

REPUBLIC OF KENYA
THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 436(N) OF 2009

VERONICAH MUSYOKA.....CLAIMANT/RESPONDENT

VERSUS

PAYLESS CAR HIRE & TOURS LTD

TRADING AS BUDGET RENT-A-CAR
KENYA.....RESPONDENT/APPLICANT

P. N. MBURU T/A VIRMIR AUCTIONEERS.....INTERESTED
PARTY

RULING

1. What is presently before me for determination is the Respondent/Applicant's Notice of Motion Application dated 7th April 2014 and the Claimant/Applicant's Notice of Motion dated 14th April 2014. Mr. Gatheru appeared for the Claimant, Mr. Nyaberi for the Respondent and Mr. Enonda for the Interested Party. In the Applications I will refer to the parties as Claimant, Respondent and Interested Party respectively. The Respondent's Application is supported by the Affidavit of J. Radia sworn on 7th April 2014 and a Supplementary Affidavit of 14th April 2014. In it, the Respondent seeks a temporary stay of execution pending the hearing and determination of the intended Appeal against the orders made by the Court. The intended Appeal is on account of the refusal by this Court to reinstate the Respondent's Notice of Motion Application dated 26th February 2014. Mr. Nyaberi submitted that the Respondent is apprehensive that execution is imminent and that there is likelihood of losing all the monies held. The Respondent believes that the non-appearance of counsel is an excusable mistake. Regarding the Application by the Claimant the Respondent argues that the Court had granted conservatory orders and that there is no necessity to make any further order on costs. It was submitted that taxation is purely administrative. The Respondent asserts that the directors are Kenyan and there is no concealment or transfer of assets or any plan to leave the jurisdiction of the Court. The Respondent denied abusing the Court process or delaying the expeditious disposal of the matter.
2. The Claimant is opposed to the Respondent's Application. Mr. Gatheru submits that the Application by the Respondent is merely meant to frustrate her and it is a gross abuse of the Court process. Litigation needs to come to an end. The Claimant states the Application is defective as it invokes Rule 40 of the Civil Procedure Rules. The Claimant argues that even if the Civil Procedure Rules can be invoked the Review of orders can only be sought once and the Application by the Respondent being a replica of previous applications should be dismissed. No offer or tender has been for costs and a party on appeal must tender costs. It was submitted that the Respondent is impecunious and is going to be unable to pay costs. The Claimant's counsel has given an unrevocable professional undertaking and if the appeal were to succeed the Claimant would refund the sums. A decree issued for the recovery of the decretal sum cannot be deemed to be a loss to the judgment-debtor. The Claimant seeks an order of assessment of costs and the release of the decretal sum to the Claimant.
3. Mr. Enonda for the Interested party emphasized that the Respondent had raised wrong provisions

of the law in spite of the Ruling of the Court. He submits that the Application is an abuse of the Court process as the orders sought have been heard and determined repeatedly. He placed reliance on the decisions by Rika J. regarding the appropriate procedures to be followed in this Court. The matters raised are *res judicata* and the Respondent's Application should be dismissed with prohibitive costs.

4. In a brief reprise Mr. Nyaberi for the Respondent submitted that the Respondent has not sought review but temporary stay of execution. The Respondent has no capacity to determine who will sit on a particular day to hear certificates of urgency. He submitted that there is a decretal sum deposited in Court and it is therefore not necessary to provide another security for costs. He stated that he had invoked the proper provisions of the law and the Court had previously held that it cannot dismiss a matter merely on technical grounds. On costs he submitted that the matter of punitive costs is neither here nor there and urged the Court to grant the Respondent's Application as prayed.
5. The matters to be determined are whether there ought to be an order for security for costs, whether the Respondent's Application for stay is fit for grant and whether there should be an order for the release of the decretal sum.
6. An application for stay of execution pending appeal is to be made timeously. The Application must meet a criteria set out in precedent and the criteria is best captured in the decision of **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365** wherein the Court of Appeal per Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that

The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

7. The case cited above was not adverted to by any of the parties though submissions were made by Mr. Gatheru on similar lines regarding the furnishing of security. The learned Judges of Appeal who all went on to later become Chief Justice held that the High Court's discretion to order a stay of execution of its order or decree is fettered by only three conditions. The first is that the applicant must establish a sufficient cause. Here there is an effort to seek recourse to the Court of Appeal for reliefs against the Judgment and Ruling of this Court, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay. The Respondent has not furnished security and instead states that the decretal sum already deposited is sufficient. I do not think that the security contemplated during stay applications is confined to the decretal sum especially in a case such as this which has a chequered and colourful history in this Court. The series of Applications made by the Respondent since my Judgment in January of this year seeking stay have been 3 formal Applications and another 2 informal applications for stay. The net effect is to escalate costs and delay the matter which is incessantly between Courts for various Applications and Rulings. I have no doubt that the costs incurred by the parties in the matter have increased since my decision on 7th January 2014. Since no security for costs has been tendered the discretion I could exercise in favour of the Respondent is fettered. In addition the Respondent has not shown what substantial loss it will suffer and in the premises I am constrained to dismiss the Respondent's Application dated 7th April 2014 with costs to the Claimant and the Interested Party.
8. As it has become apparent the Respondent is not desirous of moving to the Court of Appeal, I grant the Claimant's Notice of Motion dated 14th April 2014. The myriad Applications before this Court are an abuse of the Court process all geared towards frustrating the satisfaction of the judgment debt. The decretal sum must be released to the Claimant forthwith and the costs due to the Claimant and Interested Party be paid by the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of June 2014

Nzioki wa Makau

JUDGE