



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 633 OF 2017

(Formerly CMCC 4408 of 2011)

Before Hon. Lady Justice Maureen Onyango

HASSAN ANDALE.....CLAIMANT/DECREE HOLDER

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT/APPLICANT

RULING

1. Before me, for determination is the Respondent/Applicant's Notice of Motion Application dated 14th July, 2020. It seeks the following orders **THAT**:

(i) Spent.

(ii) Spent

(iii) *That pending the hearing and determination of the Respondent/Applicant's application there be temporary injunction prohibiting the Claimant from executing and or effecting judgment delivered on 18th December 2018.*

(iv) *That this court be pleased to stay the execution of the judgment and decree issued on 18th December 2018 pending the hearing and determination of the intended appeal.*

(v) *That the costs of this application be provided for.*

2. This Application is premised on the grounds **THAT**:

(i) *Applicant filed an application for review of the judgment that was delivered on 18th December 2018.*

(ii) *The application was dismissed vide a ruling dated 14th June 2019.*

(iii) *The Applicant being dissatisfied by the said ruling gave a notice of its intention to appeal against the said ruling.*

(iv) *The Claimant shared a draft decree with the Respondent/Applicant which they returned with amendments but they ignored the proposed amendments and proceeded to extract a decree which is not in accordance with the judgment.*

(v) *That the Claimant have instructed Viewline Auctioneers who have proclaimed the Respondents/Applicants office equipment's.*

(vi) *The Respondent/Applicant is apprehensive that Claimant Respondent will proceed to sell the proclaimed properties should the orders sought not be granted.*

(vii) *The Claimant stands to suffer no prejudice should the orders sought not be granted.*

3. The Application is further supported by the Affidavit of **SAMUEL MUNDIA**, the Head Commercial Transactions & Litigation Department of the Respondent/Applicant sworn on 14th July, 2020 in which he reiterates the grounds as set out on the face of the notice of motion application.

4. The Application is filed under Sections 3, 12(3)(i and (viii) of the Employment Act, Rule 17 of the Employment and Labour Relations Court (Procedures) Rules 2016 and Order 42 Rule 6 of the Civil Procedure Rules, 2010.

Claimant/Decree Holder's Response

5. In response to the application, the Claimant/Decree Holder filed a Replying Affidavit sworn on 20th July, 2020 in which he contends that the Applicant has not met the threshold for the grant of the Orders sought in their application.

6. The Affiant contends that the application is an afterthought, bad in law and an abuse of the court process as the judgment was delivered on 18th December 2018 and the Respondents have never settled the decretal sum. He further states that there is no appeal against the said judgment. That an application for stay and review of the court's judgment was dismissed.

7. The Affiant agrees that there was a mistake on the decree but states that he informed the Auctioneers to only recover the owing amount of Kshs.1,784,264.82/=.

8. The Affiant further states that the Respondent has not offered anything even the undisputed amount which is a sign that he has come to court with unclean hands.

9. The Affiant prays that the warrants of attachment being the ones with the arithmetical error be set aside and the judgment debtor be ordered to pay the owing amount together with the auctioneer's fees.

10. He further states that notice of appeal against the judgment was not filed within 14 days and no application for stay was filed therefore the inordinate delay has not been explained hence the application before court is an afterthought.

11. He maintains that the Respondent/Applicant has no arguable appeal against the dismissal of the application for review.

12. The Affiant states that he is currently dealing with cereals Business in Bungoma with a monthly turnover of about Kshs.200,000 hence is capable of refunding the decretal sum in the event the intended appeal succeeds.

13. He prays that the court dismisses the application with costs.

Respondents/Applicant's Rejoinder

14. The Respondents/Applicants in rejoinder filed a further affidavit sworn by **Isaac Wanjohi** on 24th July 2020. The Affiant reiterates the contents of the supporting affidavit of Samuel Mundia but further avers that the appeal is against the ruling dated 14th July 2019 dismissing the application for review.

15. He states that the appeal is arguable with high chances of success.

16. He deposes that the Respondent/Applicant is willing to deposit the decretal amount in court pending the hearing of the appeal.

17. He contends that the Claimant/Decree Holder has not produced any evidence in support of the allegation that he runs a business with a monthly turnover of Kshs.200,000. He urges the court to allow the application as prayed.

18. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

19. The Respondent/Applicant submits that it has met the threshold for the grant of the Orders sought in its Application as provided under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 it is entitled to the orders as prayed.

20. The Respondent/Applicant submits that the application was brought without undue delay as it was brought when the Claimant/Decree Holder begun execution before the parties could reach a formal agreement on the draft decree.

21. It further submits that prior to the irregular execution and the corona virus pandemic parties had engaged in correspondences on the draft decree and there was a possibility of compromising the claim.

22. The Respondent/Applicant submits that it will incur substantial loss unless stay is granted as the Claimant/Decree Holder is in the process of execution and the Respondent/Applicant is yet to exhaust its right to appeal.

