



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 11 OF 2010

RAILWAYS AND ALLIED

WORKERS UNION CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (K) RESPONDENT

RULING

1. The Application serving before Court is dated 8th July 2014 and filed on a certificate of urgency on 9th July 2014, seeking for an order;

1. To stay execution of decree for money pursuant to a warrant issued on 2nd July, 2014 against the Respondent;
2. To review, set aside and vary and / or vacate the orders of 12th June 2014 and the consequential orders thereto.

2. The Application is supported by the grounds set out in the Notice of Motion and the supporting Affidavit of Rebecca Mbithi, the company secretary of the Respondent.

The Claimant / Respondent has filed a replying affidavit dated 16th July 2014.

3. The nub of the application is that the impugned Court order of 12th June 2014 was made without hearing the Respondent and that the Claimant is not entitled to the said orders at all.

4. That on 2nd July 2014 Warrants of sale in execution of decree and proclamation of attachment dated 4th July 2014 listing the respondent's goods for attachment and giving 7 days' notice prior to execution were issued.

5. The Applicant deposes that the Court order or decree dated 12th June 2014 was not served on M/s Chege Onyongo, Kibet and Ohanga Advocates on record herein.

That the order having been made exparte, the Claimant had an obligation to serve the Respondent with the said order and issue a notice of ten (10) days to the Respondent or its Advocates on record prior to the issuance of the Warrant of execution.

6. That on 13th May 2014, M/s Rotich Advocate held brief for Mr. Abidha Nicholas for Respondent and noted erroneously that the matter was to be further mentioned on 26th June 2014 when it was in fact to be mentioned on 12th June 2014.

7. That the Court issued impugned orders on 12th June 2014 directing that the Claimant be paid Kshs.658,000/= in unpaid salaries and gratuity which amounts the Respondent has sufficient evidence to show that the same is not payable to the Claimant.

8. In the Replying of Affidavit, the Claimant / Respondent opposes this application stating that the same is frivolous and without basis.

That the matter the applicant seeks to re-open was litigated upon and finalized in an award of the Court dated 11th September 2011 which todate the Applicant has failed and / or neglected to satisfy.

That the issues raised by the Applicant are resjudicata, the Applicant having failed to file an Appeal against the Award and or move an application for the review of the Award since 11th September 2011.

9. That the only pending issue which was finalized by the Court on 12th June 2014, was computation of the Award of Kosgei J. of 11th September 2011 which the Court confirmed to be Kshs.658,000/=, in terms of the computation of the Claimant / Respondent in the absence of any contrary filing by the Respondent on 12th June 2014.

10. That no notice of Appeal nor an application for review of the computed award was filed by the Respondent until, the present application for stay of execution of the Warrant of attachment and proclamation of goods was filed on 8th July 2014.

11. That in terms of the Rules of the Court, an Appeal against an award of the Court is to be noted within 14 days from the date of the order and / or award of the Court which has not happened to date.

12. That the Advocate on record who purports to have mis-diarised the date on which the Respondent was to appear in Court and on which date the Respondent failed to appear and exparte order / were issued by the Court ought to have placed these facts before Court on Affidavit.

13. These matters have been placed before Court by a third party who has no personal knowledge of the purported errors by the Advocate on record.

14. The Affidavit by Rebecca Mbithi deponing to matters allegedly in the knowledge of the Advocates on record is inadmissible hearsay and cannot be the basis of setting aside the order of the Court granted on 12th June 2014.

For this and other reasons alluded to hereinbefore, the application has no sound basis. The same is misconceived and is dismissed with costs to the Claimant / Respondent.

Dated and Delivered at Nairobi this 19th day of Sept. 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE