



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

CAUSE NO. 846 OF 2014

BANKING, INSURANCE AND FINANCE

UNION

CLAIMANT

v

NATIONAL BANK OF KENYA LTD

RESPONDENT

RULING NO. 2

1. On 13 April 2018, the Court dismissed an application by the Banking, Insurance and Finance Union (Union) dated 29 March 2018 which had sought interim interdicts against the sale of property known as L.R. No. MN/1/11087 MOMBASA.

2. In paragraphs 7 to 19 of the Ruling, the Court set out the reasons for dismissing the said application.

3. On 10 May 2018, the Union dissatisfied with the Ruling lodged an application in Court seeking orders

1. ...

2. **THAT** this Honourable Court do issue interim ex-parte orders staying the ruling of the Court of 13th April 2018 and ultimately restraining the Respondent by themselves or their recognised agents or principals from selling and or attempting to sell by public or private auction the property of Donald Mungoma Mtana of P.O. Box 87046-80100 Mombasa **L.R. No. MN/1/11087 MOMBASA** together with all the buildings and improvements thereon situated at **Lakeview Estate, Bamburi, Mombasa County** until the hearing and determination of this application inter partes.

3. **THAT** this Honourable Court do issue an order prohibiting the Respondent themselves or by their recognised agents or principals from selling or attempting to sell by public auction or private auction the above named property until the Claim in Cause No. 846 of 2014 which is currently pending hearing and determination before the Court is disposed of.

4. **THAT** this Honourable Court do award costs of this application in favour of the applicant.

4. The primary grounds advanced in support of the application were that that property in dispute had been put up for sale by auctioneers and the action was mischievous and suspect, and was meant to pre-empt the outcome of pending litigation; that the Court had previously restrained the Respondent from auctioning properties of other co Grievants in this Cause; that the Court misdirected itself by stating the property in issue had not been pleaded when it had been pleaded in the *Amended Memorandum of Claim* filed in Court on 23 October 2015; that the termination of the Grievant's employment was unfair; that the Grievant had been granted a loan by the Respondent at staff rates before termination; that colleagues of the Grievant whose services had been terminated at the same time and had similar liabilities were not under similar threat; that the Respondent was holding security over the said property and that the Grievant stood to suffer irreparably.

5. The above application was filed together with a motion seeking orders

1. **THAT** the execution of the Ruling and orders made by this Honourable Court on 13th April 2018 be reviewed in favour of the applicant.

2. **THAT** the ruling is inconsistent with Article 27 of the Constitution of Kenya, Section 5 of the Employment Act, 2007 and the International Labour Standards.

3. **THAT** the Ruling did not take into account the several averments in the Claimant's Amended Memorandum of Claim filed in Court on 23rd October 2015.

4. **THAT** the ruling be reviewed in favour of the Claimant since the affected member will suffer treatment while the other applications taken before the same Court under the cause of action have been ruled favourably.

6. One ground was cited in support of the application for review, and it was that the Court had granted leave prior to the filing of the *Amended Memorandum of Claim* on 23 October 2015.

7. The Respondent filed a replying affidavit sworn by its Head - Commercial Transactions and Litigation and list of authorities on 16 May 2018, and the Court took arguments on 1 August 2018.

8. The Court has considered in depth the record, the grounds in support of the review application, the affidavits filed, the authorities and oral submissions.

9. Essentially presented to the Court were two distinct applications, one seeking review and another one seeking orders which had been the subject of arguments and which was ruled on (the Court is not sure why the Union took that approach).

10. Even if the Court granted leave to file an *Amended Memorandum of Claim*, there is nothing on file to remotely suggest that the Union either in the *Amended Memorandum of Claim* and/or the *Further Amended Memorandum of Claim* of 1 August 2017 made any reference to the subject property. The application to interdict the said property was therefore in *vacuo* (see *Kihara v Barclays Bank of (K) Ltd* (2001) 2 EA 420 (CAK) and *Morris and Co. Ltd v Kenya Commercial Bank Ltd* (2003) 2 E.A. 600).

11. The Court therefore has no hesitation in finding that the review application herein is not only frivolous and without merit, but an abuse of the Court process in that the Court gave detailed reasons for dismissing the application sought to be reviewed.

12. In the circumstances, the proper course for the Union would have been to prefer an Appeal.

13. In respect to the interim stay application, the same is a replica of the dismissed application and does not warrant the Court's further examination as that would be tantamount to the Court sitting on appeal over its own considered ruling/orders.

14. The upshot of the above being that the Court orders the application dated 10 May 2018 dismissed with costs to the Respondent.

15. As the Court had directed on 13 April 2018, this file should be placed before the trial Court for further proceedings.

Delivered, dated and signed in Nairobi on this 23rd day of November 2018.

Radido Stephen

Judge

Appearances

For Union Mr. Odero, Organising Secretary, Banking, Insurance and Finance Union

For Respondent Mrs. Omondi instructed by Oraro & Co. Advocates

Court Assistant Salome