REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 923 OF 2002

SUSHILA BAKHADA.....PLAINTIFF/APPLICANT

VERSUS

NAIROBI ACADEMY HOLDINGS LTD.....DEFENDANT/RESPONDENT

R U L I N G

The Plaintiff herein filed this suit on the 31st May, 2002 against the defendant claiming damages for wrongful termination of the employment agreement plus costs of the suit and interest.

It is pleaded that she was employed by the Defendant's predecessors in 1978 as a deputy administrator at a salary of about Ksh.7,000/- plus allowances. That upon the Defendant's purchase of school sometime in the year 1986, the Plaintiff's services were retained and she took over the post of the Principal of the school. The terms of the employment were stipulated in an agreement entered into between the parties and the same was to be supplemented by the standard terms applied to the teaching staff and such other terms as had generally applied to the Plaintiff's employment prior to the execution of the agreement.

It is further pleaded that vide a letter dated 4th December, 2001, the Defendant unlawfully terminated the Plaintiff's said employment without giving her a notice as consequence of which the Plaintiff was deprived of her salary, and bonuses which she would otherwise have earned and she thereby suffered loss and damage.

The Defendant filed a statement of defence and a counter-claim on the 29th July, 2002 admitting that the Plaintiff was its employee but denied most of the allegations pleaded in the plaint. The Defendant also counter-claimed for sterling pounds 12,000 or an account therefore, specials of Ksh.3,161,166.58 plus costs and interest. A reply to defence was filed on 8th day of August, 2002.

The matter was heard and determined and being dissatisfied with the judgment, the Respondent filed a notice of appeal and since an appeal does not operate as a stay of execution the applicant filed an application for stay pending appeal which was granted on the 18th May, 2010 unconditionally.

The Plaintiff/Applicant has now moved the court by way of a Notice of Motion dated 21st October, 2014 under Order 51 Rule 1 Sections 1A, 1B and 79G of the Civil Procedure Rules and Article 159 (d) of the Constitution seeking the following orders: -

1. That this honourable court be pleased to review and set aside or vary its orders contained in a ruling made on 29th April, 2010 to the Respondent granting a stay of execution till determination of

an intended appeal to Court of Appeal.

2. That the Applicant be at liberty to execute the judgment of this court.

3. That costs of the application be borne by the Respondent in any event.

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit of Sushila Bakhada sworn on the 22nd October, 2015. The summary of the facts as captured in the said affidavit are that; the court made a ruling on 29th April, 2010 in this matter granting a stay of execution pending appeal but since then, the Respondent has not lodged a Record of Appeal in the Court of Appeal or taken any step to advance the intended appeal.

That the delay of the Respondent in not filing the Record of Appeal amounts to deprivation of Justice to the Applicant and its sole purpose is to deny her the fruits of the lawful judgment of this court.

That she has always wanted to execute the judgment entered by the court but she has been barred by the existing stay of execution. In the circumstances, it is only fair and just that the application be allowed and she be allowed to go ahead and execute the judgment. The Application is opposed vide a replying affidavit by Francis Mwangi Kiragu sworn on the 4th January, 2016. The deponent has described himself as the Director of the Respondent. In the said affidavit he depones that the Respondent was being represented by the firm of Mathenge & Associates whom it had instructed to lodge an appeal on its behalf but the counsel who was handling the matter from the said firm died sometime on 20th March, 2011.

That the Respondent has been following up the matter with the said firm of Advocates only to be informed that upon the death of Mr. Mathenge, the Partnership ceased to exist and it only got to know of this information when it was served with the present application.

The Respondent blames the previous Advocate for failing to lodge the Appeal and urges the court not to visit the mistake of its advocate upon it. It has further been deponed that the Applicant failed to disclose to the court that it is also enjoying the stay order issued herein as the ruling delivered on the 18th May, 2010 is quite clear that both parties were aggrieved by the judgment of the court delivered on the 30th October, 2009 and that both parties intended to lodge their respective appeals. That notwithstanding that the Applicant's Advocates failed to lodge the Appeal, the Applicant has also not lodged his appeal and cannot therefore allege indolence on its part.

The application was canvassed by way of written submissions which the respective parties duly filed.

I have carefully considered the application and the materials in support of the same.

The application seeks to review and/or set aside the order contained in a ruling made on the 29th April 2010. The Respondent submits that the Appellant is an indolent party in that it has taken four years to act in the matter yet enjoying the stay orders granted to it.

The Appellant on its part blames its previous counsel for failure to file an appeal. That though it had instructed the firm of M/s Mathenge and associates to file an appeal against the judgment, Mr. Mathenge Advocate who was handling the matter passed away following which the partnership ceased to exist and the Respondent only got to know that the said firm was not in existence when it was served with the present application.

While I agree with the counsel for the Applicant that there has been inordinate delay in filing the appeal, am satisfied with the explanation for the delay in doing so which was caused by the death of the previous counsel who was acting for the Respondent. The counsel for the Respondent made a mistake by not filing the Appeal before his demise which was unfortunate. In the case of **Belinda Murai & Others Vs Amos Wainaina (1978) LLR 2782** Madan JA (as he then was) described what constitutes a mistake in the following words: -

"A Mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule…."

With regard to the same point, I wish also to rely on the case of **Philip Chemowolo & Another -Vs- Augustine Kubede (1982-88) KAR 103 at 1040**, where Apalo J. A (as he then was) poised: -

"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

I am not persuaded by the Respondent's submission that since the Applicant is also enjoying the stay orders she cannot allege indolence on its part. Each party is at liberty to pursue its own appeal and the fact that the Applicant has not filed her appeal is no excuse for failure by the Respondent to file its. In the interest of justice, the orders contained in the ruling made on 29th April, 2010 are reviewed in the following terms: -

1. ***The order of stay of execution granted on 29th April, 2010 shall remain but on condition that the total decretal amount in the sum of Ksh.602,041.00 is deposited in an interest earning account in joint names of both advocates within 30 days from the date hereof.***

2. ***Failure to comply with order (1) above, the stay order shall automatically lapse.***

Dated, signed and delivered at Nairobi this 14th day of July, 2016.

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L NJUGUNA

JUDGE

In the presence of

……. *for the Appellant*

……. *For the Respondent*