



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 21 OF 2013

TRANSPORT WORKERS UNION KENYA

CLAIMANT

v

AFRICAN SAFARI DIANI ADVENTURE

RESPONDENT

RULING

1. Before Court is a motion application under certificate of urgency (ex parte at this stage) dated 17 December 2013 under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules and Section 62(e) and sections 3 and 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and other enabling provisions of the law, seeking
 - i. That this application be certified urgent
 - ii. That this Honourable Court may be pleased to grant a temporary injunction restraining the Claimant from executing, attaching, carrying away or in any way dealing with the goods proclaimed on 9th of December, 2013 pending the hearing and determination of this application.
 - iii. That this Honourable Court be pleased to stay the execution proceedings, warrant of attachment and the warrant of sale of property all issued by the court on 5th November, 2013 pending the hearing and determination of Appeal filed in the Court of Appeal
 - iv.
2. The grounds stated on the face of the motion briefly are, that a Notice of Appeal has been filed in the Court of Appeal, that the Court of Appeal needs to address issues of law on mode of service, that the Claimant should have not proceeded with execution after being served with Notice of Appeal, that the decretal sum of Kshs 160,263/- can be easily settled, that the auctioneers have proclaimed the entire business properties of the Respondent and that the Respondent stands to suffer irreparable loss. A supporting affidavit by Felix Mutisya Mbuvi sworn on 17 December 2013 was also relied on.
3. I heard Mr. Muya for the Respondent/Applicant on 17 December 2013 and reserved my ruling to 19 December 2013.
4. I am satisfied that the application is urgent and do certify it as urgent.
5. Order 40 rules 1, 2 and 3 of the Civil Procedure Rules are of no assistance to the Respondent in

- the present case. Rule 1 provides for injunctions where property in dispute in a suit is in danger of being wasted, damaged or alienated. The subject property of Cause No. 21 of 2013 was not the proclaimed property but a claim for terminal dues/damages/compensation. In other words, the proclaimed property was not the suit property for purposes of the rule.
6. Rule 2 relates to injuncting a defendant from committing breach of contract and therefore it would be a Plaintiff or Claimant moving Court pursuant to the rule while rule 3 provides for consequences of breach of orders granted pursuant to rules 1 and 2.
 7. Filing of a Notice of Appeal by itself is not a sufficient ground or reason to order temporary injunction from execution, attachment or dealing with proclaimed goods or for the grant an order staying of execution.
 8. In the circumstances there is no legal basis for me to grant the relief sought at prayer 2 of the motion at this stage.
 9. Stay of execution pending appeal is governed by Order 42 and specifically rule 6. I would therefore determine the question of prayer 3 of the motion on the assumption that it is grounded on Order 42 rule 6. The principles for grant of stay pending appeal have been settled for long in case authority. The principles have been discussed in cases such as *Jotham Simiyu Wasike & Another v Jackson Ongeru & 4 others* (2013) eKLR and *Peter Samoei v Isaac Ruto* (2012) eKLR.
 10. The principles are that the order is discretionary, that the applicant may suffer substantial loss, that the application is made without unreasonable delay and on provision of such security as the Court may impose.
 11. Grounds 1, 5, 6 and 7 on the face of the motion are intertwined with irreparable loss the Respondent may suffer. The proclamation produced as exhibit *FMM 4* indicates that the auctioneers have proclaimed properties worth over Kshs 1,000,000/- for a debt of under Kshs 200,000/-. By the stretch of any imagination this is not in good faith and, I would agree with the Respondent that the objective is to paralyse its operations and therefore it is likely to suffer irreparable loss. The auctioneer went overboard.
 12. Considering the circumstances of this case, I would grant a temporary stay of execution pending the *inter partes* hearing of the motion on the condition that the decretal sum of Kshs 160,263/- and auctioneers charges of Kshs 25,400/- are deposited into Court before close of business today.
 13. For purposes of clarity, the proclamation will stand stayed once the sums ordered are paid into Court and because of the urgency a copy of this ruling should be served upon the auctioneers pending extraction of an order.
 14. The motion to be heard *inter partes* on 27 February 2014.

Delivered, dated and signed in open Court in Mombasa on this 19th day of December 2013.

Radido Stephen

Judge