



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU

CAUSE NO. 154 OF 2013

STEPHEN M. ONYIENGOCLAIMANT

VERSUS

J.R.S. GROUP SECURITY LTDRESPONDENT

RULING

The judgment in this case was delivered on 12th January, 2015 by my sister Hon. Justice Wasilwa. A decree was thereafter extracted on 29th May, 2015 for a total sum of Shs.255,038 plus costs. The Claimant filed a bill of costs. The parties recorded a consent on the bill of costs on 13th April, 2015 on the following terms

"By consent Bill of Costs dated 28th January, 2015 be assessed at KShs.66,690.00 only. There be a stay of execution for 30 days."

The Claimant filed an application for execution of the decree on 23rd June, 2015 and the Warrant of Attachment of movable property in execution of decree was issued on 24th June, 2015 to Eshikhoni Auctioneers. On 25th June, 2015 the auctioneer proclaimed the goods set out in the proclamation.

This prompted the Respondent to file the application now before me for determination on 1st July, 2015. The application is filed under certificate of urgency. The application is brought under Section 1A, 1B and 3A of the Civil Procedure Act, Section 42(2) and (4) of the Labour Relations Act, Section 16 of Industrial Court Act, Order 9 Rule 9, Order 21 Rule 8 and 9, Order 22 Rule 8 (2) and all enabling provisions of the law and powers of the court. The application seeks the following orders:-

1. This application be certified urgent and be heard ex-parte in the first instance and then fixed for hearing inter partes thereafter
2. That leave be granted to the firm of MM Omondi & co. Advocates to come on record for the applicants in place of Obura-Obwatinya & Co. Advocates.
3. There be a stay of execution of the decree herein pending the hearing of this application inter-partes
4. The decree extracted herein on 29th May, 2015, be set aside.
5. The warrant of attachment issued to Eshikhoni Auctioneers be recalled, revoked and set aside.
6. The honourable court be pleased to review and or vary the order relating to the award under the heading of underpayment to the respondent
7. The costs of this application be paid by the Respondent/claimants in any event.

The application is supported by the grounds on the face thereof and the affidavit of VINCENT ATONG the Human Resources Manager of the Applicant.

The Claimant filed grounds of opposition as follows:-

1. The application lacks merit and the same is fatally defective the same having been made by a stranger to these proceedings.
2. The Applicant is guilty of laches and therefore the court should not entertain the application because it is delaying tactics to deny the Claimant/Respondent his fruits.
3. The applicant has brought this application after judgment questioning issues which ought to have been raised during pre-trial conference for instance, the question of under payment and dependence on Section 48 of the Labour Institutions Act does not arise at this stage because both parties were given opportunity to file the pleading, it went to hearing and Claimants closed his case and Respondent/Applicant were given opportunity to defend themselves and submission were made and after all this submit up with judgment you raise issues. We object and ask that the application be dismissed.
4. The Applicant relying on Section 48 of the Labour Institutions Act on the underpayment does not bring any change because the said section does not deny a Claimant to be awarded an amount which is the difference between the actual legal salary required and the amount paid which is less. This provision is not applicable in civil matters.
5. The decree was properly issued by this court.
6. The issue of proclamation and attachment was done according to law and the Applicant is merely raising mere technicalities.
7. The Applicant/Respondent should be ordered to pay the entire decretal sums plus the costs to the Respondent/Claimant
8. The Application be dismissed with costs.

The application first came before me ex-parte on 2nd July, 2015. I granted temporary stay of execution and fixed the application for inter partes hearing on 16th July, 2015.

On the hearing date of the application Mr. Chepkwony appeared for the Claimant while M.M. Omondi appeared for the Respondent/Applicant.

Mr. Omondi submitted that the decree was erroneously extracted on 29th May, 2015 as it was not approved by the Respondent's Counsel contrary to the provisions of Order 21 Rule 8 of the Civil Procedure Rules. He submitted that the decree can only be done without approval of Respondent where the decree holder writes to court to draw up the decree, that there is no such request to court by the decree holder on the record and the decree as extracted is irregular. Mr. Omondi submitted that no execution can issue on an irregular decree. He urged that the warrants be recalled and cancelled so that counsel for the claimant can apply for a fresh decree in compliance with procedure.

Mr. Omondi further submitted that the Claimant's Counsel did not file an affidavit to confirm if the decree was forwarded to the Respondent's Counsel for approval. He submitted that the Claimant's allegation in the grounds of opposition that the decree was properly issued does not explain how and under what circumstances it was issued.

With respect to prayer no. 6 of the application seeking that the court reviews and or varies the order relating to the award under the heading of under payment, Mr. Omondi submitted that the award contravenes Section 48(4)(a) of the Labour Institutions Act as read with Section 48(4)(b), that the court awarded underpayments from 2006 to 2011 when Section 48(4)(a) and (b) provide for backdating underpayments by only 12 months proceeding the complaint. He submitted that the award for underpayments for 5 years is not acceptable, that this is an error on the face of the record as it is not in accordance with the provisions of the law.

With respect to prayer 2 of the application Mr. Omondi prayed for leave for his law firm to come on record for the Respondent. He submitted that his prayer was not contested by the grounds of opposition and should be granted.

Mr. Chepkwony for the Claimant submitted that he relied entirely on the grounds of opposition dated 13th

July, 2015 and filed on the same date. He submitted that the application is defective having been brought by a stranger. He submitted that Order 9 Rule 9 is explicit that where there is a change of advocates after judgment the change cannot be effected until and unless there is an order of the court or a consent between the incoming and the outgoing counsel. He submitted that the application by M.M. Omondi & Company Advocates should not be in the file, that the application for coming on record should be addressed first in accordance with Order 9 Rule 10 which provides that the question of change of advocates will be determined first. He submitted that the application should be struck out on that ground.

Mr. Chepkwony further submitted that the application was not served on the Respondent's outgoing advocates.

Mr. Chepkwony submitted that the Claimant's counsel wrote to the court to prepare decree and that costs had been taxed by consent. He submitted that the application is a mere delaying tactic by the Respondent to delay execution. He submitted that the amount in the decree is as awarded in the judgment and the costs as agreed by consent. He wondered why the Respondent is asking that a decree that was agreed upon be cancelled. He submitted that Mr. Omondi was not on record and cannot tell if counsel on record for the Respondent at the time was served.

On the prayer for review of award Mr. Chepkwony submitted that Section 48 of the Labour Relations Act refers to evidence in criminal prosecutions and does not state what may be granted in civil proceedings.

Mr. Chepkwony submitted that the application lacks merit, is filed by a stranger and is intended to delay and frustrate execution by the Claimant.

Determination.

I have considered the application together with the grounds and affidavit in support thereof, the grounds of opposition filed by the Claimant, and the oral submissions made by Counsel for the parties. The issues arising therefrom for determination are the following:-

1. Whether the application is filed by a stranger
2. Whether the decree and the warrants of attachment were irregularly obtained
3. Whether there is an error on the face of the record justifying the setting aside and or varying the portion of judgment relating to underpayments, and
4. Whether the application has merit.

I will tackle issue No. 3 first Section 48(4) of the Labour Institutions Act provides as follows:-

Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide an employee with the conditions of employment prescribed in the order, then—

(a) if an employer is found guilty of the offence, evidence may be given of any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence;

and

(b) on proof of such contravention, the court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid:

Provided that evidence shall not be given under paragraph

(a) unless notice of intention to give such evidence has been served upon the employer together with the summons, warrant, information or complaint.

(5) The powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings:

Provided that no person shall be liable to pay twice in respect of the same cause of action.

The Section refers to the nature of evidence that may be adduced where criminal charges are preferred against an employer for failure to apply minimum statutory terms of employment. I agree with Mr. Chepkwony that the Section does not state the evidence applicable to civil claims by employees or limit the same to 12 months preceding the filing of such claims. I find no merit in the argument and dismiss it.

I also find the timing for bringing the application and the manner in which it was brought to be suspect. A party who is uncomfortable with a portion of a judgment does not tax the bill and then raise an issue on the illegality of the award at the point of execution. This lends credence to Mr. Chepkwony's submission that the same is brought in bad faith with the intention to frustrate and delay execution of the decree.

On the issue of irregularity of decree, there is no letter on record, from the Claimant's Counsel requesting the court to prepare the decree. There is also no letter from the Claimant's Advocates forwarding a decree prepared by the Claimant's advocates to court for adoption. For this reason there is no proof that the decree was irregularly prepared by Claimant's counsel and adopted by the court without involving Counsel for the Respondent.

It is trite law that he who alleges must prove. The applicant having failed to prove the allegation, the same is rejected.

I therefore decline to recall the decree and warrants of execution.

On the issue whether the application has been brought by a stranger, Order 9 Rule 9 and 10 provide for change of advocates after judgment only by order of the court upon either application or consent of the parties. Rule 10 allow the application to be made together with other prayers provided the issue of change is determined first.

In the present application the firm of M.M. Omondi & Company Advocates drew up and filed the application. However the application is not copied to the outgoing advocate and neither has the consent of the said advocate been obtained. Mr. Omondi who prosecuted the application did not make any attempt to bring up the issue of representation to be resolved by the court before arguing the other prayers combined with the application for change of

advocates.

The wording of Order 9 Rules 9 and 10 are conched in mandatory terms as follows:-

"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed

incoming advocate or party intending to act in person as the case may be.

10. Procedure

An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

It follows that before the order of the court is obtained, a party who is not on record has no capacity to make any representations to court except the application for change. It is after the order for change has been granted by the court that the party can be heard. In the instant application I cannot grant the orders for change as the outgoing advocates have not been served and their consent has not been obtained.

As a consequence, I have to agree with Mr. Chepkwony that the application has been filed by a stranger and is fatally defective with the only outcomes being the striking out of the same which I hereby do.

The Claimant shall have costs of the application.

Dated Signed and delivered this 11th day of December, 2015

MAUREEN ONYANGO

JUDGE