



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 688 of 2007

**AINEAH LIKUMBA ASIENYA
FRANCISCA WANJIKU MUIGAI
FREDRICK ONDENG OKELLO
NASHON PHILLIP ODUOR
JAMLECK MBAE MWIRICHIA
TOBIAS OBUKWI WANZALA
EBBY KAHAI MUDAVADI
FRANCIS MUTUNGI MUTUNE
NELSON MARK ETALE
EDWARD SEWE OCHILO
CHARLES JOHN OKETCH
MARTIN KISOMBE MWANZALA.....PLAINTIFFS/RESPONDENTS**

VERSUS

KENYA AIRPORTS AUTHORITY..... DEFENDANT

RULING

The application before the court is the Notice of Motion dated the 17.7.2012 but filed in court by the Defendants on 19.7.2012. It seeks an extension of the order of stay of execution granted by the court on 28.6.2012 pending the hearing and determination of the application aforementioned. It also seeks costs thereof.

The main grounds, upon which the application is based, are that the applicant/defendant has filed an appeal against the ruling of court dated 28.6.2012 which has high chances of success. Secondly, that there was a clear threat from the Respondents of executing the judgment dated the 28.6.2012 which process will prejudice the applicant corporation due to the large sum of the decretal sum involved and that such execution will make the applicant suffer irreparable loss.

The application was supported by an affidavit sworn on 17.7.2012 by one Jane Florence Otieno who is the applicant's corporation secretary authorized to swear the same. From her depositions, the following facts emerge:-

The Respondents who were retrenched retirees of the applicant corporation, had filed a suit claiming their retirement benefits. By leave of court they amended their plaint to include a sum amounting to Kshs.36,560,752/75 being compensation based on what they considered fair and reasonable retrenchment package. Later the Respondents filed an application for summary judgment dated 21/10/2008, on the ground that the corporation had no defence to their claim and had not filed any. The application for summary judgment was fully argued inter partes before Khaminwa, J on 23.4.2012.

On 28.6.2012 Khaminwa, J in her judicial discretion, having heard and considered both sides, allowed the application for summary judgment by entering judgment for the applicants/plaintiffs in the sum of Kshs.36,560,265/- together with court interests at 12% p.a. from 25.7.2008 until settlement. This judgment covered the claim of 16 out of about 50 plaintiffs whose claim would continue being pursued. The applicants were dissatisfied with this court's decision and filed a Notice of Appeal to the Court of Appeal, through this court, on 3rd July, 2012.

On the same day of 28.6.2012 immediately after the Ruling for summary judgment had been delivered, the applicant through its Counsel, orally sought and obtained a stay of execution of the judgment. The court put it as follows:-

“Defendant is granted stay for a period of 14 days to enable filing of a formal application for stay.”

It is clear from the record then that the applicant/defendant who had applied **“for stay pending appeal,”** did not get such stay, but got a stay of 14 days within which it would file a formal application seeking stay of execution pending the hearing and final determination of the then intended appeal. The period of 14 days would expire on 13th July, 2012.

Come the 13th July, 2012, the applicant herein had not filed the formal application seeking stay. I have examined the court file record but no such application has ever been filed and the applicant has not argued differently.

The record however shows that this application now before the court was filed on 17.7.2012. It does not, as the court understand it, seek a stay of execution pending the determination of the appeal which is represented by the Notice of Appeal filed in court on 3.7.2012. On the contrary, the application as earlier shown, seeks, **“extension of the stay of execution granted on the 28th of June, 2012 pending the hearing and determination of this application.”**

To put this matter to a proper perspective, the record shows as well, that the applicants on 28.8.2012 (during vacation) filed an application on the same day seeking that this application, dated 17.7.2012 and now before the court, be certified extremely urgent and fit to be heard during the vacation. Indeed it was placed before the vacation judge who promptly fixed it for a hearing on 12.9.2012. The said court also went ahead and issued a temporary stay of execution of the decree for 14 days. That order halted an ongoing execution process wherein a proclamation of sale of certain goods belonging to the applicants herein was already in progress. The court however, also issued a condition requiring the applicants to provide within 14 days a security bond worth Kshs.20,000,000/- which the applicants complied with on 11/9/2012.

It is noted that on the basis of the Kshs.20million security bond, the interim stay granted by Kimondo, J on 28.8.2012, was extended on 12.9.2012, on 20.9.2012 and on 8.10.2012 when the application dated 17.7.2012, argued out by way of written submissions by 8.10.2012, was reserved for this Ruling, with the interim order of Kimondo, J dated 28.8.2012 being also finally extended until this ruling is delivered.

I have carefully perused the court file records, including the application dated 17.7.2012 which is the one pending before this ruling. The main prayer in the application as earlier several times mentioned, is for extension of the order of stay of execution made by Khaminwa, J on 28.6.2012. It can however be noted that if allowed, the prayer so allowed will be valid only until this application is determined as the prayer seeks. Is it however allowable?

The record of Khaminwa, J's orders, is clear. While the applicant sought a stay of execution pending the appeal, the court impliedly denied the same. It however stayed execution for 14 days to enable the applicant/defendant to file a formal application which would be supported with proper legal and factual grounds and which would be served upon the other side to give them opportunity to defend and/or be heard before a ruling would be given by court. It is clear therefore that the stay granted by Khaminwa, J was merely interim to assist the applicant file a proper application. The period of 14 days was to expire on 13.7.2012 when the stay would also expire.

It is not denied that the applicant did not file the formal application seeking a stay pending the intended appeal by 13.7.2012. Indeed the applicants have never filed such an application to date. It is not difficult accordingly to see that the interim order of stay of 14 days, expired on 13.7.2012 and by 17.7.2012 when this application before the court was filed, there was no existing order which in practical terms, would be extended. That position in my view and finding, persists today i.e. there is no stay order which can be extended by this court presently and this application seeks an order which is not practical to grant.

The result therefore, is that this application has no merit and must fail. However, even if this court were to grant the application and thus grant a stay until this application is determined, as indeed sought in the application, such an order would be of no use to the applicant. Accordingly the application is hereby dismissed with costs. Since the fate of the interim orders of stay granted by Kimondo J and Havelock, J abided the result in this application, it means that no other stay of execution orders on the record survives the result of this ruling.

DATED and **DELIVERED** at Nairobi this **4th** day of **December**, 2012

.....

D.A. ONYANCHA

JUDGE