23. It relies on the Ugandan case of **Tropical Commodities Suppliers Lid & Ors v International Credit Hank Ltd (In Liquidation) (Misc. App. No. 379 of 2003)**, where the court observed thus:

"The conclusion is inescapable. Substantial loss does not represent any particular amount or size, it cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal."

24. It further submits that the decretal amount herein is a colossal amount of real worth. That since some amounts had already been paid to the Claimant/Decree Holder as his retirement benefits the Respondent/Applicant will suffer substantial loss unless stay of execution is granted pending the intended appeal.

25. It further submits that the Respondent being a financial institution is ready and able to pay the Claimant should the intended appeal fail. It relies on the case of the case of **National Bank of Kenya Ltd v Alfred Owino Bala [2015] eKLR**, which is on all fours with the instant matter, where the High Court at Kisii held thus:

"In my humble view the appellant as correctly deponed is a financial institution and has constant cash flow therefore they are highly likely to raise Ksh.1,440,785/= while as the Respondent who was a former employee of the Appellant may find it very hard to raise the said amount should he be allowed to access the fruits of his decree and judgment."

26. The Respondent/Applicant submits that it is willing to deposit the decretal sum in court with costs.

Claimant/Decree Holder's Submissions

27. The Claimant/Decree Holder that submitted the Respondent an file notice of appeal against the judgment delivered on 18th December 2018 therefore there is no appeal against the said judgment.

28. He further submits that the Respondent/Applicant delayed for one year Eight Months and the delay has not been explained. He further submits that the time for appeal did not stop running by filling of an application for review and no application for extension of time has been filed, therefore there is no arguable appeal. He relies on the case of **Suleiman Sumra & Another v Said Mohammed Said (2018) eKLR**, where the court rejected an application for stay of execution for failure by the Applicant to explain a delay of 5 months.

29. In conclusion the Claimant/Decree Holder submits that the application be dismissed with costs.

Analysis and Determination

30. Upon considering the parties' arguments and the evidence adduced, I find that the issue for determination is whether the Applicant meets the threshold for grant of the orders sought.

31. **Order 42 Rule 6(2)** of the Civil Procedure Rules bars this Court from ordering stay of execution pending appeal unless –

- a) The Application is brought without inordinate delay.
- b) The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and
- c) The Applicant is willing to give security as the Court may deems fit to order.

Inordinate Delay

33. Judgment in this suit was delivered on 18th December 2018. The Applicant filed a notice of appeal against the judgment which it abandoned and instead settled for an application for review of the judgment. It is the dismissal of the application for review of the judgment that is the subject of the appeal in respect of which stay has been sought in the instant application.

34. The notice of appeal was filed on the 25th June 2019. The current application seeking stay of execution pending appeal was filed on 14th July 2020 after a proclamation by the decree holder on 9th July 2020.

35. It is clear that what prompted the Applicant to file the instant application is not the intention to appeal, but the proclamation.

36. Order 42 Rule 6 provides that an appeal does not operate as a stay of execution. The Applicant must apply for stay either at the time of delivery of judgment/ruling or within a reasonable time thereafter.

37. I find that a delay from 14th June 2019 to 14th July 2020 when the instant application was filed is inordinate and the same has not been explained or justified.

38. The intended appeal herein is not in respect of the judgment but in respect of dismissal of the application for review. The grounds for the review was that the Applicant's submissions, which were not on record at the time of writing judgment were not taken into account in the judgment.

39. As was held in the case of **Ken-Knit(K) Ltd v Ezekiel Ombasa Ombui [2015] eKLR** –

“... I wish to emphasize that submissions by nature are a summary of all evidence and facts of a case. They are not themselves evidence. The failure by a court not to have considered the submissions whether or not they were on record cannot of itself constitute a mistake, omission, commission or an error on the face of the record. The judgment was arrived at after a careful consideration of evidence and facts on record as well as applicable principles of law as were within the knowledge of the court. And the court was careful to note that it had considered that evidence.”

40. The Applicant did not in the application for review, state how the failure by the Court to consider its submissions affected the decision of the Court. In view of the fact that the judgment itself is not contested but only the failure to consider the submissions of the Applicant, I do not see why the decree holder should be denied the benefits of the fruits of his judgment delivered on 18th December 2018.

41. I however note that there is an error on the decree, which error has been admitted by the decree holder and which in my view can be corrected by the parties or by the Deputy Registrar. As has been admitted by the Claimant/Decree Holder, **an amount of Kshs.1,727,743.20 is what is due to him from the judgment. I order that the same be paid to the Decree Holder by the Applicant pending correction of the decree herein.**

42. **From the foregoing, the application herein is without merit and is accordingly dismissed.**

43. **The Applicant will in any event pay the Claimant/Decree Holder’s costs for this application. It shall further pay Auctioneer’s fees to be agreed or taxed based on the corrected decretal sum.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JULY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE