



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 114 OF 2013

DAVID WEPUKHULU.....CLAIMANT

VERSUS

KUNDAN SINGH CONSTRUCTION LTD.....RESPONDENT

RULING

1. Before Court is a Notice of Motion application dated 8th September, 2021, expressed to be brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act. The Applicant seeks orders for: -

a) Spent

b) That all money in HFC Bank Kisumu Branch Account Number xxxxxxx-0, Account Name OTIENO YOGO OJURO & COMPANY and KHASOA & COMPANY ADVOCATES be released to the Firm of KHASOA & COMPANY ADVOCATES.

c) Costs of the application.

2. The application is supported by the grounds on the face thereof and the supporting affidavit of Carolyn Khasoa, the crux of which, is that by an Order of this Court issued on 16/2/2019, the Respondent was directed to deposit Kenya Shillings One Million Two Hundred Thousand in a joint interest earning account of both counsels on record for the parties herein.

3. It is the Applicant's position that the money was deposited as ordered by the court in account No. xxxxxxx-0 in HFC Bank, Kisumu branch and that the money continues to lie in the account while the Claimant is denied the fruits of his judgment.

4. The Applicant states that the Respondent's Counsel is unwilling to release the money to the Claimant, and that the matter is in abeyance as no appeal has been filed.

5. The application is opposed vide a replying affidavit sworn by **Mr. Geoffrey O. Yogo**, Counsel on record for the Respondent on 28th September, 2021 and filed in court on even date.

6. The Respondent avers that an application for stay pending appeal was allowed by consent on 16th December, 2019 on condition that an amount of Kshs. 1,200,000.00 is deposited in a joint interest earning account in the name of counsels for both parties. The Respondent's further case is that the amount was deposited as directed and compliance was confirmed on 10/3/2020.

7. It is the Respondent's assertion that they lodged their record of appeal and served the same on the Claimant vide their letter of 15th February, 2021, and that the appeal is yet to be heard and determined.

8. The Respondent avers that there was no way they could release the security deposited as the appeal is yet to be heard and determined.

9. The Applicant in a further affidavit filed on 25th October, 2021, deny ever being served with a record of Appeal by the Respondent herein, until 12th October, 2021, when her Firm received a forwarding letter dated 15/2/2021, and a record of appeal that had not been filed in court as evidenced by its lack of a rubber stamp as an indication of having been received in court.

10. The Applicant further avers that the record of appeal in this matter was filed upon receipt of this application, a clear indicator that the Respondent is not interested in the appeal. It is the Applicant's assertion that the Respondent has taken two years and two months to institute its appeal contrary to the requirements of the Court of Appeal Rules, and the appeal stands to fail.

11. The Applicant avers that there are no orders staying the release of the Decretal Sum in the matter.

12. Parties filed submission in the matter and which have been duly considered.

Analysis and Determination

13. I have considered the application herein, the grounds and the affidavits in support thereof, the replying affidavit sworn in opposition and the Parties' submissions. The issue for determination, is whether the Respondent has filed an appeal to justify the continued holding of the security deposited in the matter pursuant to the orders of this court.

14. The Respondent's position is that it had prepared a record of appeal, filed it in court, and served the same on the Counsel for the Claimant vide a letter of 15th February, 2021. The Applicant/Claimant on his part, deny receipt of the Respondent's record appeal forwarded vide the said letter, and avers that he received the Respondent's letter dated 15th February, 2021 on 12th October, 2021 together with a record of appeal that had not been filed, as the same did not bear the court's rubber stamp as evidence of having been received in court.

15. The attachments annexed to the replying affidavit in opposition to the instant application, are court receipts indicating various payments made between 7th September, 2021 and 8th September, 2021. The instant application was lodged on 8th September, 2021.

16. The attachments annexed herein, are not accompanied by the record of appeal purported to have been filed in the matter. This court cannot therefor ascertain that the record of appeal was filed at all.

17. To grant or not grant stay orders, is a discretionary power of the court and which is exercised so as to prevent the appeal, if successful from being rendered nugatory per **Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459**.

18. The question for this court is whether the stay orders granted in this matter have served the ends of justice. The Respondent has not in my view justified the time taken to lodge their record of appeal (no evidence that the same has been lodged to date) and no effort has been made to fix the appeal for hearing or at the very least for directions.

19. Guided by the holding of **Hancox JA in Kenya Shell Limited v. Benjamin Karuga Kibiru & Ruth Wairimu Karuga (1986) JELR 99917 (CA)**, where he stated:

“..... that Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.” I find and hold that the Respondent has been indolent in as far as the appeal subject of this case is concerned, and for this singular reason, I find the instant application merited and the same is allowed.

20. Consequently, I make orders as follows: -

i. That all the money deposited in HFC Bank Kisumu Branch Account Number xxxxxx-0, Account Name OTIENO YOGO OJURO & COMPANY and KHASOA & COMPANY ADVOCATES be released to the Firm of KHASOA & COMPANY ADVOCATES.

ii. The costs of this application shall be borne by the Respondent.

21. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Applicant/Claimant

Mr. G. Yogo present for the Respondent

Christine Omollo – C/A