

REPUBLIC OF KENYA?

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 772 OF 2010

KENYA UNION OF COMMERCIAL FOOD

& ALLIED WORKERS.....CLAIMANT/APPLICANT

versus

1. KEROCHE INDUSTRIES LTD?

2. LAKE NAIVASHA REWERY LTD?

3. JOSEPH KARANJA OR TABITHA MUNGAI.....RESPONDENTS

RULING

1. On 3rd December 2013 the Claimant/Applicant canvassed the Application dated 7th November 2013. Mr. Owiyo urged the said Application. The Application was opposed by the Respondents who were represented by Mr. Karanja.

2. Mr. Owiyo stated the Application dated 7th November 2013 was premised on the Court of Appeal Rules 2010. He sought variation of the stay orders granted to the Respondents on grounds that no appeal was filed and that essential steps had not been taken within the specified time. He submitted that a brief look at the Court of Appeal Rules Section 75 provides for Notice while Section 77(1) provides that an intended Appellant shall upon giving notice serve Notice to the party directly affected. The Claimant averred that it has not been served with a Notice of Appeal and that as at time of filing the Application there is no notice of Appeal or request of proceedings lodged in the file. Mr. Owiyo continued and stated that looking at the Respondent's replying Affidavit there is a Notice of Appeal purported to have been issued on 24th December 2012 and beneath the Notice it is indicated it was lodged in Nakuru. He submitted that at the time there was no Industrial Court at Nakuru and that there could be no registry at Nakuru. Beneath that is a letter applying for proceedings under Section 81 of Court of Appeal Rules. Section 81 is for Withdrawal of Appeal and Notice of Cross Appeal and it has nothing to do with proceedings from the superior court. Section 82(1) of the Court of Appeal Rules 2010 provides for the period within which the Appellant is to lodge or institute the Appeal with the relevant registry. It is within 60 days and if Application for proceedings has been lodged the counting of days will be taken to include the days. The application must be in writing and a copy served on Respondent. He stated that it's one year down the line and the Claimant has not been served. He submitted that the documents attached by Respondent have been negated by that section and he relied on Section 83 of the Court of Appeal Rules 2010 which states that if party lodges Notice of Appeal and fails to lodge appeal the court may on its own motion or on application make orders in favour of Respondent as it is assumed it has been withdrawn. Under Section 83 which provides that a person affected by appeal may before or after institution of Appeal apply to strike out the Notice on grounds that no appeal lies on grounds that no steps have been taken. He held that failure by Respondent to secure proceedings since May this year amounts to failing to take an essential step and thus urged the Court to find the failure of Respondent to serve essentially makes the Notice of Appeal filed irrelevant. He sought that the Court finds in favour of the Claimant and orders that the Registrar to release the Kshs. 2.2 million already deposited plus costs.

3. Mr. Karanja for the Respondents opposed the Application. He had filed a Replying Affidavit. He

submitted that the Notice was lodged in this Court on 24th December 2012 together with the letter asking for proceedings dated 17th December 2012 and lodged in Court the same day. He pointed out that the Judgment herein was not delivered on 11th November but 11th December and thus the Notice of Appeal was filed in time. Application for stay was dated 24th January 2013 and to it was attached the letter bespeaking proceedings and also attached the Notice of Appeal to the Application. No objection was made. He submitted that under the Civil Procedure Rules Order 42(6)(4) an appeal is deemed filed when the Notice is given. He went on to state that a Notice of Appeal is a Court of Appeal document and only the Court of Appeal can strike it out. He submitted that Mr. Owiyo correctly pointed out a person affected can apply to the Court of Appeal to strike out the Notice of Appeal. He stated that this Court cannot strike out the Notice of Appeal. He conceded that he had not filed the Appeal. In the Reply he has attached another letter of 7th June 2013 asking for proceedings and so far the proceedings have not been typed. He posed a question that how can he file an Appeal if documents are not typed? He submitted that his clients have done all they can do to prepare to file appeal. He held that if the Claimant feels aggrieved they should have filed application for review and as such the Claimant was seeking a short cut to the cash.

4. Mr. Owiyo in a brief reprise stated that it was true that he raised the issue in court because he had received the Replying Affidavit only on Friday and they needed to repudiate. He submitted that this Court gave the orders and that this Court has power to vacate its orders and especially if the Court is persuaded. He stated that parties who come to Court have the responsibility of following up the matter and confirm and ensure their documents are on file properly. He stated that the Respondent alleges they made a request in December but on perusal, there was no request on the file. The Registrar cannot be blamed and thus he urged the Court is within its mandate to find that it was swayed with non-existent intention and vacate the orders.

5. The Application as conceived by the Court is one which seeks to vacate the Orders of the Court granted staying the execution which had commenced against the Respondents. The stay is a stay pending Appeal. Mr. Owiyo cited Court of Appeal Rules 2010 in support of the contention that the Respondent had not taken essential steps. I have carefully perused the Court record and cannot see any letters bespeaking proceedings. I however see a Notice of Appeal stamped 24th December 2012. The Applicant has mentioned the Court of Appeal Rules in his submissions though his Application does not cite them. Nevertheless, this Court became *functus officio*, save for taxation of costs and execution, when I granted the stay pending appeal. The litany of complaints levelled against the Respondents who are the intended Appellants can only be made to the appropriate Court which is the Court of Appeal. As seen in the thrust of arguments and inferences of lapses and the alleged failure to take essential steps in terms of the Court of Appeal Rules 2010, it is obvious the arena for the dispute is the Court of Appeal. I have no jurisdiction to entertain a matter that should be before the Court of Appeal. In the premises the Application is not fit for grant. I dismiss the Claimant's Notice of Motion Application dated 7th November 2013 with costs to the Respondents.

It is so ordered.

Dated and delivered at Nairobi this 17th day of December 2013

Nzioki wa Makau

JUDGE