



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 2274 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 9th July, 2018)

JOSHUA NYAGOL ONYANGO.....1ST CLAIMANT

SARAH NDAGARA.....2ND CLAIMANT

STANLEY GITAU NJOGU.....3RD CLAIMANT

ANTHONY KANAI WANJOHI.....4TH CLAIMANT

DAVID OTIENO OWUOR.....5TH CLAIMANT

VERSUS

RELIEF & MISSIONS LOGISTICS LIMITED.....RESPONDENT

RULING

1. The Application before Court is the Notice of Motion Application dated 8/3/2018 filed by the Respondent/Application herein under Certificate of Urgency and brought under Order Rule 32 (1) (b)(c) of the Industrial Court (Procedure) Rules, 2010 and all other enabling provisions of the law.

2. The Applicants seek orders of execution and of review of this Court's orders issued on 6/3/2018.

3. The Application is based on the following grounds:-

1. The Orders issued on 06/03/2018 were issued without due consideration to the Court's directions issued on 21/02/2018 and hence are based on error apparent on the face of the record.

2. The matter was coming up for mention on 6/03/2018 to confirm compliance with the Court's directions issued on 21/02/2018 that parties to file their submissions with regard to the Respondent's Application dated 22/06/2017.

3. The directions of the Honourable Court given on 21/02/2018 was that parties to be heard by way of written submissions that was to be filed and exchanged before the scheduled mention on 06/03/2018.

4. The issue as to whether costs can be stayed could only be dispensed after the Court considered the Application dated 22/06/2017 that was pending for hearing as directed by the Honourable Court on 21/02/2018.

5. There was no basis upon which the Honourable Court issued orders that part of the decretal sum be released to the Claimant without considering the submissions and/or failing to consider the submissions filed by the both parties.

6. The release of the party to party costs from the decretal sum which had earlier been deposited in Court in order to protect the interest of all parties was therefore not in the best interest of justice since the intended Appeal is against the entire decision delivered on 17/02/2017.

7. It is clear that the impugned orders of 06/03/2018 were issued on an error apparent on the face of record and in disregard of

the earlier directions issued on 21/02/2018.

8. It is therefore in the interest of justice that the orders issued on 06/03/2018 be reviewed and set aside by this Honourable Court and parties accorded fair hearing on the Application dated 22/06/2017.

9. No prejudice will be suffered by the Claimants/Respondent if the Orders entered against the Respondent/Applicant is set aside and the matter proceeds for highlighting of submissions already filed by both parties.

4. The Application is also supported by the Affidavit of one Samuel Owade Muga, the Respondent's Counsel herein who has deponed that he filed an Application for stay pending Appeal dated 22/6/2017. The Court directed that this Application be heard by way of written submissions.

5. That on 21/2/2018, the Court further directed the Respondent to deposit the decretal amount in Court and this was done on 23/2/2018 as per their exhibit SOM 1.

6. That the matter was scheduled to be mentioned on 6/3/2018 to confirm compliance of parties with the directions given on 21/2/2018 and both parties had complied and confirmed by Court on 6/3/2018.

7. That having confirmed that the Respondent had met the requirements for stay of execution the Court marked the application as spent. That the Court also ordered costs of 153,000/= be released to the Claimant from the decretal amount that was deposited in Court by the Respondent.

8. The Applicants aver that the Court erred by marking the Respondent's Application dated 22.6.2017 as spent without regard to **the submissions filed by both parties and failed to give directions as to the hearing or ruling of the said application.**

9. They also aver that the Court erred in giving the discretion for release of the party to party costs as it was a contested issue that could only be dispensed with after giving all the parties a fair hearing since their intended Appeal was against the entire decision delivered on 17/2/2017.

10. The Respondents further aver that their application dated 22/6/2017 was prematurely dispensed with prejudicing their right to fair and just chance to prosecute their application to its logical conclusion.

11. They contend that their intended appeal has merit and has triable issues with high chances of success and so should be allowed to proceed on its merit and order issued on 6/3/2018 thereby be vacated.

12. The Claimants filed their Grounds of Opposition on 16/3/2018 where they aver that this application lacks merit. They aver that the Bill of Costs dated 15/9/2016 was taxed at Kshs.153,480/= by consent of both parties.

13. They also aver that the Honourable Court never interfered with the Court's Judgement except with justifiable reason as the Respondent/Applicant had offered Objection and Reference pursuant to Rule 11 of the Advocates (Remuneration) Order. There is therefore no error apparent on the face of the record as the Court's decision was made on the basis that it lacked jurisdiction to stay taxed costs.

14. The parties agreed to dispose of this Application by way of written submissions, which the parties subsequently filed.

15. I have considered the averments of both parties. The 1st issue, I take note of is that the Applicant/Respondent filed this application under Rule 32 of the Industrial Court (Procedure) Rule 2010. The Application was definitely brought under non-existent rules. The said rules having been repealed on 5th August 2016, when the Employment and Labour Relations Court (Procedure) Rules 2016 were gazetted. Under Section 24 of Cap 2:-

“Effect of repeal of Act on Subsidiary Regulation:-

Where an Act on part of an Act is repealed, Subsidiary Legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by Subsidiary Regulation issued or made under the provisions of the repealing Act and shall be deemed for all purpose to have been made thereunder”.

16. The 2016 rules having repealed wholly the 2010 (Industrial Court) Procedure Rules, the Applicants were wrong to approach this Court under non-existent rules.

17. That notwithstanding, I note that this Court was faced with 3 Applications on 21/2/2018.

18. The 1st Application was by the Judgement Debtor seeking stay of execution. The other was by the Decree Holder seeking for Garnishee orders and the last was by the Judgement Debtor seeking setting aside of Garnishee orders.

19. When the Applications came up for hearing, the Parties compromised certain of these orders by the Judgement Debtor agreeing to deposit the decretal sum in Court. This was done on 23/2/2018 basically disposing of all the pending Applications.

20. The Parties appeared in Court on 6/3/2018 and also agreed to costs of 35,000/= to be paid to the Garnishee.
21. The Applicant/Respondent had sought stay orders. Since the decretal sum was also deposited in Court, stay orders were also spend.
22. In the meantime the parties had attended before the Deputy Registrar (DR) on 12.6.2107 where the costs of the cause were by consent agreed at Kshs.153,480/=.
23. On 6/3/2018, this Court ordered costs which had been agreed at 153,000/= be released to the Decree Holder immediately.
24. This Court did not direct the release of 153,000/= from the moneys deposited in Court. The order was explicit that the Judgement Debtor was to release the money to the Decree Holder.
25. This order given by Court is what the Applicant seek stay of and review accordingly.
26. It is my position that the release of this money would have been effected through an execution process.
27. The execution process has not been started yet. There is therefore nothing to stay. On review of the order for release of the costs of 153,000, it is my finding that the Applicants having been before this Court improperly by virtue of the repealed law, the Application they seek should also not be granted. However, I exercise my discretion based on the provisions of Article 159(2) (d):-

“d) justice shall be administered without undue regard to procedural technicalities”.

28. I will therefore allow the Application for review and order that the costs of Kshs.153,000/= incurred also be deposited in Court as ordered in relation to the decretal sum.
29. Costs in the cause.

Dated and delivered in open Court this **9th day of July, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Macharia holding brief for Gomba for Claimants- Present

Muge for Respondents – Present