



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 77 OF 2018

(Before D.K.N Marete)

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

GENERATION ELECTRONIC ALLIED LIMITED.....RESPONDENT

RULING

This is an application dated 26th October 2020 and seeks the following orders of court;

- i. The honourable court be pleased to hear this application on priority basis.
- ii. The honourable court be pleased to stay execution herein pending inter-parties hearing of this application.
- iii. The honourable court be pleased to stay execution herein pending, hearing and determination of the appeal.
- iv. Costs be provided for.

It is grounded as follows;

- a. The Applicant has filed an appeal which is yet to be heard.
- b. The appeal has overwhelming chances of success.
- c. If execution proceeds the appeal will be rendered nugatory and the applicant will therefore suffer irreparable loss and damage.

The application is further supported by the affidavit of David M.Mwangi sworn on the same date.

The Respondent, KUCFAW, in opposition to the application raises a Notice of Preliminary Objection as follows;

- i. THAT the Notice of Appeal having been lodged on 25th October , 2019 the Respondent did not comply with Rule 82 of the Court of Appeal Rules and has not, to date, lodged a Record of Appeal and has not availed security as required.
- ii. THAT the Memorandum of Appeal was lodged on 31st December, 2019 way out of time and the same is not accompanied by a Record of Appeal such that in essence, there is no pending Appeal without a Record of Appeal.
- iii. THAT under Rule 83 of the Court of Appeal Rules the Respondent defaulted and failed to institute an appeal within the appointed time so that it is only right to consider the Notice of Appeal as withdrawn or worse still have it struck out.
- iv. THAT the Respondent did not comply with Rule 4 of the Rules of the Court of Appeal and has not sought extension of time to file their intended Appeal out of time.
- v. THAT **this court is functus officio having dealt with this matter** conclusively which brings into question jurisdiction of this

court to deal with and determine this Application.

vi. THAT costs be awarded to the Claimant/Applicant.

She also filed a Replying Affidavit soon on 20th November 2020 which compliments the Preliminary Objection, *inter alia*, as follows

2. The claimant shall from the onset oppose the Notice of Motion Application dated 20th October 2020 on the grounds **THAT**:-

- i. That the judgment in this cause was delivered on 17th October 2019 and the Notice of Appeal was filed on 25th October 2019.
- ii. As at the time of delivery of judgment or by the time of filing Notice of Appeal the Respondent did not seek stay of execution of Judgment and decree of the court neither did they apply for the same.
- iii. As of today, the Respondent has not filed a Record of Appeal within the Rules of the Court of Appeal such that there is no pending Appeal.
- iv. The Respondent proceeded and filed a memorandum of appeal on 31st December 2019 out of time and without a record of Appeal and further that no leave was sought either from this court or from the court of appeal under Rule 4 of the Court of Appeal Rules.

It is the claimant/Respondent's case that in filing the Record of Appeal and the supposed appeal, the Respondent/Applicant failed the test of compliance with the procedure and law on filing of appeals to the Court of Appeal by contravening rules 4, 82, 83 and 75 of the Court of Appeal rules. She did not seek an extension of time to raise an appeal and neither did she comply with rules 82 and 83 on the prerequisites for filing of an appeal. Essentially therefore, no appeal lies in favour of the Respondent/Applicant.

The parties did not file any further support documents in support or opposition to the application. Instead, they on 16th December, 2020 at a mention agreed that the application be determined on the basis of the pleadings before court.

Overall, an observation of the data and pleadings before court demonstrates that the Applicants/Respondents fell short of compliance with the requisites principles for an issue of stay of execution. These are;

- i. The availability of a sustainable appeal
- ii. The timeliness of the said appeal
- iii. An offer of security to the Respondent

The Respondent/Applicant fails in all these. The application therefore falters for non-compliance with law and procedure. It collapses *in toto*.

This is a straight forward and clean application. Its facts are apparent on the face of the record. It is thorough and neat in substance and expression.

I agree with the claimant/Respondent's case that the Respondent/Applicant's case is gapping. What with the enormous non-compliance with the law and procedure of raising and filing a sustainable appeal before the Court of Appeal.

The claimant/Respondent's case overwhelms that of the Respondent/Applicants in essence and substance. It takes the day.

I am therefore inclined to dismiss the application with costs to the Claimant/Respondent.

Dated and delivered at Nyeri this 26th day of January 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss.Macharia for the Claimant Union
2. Mr.Karanja holding brief for Kimathi Kiara for the Respondent