



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

AT NAKURU

CAUSE NO.414 OF 2013

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

LOCHAB BROTHERS LTD.....RESPONDENT

RULING

1. The ruling herein relate to application dated 2nd November, 2016 filed by the respondent, Lochab Brothers Ltd and seeking for orders that;

1. Spent.
2. Spent.
3. There be stay of execution of the orders issued on 30/9/2016 pending hearing and determination of this application.
4. The applicant be given leave to respond to respondent's application for review of judgement dated 10th/12/2015.
5. Costs of this application be borne by the respondents.

2. The application is based on the ground that the respondent as the applicant was condemned unheard as there was no information about proceedings before court through the advocate on record. The respondent has sufficient reasons as to why they did not participate in the proceedings on 21st July, 2016 and the orders issued on 30th September, 2016 have far reaching consequences and may economically injure the respondent.

3. Other grounds in support of the application are that the claimant is guilty of non-disclosure on how the sum of Kshs.2, 655,400.00 was computed. New and important facts have since emerged on membership of the claimant union which fact was not within the precincts of the respondent. the matter was heard without the respondent being given a fair hearing contrary to article 50 of the constitution.

4. The application is also supported by the affidavit of Maranga Otiso, administration and public relations manager of the respondent and who avers that the respondent instruct the firm of Mongeri & Co. Advocates to act on its behalf herein and which firm acted until judgement was delivered. On 25th October, 2016 the respondent was served with a judgement requiring them to pay Kshs.2, 655,400.00 to the claimant and upon court visit the respondent learnt that the matter had proceeded for hearing on 21st July, 2016 in their absence. The respondent had not been informed of the hearing and thus pray that the orders of 30th September, 2016 be stayed or set aside as the respondent was condemned unheard.

5. Mr Otiso also avers that there are fundamental issues that warrant the court consideration on their merits. The order served on the respondent compels them to pay Kshs.2,655,400.00 which is extremely difficult to ascertain how it was computed as a new list attached to the ruling introduces several other members who were not available to the respondent as to warrant deductions from the years 2010-2014 and these were not provided before the ruling. Some on the list have never been employees of the respondent and there is a list of employees as of September, 2016.

6. In reply, the claimant filed a Replying Affidavit was worn by Dan Mihadi the Secretary General of the claimant union and who avers that on 25th February, 2014 the claimant field a claim herein to which the respondent filed a response and a hearing was conducted when the respondent called its witness Mr Otiso and judgement was delivered on 28th March, 2014.

