



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 759 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 5th December, 2018)

KENYA UNION OF ENTERTAINMENT AND

MUSIC INDUSTRY EMPLOYEES.....CLAIMANT/APPLICANT

VERSUS

BOMAS OF KENYA LIMITED.....RESPONDENT

RULING

1. The Application before the Court is the Respondents Notice of Motion dated 30th August, 2018, brought under 12 [3](i) and) (viii), 17 (1) and (2) of the Employment and Labour Relations Court Act Rule 3(1) & C (2) of the High Court (Practice and Procedure Rules) of the Judicature Act Cap 8 Laws of Kenya, and all the enabling provisions of the Law and the inherent powers of the Court seeking for orders that:-

1. THAT this Honourable Court certifies this Application as urgent and the same be placed before the duty Vacation Duty Judge and be heard ex-parte in the first instance.

2. THAT this Honourable Court may be pleased to grant a temporary injunction restraining the Claimant from executing, attaching, carrying away or in any way dealing with the goods proclaimed on 29/8/2018 pending the hearing and determination of this application interpartes.

3. THAT the Court be pleased to stay the warrants of attachment issued by the Deputy Registrar and dated 23/8/2018 pending the hearing and determination of this review application filed herein.

4. THAT the cost of this application and all consequential costs be borne by the Claimant.

2. The Application is premised on the following grounds:

1. THAT on 29/5/2018 the Respondent's goods were proclaimed by Cash Crop Auctioneers claiming to be acting under the instruction of the Claimant union on allegations of unsatisfied decree amounting to Kshs. 3,333,225.00 which information is not true and correct.

2. THAT this matter was heard and determined before Justice Wasilwa and a consent was recorded to the effect that agency fee arrears was by then 1,639,460.00 and the issue that remained for determination by the Court was whether the Respondent could proceed to deduct agency fee from employees who had resigned.

3. THAT on 31/5/2017 the Court made a ruling on the issue of deduction of agency fee for the members who had resigned and joined another union whereby its held that that the Respondent could not effect such deductions.

4. THAT the union again proceeded to proclaim the goods of the Respondent claiming that there were outstanding dues amounting to Kshs. 2,610,000.00 which prompted the Respondent herein to move the Court and halt the execution process.

5. THAT the Respondent rightly provided evidence of payment of the dues to the union but the Court overlooked the evidence but failed to demonstrate which other evidence was required to be submitted to prove payment which is a clarification sought at this

time.

6. THAT the Respondent has always deducted the agency fee as agreed and on the number of employees who are still in the employment of the Respondent and remitted the same to the union every month without fail and so far there is no remaining amount on arrears.

7. THAT the Union is acting maliciously hence forcing the Respondent to seek protection from this Honourable Court as the Consent filed in court and the ruling delivered by lady Justice Wasilwa is clear and therefore its misleading to the Court to claim non-payment when they have not disputed the sums received.

8. THAT the union is throwing a blanket denial of non-payment without giving any specific prove of non-compliance and the Court having made a determination on the issues cannot again turn round and consider issues that had been determined earlier by parties.

3. The Application is supported by the Affidavit of Jimmy Okidiang wherein he reiterates the grounds on the face of the application and adds that sometime on 6th December, 2017, the Claimant union instructed auctioneers who proceeded to proclaim the goods of the Respondent and immediately the Respondent obtained orders of stay herein.

4. That the Court made a Ruling on the said application but failed to consider the Payment Vouchers annexed as proof of payment and on that basis arrived at the wrong determination that the Respondent had not discharged the burden of establishing compliance with the Court Orders.

5. He avers that the Respondent was not present when the said Ruling was delivered on 22nd May, 2017, hence the delay in filing the review application to demonstrate otherwise. That the Application be allowed in the interest of justice.

6. The Respondent in response to the Application filed Grounds of Opposition dated 5th September, 2018, raising grounds that:-

1. The Application is in breach of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. The contents of the supporting affidavit are the same in both the current Application before the Honourable Court dated 30th August, 2018 and the one dated 19th December, 2017, which has already been determined by the Honourable Court and therefore, the Respondent is using the backdoor for her own gain after failing to appeal within the stipulated time frame.

3. It is in the interest of justice that the Respondent's Application dated 30th August, 2018, be dismissed with costs as the same is merely raised to mislead the Court.

Applicant's submissions

7. It is submitted that the Union has not met the threshold of litigation by not providing the names of the employees who it purports are its members and are not being deducted or if they are deducted the amounts are not being remitted as such, it does not deserve the Orders. They cite the case **Civil Appeal Number 168 of 2011 Dakianga Distributors (K) Limited Vs Kenya Seed Company** where the Judges cited Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (the Common Library No. 5):-

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the Court will have to determine at the trial."

8. That parties are bound by their pleadings and in the instant case the Union was not asked to substantiate the claims it is making by mentioning a number without names which has led to a miscarriage of justice. They urge the Court to allow the Application and find that the Applicant's obligation to the Respondent has been discharged.

Respondent's submissions

9. The Respondent relies on the grounds of opposition enumerated hereinabove and add that the application is not properly before the Court and the only avenue for the Respondent is an appeal and therefore the same should be dismissed with costs.

10. The Applicants in essence seek stay orders pending review of the Application filed herein. I note that the Applicants filed an Application for stay dated 19.12.2017 where they sought orders similar to the ones sought in the current Application.

11. I did hear the said Application for stay on similar grounds raised in the current application dealing with the discrepancy in the figures paid and not paid. In this case, the Application is resjudicata and there is nothing more to determine.

12. The Application is dismissed accordingly with costs to the Claimant/Respondent.

Dated and delivered in open Court this 5th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kanyiri holding brief for Masese for Respondent – Present

No appearance for Claimant