clearly provided

for by statute. As illustrated in the authority above cited this is open and clear-cut. The role of the Registrar is administrative and no more. This is the position submitted by the Claimant/Applicant and therefore the difficulty of the respondents in sustaining a plausible defence in the circumstances. This application is tenable through and through and must succeed.

I am therefore inclined to allow the application and order as follows;

- i. That the orders of Deputy Registrar made on 23rd March, 2018 and any other subsequent order so made staying the judgement and decree of this court dated 15th November, 2017 be and are hereby set aside.
- ii. The respondent be and is hereby ordered to comply with the terms of the judgement of court dated 15th November, 2017 and orders on costs dated 28th February, 2018 within fourteen (14) days of these orders of court.
- iii. The costs of this application shall be borne by the respondent.

Delivered, dated and signed this 18th day of May 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant/respondent.
2. Miss Bargwasi instructed by Olel, Onyango Ingutia & Company Advocates for the respondent/applicant.