



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2129 OF 2014**

**DAVID WEKESA NAMBAFU.....CLAIMANT**

**VERSUS**

**BOB MORGAN SERVICES LIMITED.....RESPONDENT**

**RULING**

1. On 29<sup>th</sup> April 2020, **O.N Makau J** entered judgment in favour of the Claimant in the sum of Kshs. 2,043,500 being salary for the period of six (6) years when the Claimant was on suspension, together with costs and interest.
2. On 7<sup>th</sup> October 2021, the Respondent filed the present application seeking stay of execution of the judgment pending an intended appeal.
3. The application is supported by an affidavit sworn by the Respondent's Chief of Staff, Dennis Michieka and is based on the following grounds:
  - a) On 29<sup>th</sup> April 2020, **O.N Makau J** delivered a judgment finding *inter alia* that the non-payment of the Claimant's salary during his suspension period was unlawful and awarding Kshs. 2,043,500 in respect thereof;
  - b) The Respondent intends to appeal against part of the judgment and had lodged its Notice of Appeal on 13<sup>th</sup> May 2020. The Respondent also wrote a letter to the Employment and Labour Relations Court Registry on 15<sup>th</sup> May 2020, requesting for typed proceedings to enable it compile and lodge its Record of Appeal at the Court of Appeal. The said proceedings are yet to be availed by the Court;
  - c) In the interim, the Respondent made attempts to negotiate with the Claimant on a without prejudice basis, to reach an out of court settlement. However, these attempts were unsuccessful culminating with the change of the Claimant's Advocates from the firm of M/S Kimathi Muthuri & Company Advocates to M/S D.W Muyundo & Associates Advocates on 17<sup>th</sup> September 2021;
  - d) Following the change in representation, the Claimant's Advocates on record served the Respondent with a letter dated 28<sup>th</sup> September 2021, threatening to levy execution within 14 days from the date of the letter to recover the decretal sum, costs and interest amounting to Kshs. 3,585,004.27;
  - e) The Respondent has an arguable appeal and seeks to challenge material errors of law and fact by the Court;
  - f) In the absence of orders staying execution of the judgment, there is an imminent risk that the Claimant will take action to execute for recovery of the substantial judgment amount before the intended appeal is heard and determined. The intended appeal would consequently be rendered nugatory occasioning a grave injustice to the Respondent in the event that its intended appeal is successful;
  - g) The Claimant's residential address and/or assets are unknown to the Respondent and there is imminent risk that the Respondent will not recover the substantial amount claimed in the event that its intended appeal is successful. The Respondent is likely to suffer substantial loss;
  - h) The Respondent is ready and willing to furnish such security on such terms as the Court may deem just;
  - i) It is absolutely crucial and in the interest of justice that the application be heard as a matter of urgency and the orders sought herein granted.

4. In response to the Respondent's application, the Claimant filed a replying affidavit sworn on 19<sup>th</sup> October 2021.
5. The Claimant terms the application as incompetent, an afterthought and devoid of merit. He adds that it is meant to frustrate and delay the cause of justice.
6. The Claimant accuses the Respondent of failing to take any step for more than 15 months, to procure the proceedings from the Court and file its Record of Appeal within the stipulated time.
7. The Claimant states that as per the Appellate Jurisdiction Act, Cap 9, Laws of Kenya, the Respondent ought to have filed its Memorandum and Record of Appeal within sixty (60) days of lodging its Notice of Appeal, which period lapsed on or about 13<sup>th</sup> July 2020.
8. The Claimant points out that the Respondent only made an attempt to follow up on the matter eight (8) months after lodging its Notice of Appeal vide a letter dated 13<sup>th</sup> January 2021, addressed to the Claimant's Advocates then on record, seeking to settle the matter at a compromised amount of Kshs. 1,000,000.
9. The Claimant denies that his change of Advocates was caused by the fact that negotiations to settle the matter out of court had stalled. He adds that the change of Advocates was necessitated by a breakdown of communication between his previous Advocates and himself.
10. The Claimant notes that the Respondent has not produced a Certificate of Delay to explain the delay in filing the appeal.
11. The Claimant avers that the proposed appeal has no chance of success and further, the Respondent has not demonstrated how it will suffer substantial loss if the decretal sum is paid out. He adds that no evidence has been presented to show that he is a man of straw and that he will not be able to refund the decretal sum or part thereof, should the appeal succeed.
12. The Respondent's plea in this application is for stay of execution pending appeal. It is however evident that the period within which the Respondent ought to have filed its Record of Appeal has long lapsed. There is no indication that the Respondent has sought leave for enlargement of time within which to file the Record of Appeal. In the circumstances, the only conclusion to make is that there is no appeal on record and the current application is therefore incompetent.
13. The Respondent's application dated 1<sup>st</sup> October 2021 thus fails and is dismissed with costs to the Respondent.
14. The interim orders granted on 8<sup>th</sup> October 2021 are vacated,
15. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Amimo for the Claimant

Miss Onyango for the Respondent