



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 874 OF 2016**

**REBECCA WANJIKU MATHENGE.....CLAIMANT**

**VS**

**ALPHINE INSURANCE BROKERS LIMITED.....RESPONDENT**

**RULING**

1. On 3<sup>rd</sup> October 2019, I entered judgment in favour of the Claimant in the following terms:

a) Salary arrears for 26 months @ Kshs. 3,000.....Kshs. 78,000

b) Leave pay for 20 days (18,000/39x20).....12,000

**Total.....90,000**

2. The Party and Party Bill of Costs was taxed at Kshs. 160,145.

3. Upon commencement of execution, the Respondent filed a Notice of Motion dated 18<sup>th</sup> February 2021, seeking the following orders:

a) Stay of execution of the Decree and/or the enforcement of Warrants of Attachment and Sale of the Respondent's moveable property issued on 18<sup>th</sup> February 2021 pending the hearing and determination of the application *inter partes* and/or further orders of the Court;

b) In the alternative, stay of execution of the Decree herein pending the hearing and determination of this application *inter partes* and/or pending the hearing and determination of the appeal to the Court of Appeal.

4. The application is supported by an application sworn by the Respondent's Counsel, Randolph M. Tindika and is based on the following grounds:

a) That when the Respondent's Advocates discovered that the Claimant's Bill of Costs had been taxed *ex parte*, they filed an application dated 18<sup>th</sup> November 2020, seeking stay of execution and also setting aside of the *ex parte* taxation;

b) That after lodging the said application, they were informed that the court file could not be traced and as a result, they wrote a letter requesting for a skeleton file to be constructed;

c) That the Respondent's Advocates had severally visited the Deputy Registrar on the issue of the missing file and sought directions with regard to the reconstruction of the file but the indication was that the court file was available and the Court Assistants ought to trace it;

d) That the Respondent's Advocates' Court Clerk, John Kombe had been to the registry many times and for several months to follow up on the issue of the court file to no avail;

e) That due to the fact that for several months the file could still not be traced, the Respondent's Advocates did another letter on 5<sup>th</sup> February 2021, requesting for a skeleton file to be constructed;

f) That the Respondent's Advocates were informed by the registry staff in the evening of 16<sup>th</sup> February 2021 that the file had been traced whereupon they immediately placed the Notice of Motion dated 18<sup>th</sup> September 2020 on record;

- g) That since the court file had been missing, it would be a gross injustice to the Respondent if the execution process is not put to a hold;
- h) That meanwhile, the Respondent had preferred an appeal in the Court of Appeal and thus there would be need not only to stay execution pending re-taxation, but also pending the hearing and determination of the appeal to the Court of Appeal;
- i) That the Respondent is willing to provide security for the due performance of the Decree herein, which is Kshs. 90,000;
- j) That the Respondent would be prejudiced if the orders sought are not granted and has suffered and continues to suffer loss and damage.
5. The Claimant's response to the Respondent's application is by way of her replying affidavit sworn on 12<sup>th</sup> March 2021.
6. The Claimant opposes the application on the following grounds:
- a) The Court cannot grant stay of execution since there is no proper appeal against the judgment dated 3<sup>rd</sup> October 2019;
  - b) The Respondent is not telling the truth concerning the availability or otherwise of the file;
  - c) There is no progress that the Respondent has shown in prosecuting the appeal;
  - d) Granting stay of execution will amount to handling and determining the application dated 18<sup>th</sup> September 2020, that was abandoned by the Respondent and was not served on the Claimant's Advocates;
  - e) Granting stay of execution pending appeal will also amount to this Court sitting on appeal against the ruling dated 7<sup>th</sup> November 2018;
  - f) The Claimant will be prejudiced if the court grants stay of execution;
  - g) The best interest of justice will be to dismiss the application or order the Respondent to deposit the entire amount of Kshs. 262,958.28 in court if stay of execution is granted.
7. On the face of its application, the Respondent seeks stay of execution pending appeal. The conditions under which such an order may be granted are set out in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules as follows:
- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
  - b) such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.**
8. The first question to ask in this application is whether the Respondent has an appeal at all.
9. In its written submissions filed on 15<sup>th</sup> April 2021, the Respondent referred to Order 42 Rule 6(4) which provides:
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.**
10. Rule 75 (1) and (2) of the Court of Appeal Rules requires that the Notice of Appeal be lodged within 14 days of the date of the decision to be appealed from.
11. Judgment in this case was delivered on 3<sup>rd</sup> October 2019 and the Respondent lodged its Notice of Appeal 22 days later, on 25<sup>th</sup> October 2019. The Respondent did not even bother to apply for extension of time and the purported Notice of Appeal is therefore not properly on record. As a result, the Respondent has no appeal upon which it can seek stay of execution.
12. What is more, the Respondent did not comply with the timeline for service of the Notice of Appeal set under Rule 77 of the Court of Appeal Rules.
13. On the whole, the Court finds and holds that the Respondent has no appeal upon which an application under Order 42 Rule 6 (1) and (2) may be considered.
14. The application dated 18<sup>th</sup> February 2021 is therefore dismissed with costs to the Claimant. The interim orders granted on 19<sup>th</sup> February 2021 are vacated.
15. Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Tindika for the Claimant

Mr. Maragia for the Respondent