



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1349 OF 2010

ANNE KIRUMBA RIUNGUCLAIMANT

VERSUS

TELKOM KENYA LIMITED RESPONDENT

RULING

1. On 15th December 2014 the respondent filed their application seeking urgent orders with regard to restraining the claimant proclamation dated 9th December 2014 on the attachment and sale of motor vehicle registration No. KAT 667X pending hearing of the application. This application was amended vide application filed on **12th February 2015** brought under the provisions of section 12(3) and (3) of the Industrial Court Act adding the prayer that the attached motor vehicle be released to the respondent. this application is supported by the annexed affidavit of Caroline Ndindi. The Claimant filed Replying Affidavit on 7th January 2015 in opposition to the application. Both parties were directed to file written submissions but only the respondent compiled and filed submissions on 12th February 2015.

2. The application is based on the grounds that judgement herein was delivered on in favour of the claimant and being aggrieved by the decision the respondent filed an appeal and an application for stay of execution in the High Court. A ruling of the court on 29th March 2014 disallowed the application for stay and the respondent then filed an application for stay before the Court of Appeal and this was certified as urgent. The Court of Appeal has not heard the application for stay and in the interim the claimant proceeded to proclaim upon which the respondent deposited the decretal amount with the claimant's advocate and to now proclaim for the decretal amount would be double enrichment. The respondent vehicle Registration No. KAT 667X has been attached despite the decretal amount being paid in full and the attachment is therefore illegal as the vehicle should be released. The notice of sale of the vehicle is an afterthought by the auctioneers and should be restrained as any sale will cause irreparable damage and loss to the respondent.

3. In reply, the claimant stated that judgement herein was in her favour in the sum of Kshs.1, 946,062.96 and upon demands to pay the respondent paid kshs.1, 362, 244, 06 leaving a balance of Kshs.583, 818.90. auctioneers have since proceeded to proclaim assets of the respondent vide notice dated 24th April 2014 when the respondent made part payment of the judgement amount. The respondent noted that the balance no paid was with regard to Kenya Revenue Authority (KRA) tax dues but there is no evidence of such payments, hence the current attachment. The application herein thus lacks merit and should be dismissed.

4. In submission, the respondent stated that they have settled the entire judgement amount of kshs.1, 943,612.96 and subject to statutory deductions the remainder was paid. The sale of vehicle No. KAT 667X is unlawful as the decretal amount ha sink been paid to forestall attachment and sale. The

claimant's advocates have since acknowledged receipt of the decretal sum which was less statutory deductions. The respondent rely on **Lakeland Motor Limited versus Harbhajan Singh Sembi, Civil Appeal No.24 of 1998.**

5. The respondent also submitted that the auctioneers that have proclaimed the respondent's property is acting without instructions. The attachment being illegal as the respondent has settled the claim and thus the application is merited and should be allowed for purposes of meeting the ends of justice.

6. The Court of Appeal in **Mukuma V Abuoga (1988) KLR 645** reaffirmed the principles upon which an application such as this one seeking injunction and restraining orders. What is crucial here is that such orders of injunction, restraint or for any reason to seek an injunction against another, the applicant must have a basis that is not already settled. Such orders of injunction restraining the claimant cannot be an end in themselves as a basis such as a claim, petition or memoranda must be attached. Stay of execution in this case has already been addressed upon judgement which was preceded with the court hearing the parties on the claim filed by the claimant. that having been resolved, to invite the court back as herein is to have a second bite into the cherry as it were. The court having directed itself with regard to orders of stay of execution and ruling dated 20th March 2014, to be invited back to make directions or ruling on the same issue is similar to asking the court to seat on appeal. As of 20th March 2014, the court became *factus officio*.

7. The respondents admit that there is an appeal before the Court of Appeal over this matter. On the basis of the ruling of the court on 20th March 2014, the next forum automatically became the Court of Appeal. For the court to move as herein invited would be a miscarriage of justice and seating on appeal. The application must fail.

8. The above stated, Compliance with the provisions of section 49(2) of the Employment Act is a matter of law. Where a party has so complied there must be evidence. To therefore allege such compliance, evidence must exist. This is a fact that should form the basis of the affidavit and not await for the submissions of eh parties. To leave such crucial document outside the evidence in support if an application such as the one the respondent has filed is fatal. The application herein was filed on 15th December 2014, an amended application was later filed on 12th February 2015 whereas the KRA letter is dated 22nd January 2015 but not attached as evidence in the two filed applications. To attach this document with the submission is to remove its veracity from the core evidence to enable the claimant respondent to it. That notwithstanding, a letter such as the one dated 22nd January 2015 from KRA is not evidence of payment of the judgement amount. Where such amount is paid, the confirmation document is not such a document. I find no such evidence.

Application dated 15th December 2014 and amended in application dated 12th February 2015 is hereby dismissed. each party shall meet their own costs.

Delivered in open Court dated and signed in Nairobi on this 19th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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