7. As part of the court judgement, the respondent complied and signed a collective agreement (CBA) on 27th December, 2016 being CBA No.2016 of 2015 and which was registered with the court.
8. Mr Mihadi also avers that on 12th June, 2014 the respondent filed an application seeking stay of execution pending appeal and which was set for hearing on 2nd October, 2014 but failed to attend and the same was dismissed. No appeal was filed and the judgement has never been set aside.
9. The allegations by the respondents that employees as at 12th December, 2015 is a period over a year since judgement was delivered and there is no application for review. The claimant has since moved the court to execute judgement. By application dated 12th June, 2014 the claimant made application for the tabulation of dues owing and the court has since addressed the matter and directed for the payment of Kshs/2,655,400.00 and the application now made by the respondent is with delay and without basis. Execution has commenced and Ganishee Orders issued.
10. The respondent filed Further Affidavit by Ranjit Singh Lochab the managing Director and who avers that the non-attendance of court on 21st July, 2016 and the failure to file response to the claimant's application dated 10th December, 2015 for tabulation of dues was caused by the former advocates, Mongeri & Co. Advocates and such mistake should not be visited upon the respondent as the client. Upon noting the laps the respondent filed this application on 2nd November, 2016.
11. Mr Lochab also avers that the respondent has complied and made a deposit of Kshs.4, 047,160.50 vide receipt of 15th January, 2018.
12. Both parties filed their written submissions. I have put these into account in the analysis of the issues for determination on whether a stay of execution should issue with regard to orders of 30th September, 2016 and whether leave to reply to the review of judgement dated 10th December, 2015 should issue.
13. On 8th November, 2016 the court heard the respondent as the applicant *ex parte* and directed that the new proposed advocates and firm of Magatta Associates to come on record for the respondent in the place of Mongeri & Co. Advocates. the court also allowed for a stay of execution of the orders issued on 30th September, 2016 pending hearing and on condition that the respondent make a deposit of Kshs.2,655,400.00 by 16th November, 2016 and before the hearing date on **17th November, 2016**.
14. On the due date the respondent had not served the claimant with the application and had not made a deposit as directed. On this basis the court did not extend the orders and stood over the matter generally.
15. Effectively, the judgement of the court delivered on 28th March, 2014 was in force.
16. By application dated 14th March, 2017 the claimant union moved the court seeking for Ganishee Orders. The claimant also moved the court for the taxation of cost and a Certificate of Costs has since issued. Execution proceeded and on by application dated 4th January, 2018, the respondent applied for stay of execution and release of its attached property. A ruling thereon was delivered on 30th April, 2018 and the respondent directed to deposit the judgement amounts as directed on 30th September, 2016 within 14 days.
17. On 15th January, 2018 the respondent made the requisite deposit.
18. The above addressed, I note Judgement was delivered on 28th March, 2014. A decree has since issued.
19. On 12th June, 2014 the respondent applied for stay of execution pending appeal. There was no attendance to prosecute the application and it was dismissed.
20. On 24th July, 2014 the claimant union moved the court seeking a review of the judgement and for the tabulation of dues owing. This was done and orders issued that the respondent should pay Kshs.2, 655,400.00
21. The question of stay of execution has therefore since been addressed. Such application cannot be reintroduced again at this stage and execution has commenced and the inordinate delay has effectively rendered the matter as overtaken. To allow the respondent move as applied for at this stage and time would be to ignore the time gap and events taking place within the intervening period and the application dated 12th June, 2014 since dismissed and largely addressed by the court to conclusion.
22. The respondent has also failed to compliance with interim orders to deposit the judgement amounts from 8th November, 2016 effectively left exposed to execution. Such conduct should not be sanitised with further orders of stay of execution.
23. On whether the respondent should be allowed to reply to the application seeking to review judgement of 10th December, 2015 on the grounds that the claimant failed to disclose material facts and that the respondent be allowed to reply thereto, such prayer has since been overtaken by events.
24. The application by the respondent is seeking that;

The applicant be given leave to respond to respondent's application for review of judgement dated 10/12/2015.

25. Judgement was delivered on 28th March, 2014.

26. On 24th July, 2014 the claimant filed a review and for tabulation of dues and which the court confirmed at kshs.2, 655,400.00.

27. I have laboriously gone through the entire court record. There is no Judgement *dated 10/12/2015*. There is also no application *dated 10/12/15*. The orders requested by the respondent as set out are without a foundation.

28. On record is court ruling dated 30th September, 2016. It sets a chronology of events and dates and particularly at paragraphs 8 and 9 thereof it is noted that the respondent had made application seeking stay of execution pending appeal but failed to attend to prosecute it and the court dismissed the same. There is no appeal thereof or application for review.

29. Further, application for review ought to apply the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and even where the substantive issues are to be addressed, the respondent has relied on an employment record and schedule of September, 2016 without giving the court the benefit of its records with regard to the claim and subject period of 2010 to 2014. This is to avoid the obvious. The records submitted are diversionary and of no use.

30. The principles required to be complied with for review in terms of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 are not addressed. Also the question of stay of execution having been since addressed cannot be reintroduced again. Such is in abuse of court process and as held in the case of **Michael Muriuki Ngubuni versus East African Building Society Limited [2015] eKLR** once the court has addressed itself on the facts, the remedy for an aggrieved party does not lie in a review. The respondent has since addressed itself on the issue of stay of execution pending appeal and no appeal was filed and the stay application was not prosecuted and hence dismissed. To now attend seeking review would be to muddle the procedure and failing to take into accounts the delay and the execution process gone by.

In light of the above, application by the respondent dated 2nd November, 2016 is hereby without merit and is hereby dismissed. Costs to the claimant.

Dated and delivered at Nakuru this 3rd day of October, 2018.

M. MBARU JUDGE

In the presence of:

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