



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 151 OF 2010

BERNARD KURIA.....1ST CLAIMANT

PETER GICHANGI WACHIRA2ND CLAIMANT

MICHAEL KAHARU WACHIRA.....3RD CLAIMANT

VERSUS

KASTURI LIMITED.....RESPONDENT

RULING

The application before me for consideration is the Notice of Motion dated 6th May 2014 filed by the Respondent under certificate of urgency of the same date. The Respondent seeks the following orders:

1. **THAT** this Application be certified urgent and the same be heard ex-parte in the first instance;
2. **THAT** there be a stay of execution of the Judgment and Decree of this Honourable Court passed herein on 9th November, 2012 pending the hearing and determination of this Application;
3. **THAT** pending the hearing and determination of the intended Appeal against the Ruling and order made by the Hon. Lady Justice Maureen Onyango on 9th April, 2014, there be a stay of execution of the Judgment and Decree of this Honourable Court passed herein on 9th November, 2012.
4. **THAT** costs of this Application be in the cause.

The application is supported by the Affidavit of Bipinchandra P. Shah sworn on 6th May 2014 and on the grounds on the face of the application.

I have not seen any replying affidavit or grounds of opposition in the file on behalf of the Claimants. The record however shows that Mr. Mutembei was served with grounds of opposition by one Mr. Thuku in court on 22nd May, 2014. On that date the parties also agreed to proceed with the application by way of written submissions.

The grounds in support of the application and the affidavit state that the applicant is dissatisfied with the ruling of this court dismissing its application to set aside ex-parte judgment and consequential orders and intends to appeal against the ruling. The grounds of appeal as set out in Mr. Shah's affidavit are as follows:

- 5 (a) **THAT** the learned Judge erred in finding and holding that there was proper service of the hearing notice on the Respondent or its Advocates;

5 (b) **THAT** the learned Judge erred in finding and holding that there was proper hearing of the claim, even in the absence of oral hearing;

5 (c) **THAT** the learned Judge erred in finding and holding that there was no proper Memorandum of defence or Memorandum of defence raising triable issues;

5 (d) **THAT** the learned Judge disregarded the Respondents Affidavit evidence in arriving at her ruling;

5 (e) **THAT** the learned Judge erred in dismissing the Application for setting aside Judgment and decree passed on 9th November, 2012.

In the written submissions the applicant states that the application is brought under Rule 31(2) of the Industrial Court (Procedure) Rules which provides that rules on execution of orders and decrees in the Industrial Court are those applicable in the High Court, Order 42 of the Civil Procedure Rules which grants the court discretion to grant orders of stay of execution pending appeal.

The Applicant further submits that the court has inherent powers under section 3A of the Civil Procedure Act to grant any orders necessary for the ends of Justice or to prevent abuse of the process of the court. The Applicant referred the court to the decision of the court of Appeal in GITHUNGURI V. SIMBA CREDIT CORPORATION LIMITED (No. 2) {1988} KLR 838 in which the court set out the guiding principles for grant of stay of execution as follows:-

“The guiding principles which emerge and are discernible from case law on this subject, are, first, the appeal should not be frivolous or as is otherwise put, the applicant must show that he has an arguable appeal and second, this court should ensure that the appeal, if successful should not be nugatory”.

The applicant submitted that the supporting affidavit of the Applicant’s Managing Director has set out five grounds of appeal which cast doubt on whether the proceedings that culminated in the judgment and decree were conducted in accordance with the law. The Applicant further submitted that the ruling of this court of 9th April 2014 regularizes a judgment that the Applicant believes is irregular and therefore unenforceable. Further that the Respondent has an arguable appeal, that the Respondent’s appeal has high chances of success, that if the application for stay is not granted the appeal would be rendered nugatory as the applicant is not aware of any assets or means of the claimants from which the Applicant may recover the decretal sum of Kshs.1,477,783/= and costs. That for these reasons substantial loss would be occasioned to the Applicant.

On the grounds of opposition, the Applicant submitted that this court has jurisdiction to grant the orders sought, the application is merited and brought in good faith within the provisions of the law. The applicant submits that the other grounds of objection are too vague for comment. The Applicant prayed that the application be allowed.

The Claimants opposed the application. They relied on the grounds of opposition filed on 21st May 2014. The claimants argue that the applicant has prayed for the wrong orders as this court can only grant stay of execution of the ruling delivered on the 9th April, 2014 and not the judgment delivered on 9th November, 2012. The Claimants pray that should the orders be granted half the decretal sum should be paid to the claimants while the other half be deposited into an interest earning account in the joint names of both Advocates within 14 days as a condition for the stay.

I have considered the application together with the grounds and affidavit in support thereof. I have also considered grounds of opposition, the written submissions filed by both parties and the authorities cited by the parties.

As submitted by the Applicant, the principles of setting aside judgments and orders are well established in

case law. The principles were restated by the court of Appeal in the GITHUNGURI case (bid). The Court of Appeal stated that the applicant must demonstrate first, that it has substantial points to raise to the court on appeal, and second, that the appeal would be rendered nugatory if the court denied the applicant the interim relief sought.

In the present case the right of appeal is donated by Section 17 of the Industrial Court Act which provides as follows:

17. (1) Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the

Constitution.

(2) An appeal from a judgement, award, decision, decree or order of the Court shall lie only on matters of law.

My task is therefore to confirm if the grounds of appeal set out in the affidavit in support of the Applicant's application are matters of law to qualify for appeal.

The first ground is that the Judge erred in finding and holding that there was proper service of the hearing notice on the Respondent on its Advocates. In my opinion this is a matter of fact and not law.

The second ground is that the court erred in finding and holding that there was proper hearing of the claim. This again in my opinion is a matter of fact.

The third ground of appeal is that the Judge erred in finding that there was no proper Memorandum of defence or defence raising triable issues which in my opinion is also a matter of fact.

The final ground, that the Judge erred in dismissing the application is really a result of the first four grounds.

In my opinion therefore the applicant has not demonstrated that it has an arguable appeal as its proposed grounds of appeal cannot qualify under section 17(2) of the Industrial Court Act.

There is also another fatal omission. Appeals are supposed to be filed within 60 days. The court's ruling having been delivered on 9th April 2014, appeal should have been filed by 9th June 2014. If the appeal is not lodged by that date that appellant must apply for extension of time.

The Applicant has not requested for certified copies of proceedings and judgment for purposes of appeal. For this reason even if the Applicant has a good appeal it will be an uphill task to obtain leave to file the appeal out of time as there would be no certificate of delay to cover the intervening period.

For the foregoing reasons I do not have to consider whether the Applicant has demonstrated that it will suffer irreparable loss as in my opinion there is no arguable appeal and the applicant is also out of time for filing appeal having not applied for certified copies of proceedings and judgment for the purpose of appeal.

For the foregoing reasons I dismiss the application by the Applicant dated 6th May 2014 with costs.

Orders accordingly

Read in open Court this 25th day of September, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Yusuf Kirato holding brief for Mr. Nyagah – for Respondent/Applicant

Gacharia holding brief for S. N. Thuku for Claimants