



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1837 OF 2011

MINNIE MBUE..... CLAIMANT

- VERSUS -

JAMII BORA BANK LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 31st July, 2018)

RULING

The respondent has filed two applications through Wamae & Allen Advocates. The first application is dated 12.07.2018 and filed the same date praying for a temporary injunction restraining the claimant from executing of the decree dated 10.03.2017 and the certificate of taxation dated 26.06.2018 and the consequential orders thereto pending the hearing and determination of the application. The application seeks that the respondent be allowed to settle the decretal amount of Kshs.36, 890, 997.00 in ten equal monthly instalments of Kshs.3, 689, 099.70 beginning 18th July 2018 until settlement in full. The prayer is said to be without prejudice to the respondent pursuing the application dated 28.04.2017 in Civil Appeal (Application No.224 of 2014) seeking to recall, review and set aside the decision of the Court of Appeal delivered on 10.03.2017 or grant of leave to appeal to the Supreme Court. That application is under section 1A, 1B, and 3A of the Civil Procedure Act; Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016; Order 21 Rule 12, Order 40 Rules 1, 2, 3, 4, 10 and 11; Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

The grounds for that application include that the application for review before the Court of Appeal will be rendered nugatory if the temporary injunction staying the execution is not granted. At paragraph 10 of the supporting affidavit of Christine Wahome filed together with the application on 12.07.2018, it is stated that the respondent herein filed the notice of motion dated 14.11.2017 under certificate of urgency in the said Court of Appeal seeking stay of execution of the judgment dated 10.03.2017 and further orders for the application dated 28.04.2017 (seeking review or leave to appeal to the Supreme Court) to be heard on priority basis.

The second application filed on 19.07.2018 by the respondent under section 1A, 1B, and 3A of the Civil Procedure Act; Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016; section 28 of the Auctioneers Act 1997; Rule 55 of the Auctioneer's Rules 19197; Order 40 Rules 1, 2, 3, 4, 10 and 11; Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The application prays that pending the hearing and determination of the application, the Honourable Court should be pleased to grant a temporary order of injunction restraining the claimant or respondent from executing the judgment and decree dated 10.03.2017 and the proclamation by Charles Mwangi Kamande t/a Chaka & Co. Auctioneers dated 17th July 2018 and the consequential orders thereof. In alternative the application be consolidated with the earlier application dated 12.07.2018 that had been set down for hearing on 24.07.2018 and to be heard within the proclamation period. Other prayers in the application are directed at Charles Mwangi Kamande t/a Chaka & Co. Auctioneers.

The claimant has on 20.07.2018 filed two sets of preliminary objects through Sharpley Barret & Company Advocates and Mr. Oyatsi Advocate appeared at the hearing. The claimant urges that the applications are misconceived and incompetent as the Honourable Court has no jurisdiction to hear and determine the application on the following grounds:

- a) The applications seek to stay execution of the final order or decree of the Court of Appeal and the Honourable Court being a subordinate Court has no jurisdiction or mandate to stay a final decree or order of the Court of Appeal in Nairobi Civil Appeal No. 224 of 2014.
- b) The Honourable Court became *functus officio* in the present suit from the moment the Court of Appeal became seized of the above Appeal and delivered its judgment in the Appeal.
- c) The only jurisdiction or mandate of the Court in the case is to execute the said Court of Appeal order or decree.
- d) On the applicant's own admission, the applicant has filed a similar application in the Court of Appeal seeking the same orders of stay and the Honourable Court has no jurisdiction to usurp the powers and functions of the Court of Appeal to handle and determine.

The claimant prayed that the applications be dismissed with costs.

The Court has considered the material on record. The main ground for seeking a temporary injunction restraining the claimant from executing is in view of the application for review or leave to appeal to the Supreme Court against the judgment and decree by the Court of Appeal given on 10.03.2017. It is also not in dispute that the respondent herein has filed an application for stay of execution of the same judgment and decree before the Court of appeal. The Court finds that the applicant is seeking substantially similar remedies in the applications before this Court and before the Court of Appeal. Thus the Court returns that the two applications filed before this Court are an abuse of the process of the Court in so far as they seek a temporary injunction to stop execution of the decree because they are substantially similar to the application before the Court of Appeal seeking stay of execution pending the review or leave to appeal to the Supreme Court. On that ground alone the preliminary objections will be upheld and the applications dismissed with costs. The applicant is at liberty to prosecute the application filed on 19.07.2018 as against the 2nd respondent but prayers 2 and 3 therein are determined accordingly.

In conclusion the preliminary objections filed for the claimant and dated 20.07.2018 respectively are hereby upheld with orders as follows:

a) The applications filed for the respondent on 19.07.2018 and 12.07.2018 respectively are hereby dismissed with costs.

b) The applicant is at liberty to prosecute the application filed on 19.07.2018 as against the 2nd respondent but prayers 2 and 3 therein are determined accordingly.

Signed, dated and delivered in court at **Nairobi** this **Tuesday 31st July, 2018.**

BYRAM ONGAYA

JUDGE