



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.E036 OF 2021

HUSSEINI BUILDERS LIMITEDAPPELLANT

VERSUS

KYALO KINYILIRESPONDENT

RULING

The appellant filed application dated 11th May, 2021 under the provisions of Order 51 Rule 1, Order 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules and seeking for orders that;

- a) The execution of the judgement entered and decree dated 3rd March, 2021 and all consequential orders and proclamation, attachment and execution process be stayed, suspending and/or lifted pending the hearing and determination of this application.*
- b) This court be pleased to set aside, review and/or vary the judgement entered herein and decree passed on 3rd March, 2021 against the defendant/applicant;*
- c) This court be pleased to stay execution of the judgement entered on the 3rd March 2021 pending hearing and determination of the intended appeal;*
- d) The court do issue any other orders deemed appropriate.*
- e) Costs of the application.*

The application is supported by the affidavit of Sajjad Hussesin Moosajee and on the grounds that the appellant is dissatisfied with the judgement delivered on 3rd March, 2021 by the trial court and the respondent threatens to execute the judgement and decree thereof and which will render the intended appeal nugatory. There shall be irreparable loss, damage and prejudice unless the orders sought are not issued.

In reply, the respondent filed the Replying Affidavit of Lemmy Regau Nyawade advocate and who avers that the appellant has not demonstrated what damage shall be suffered and the essentials for the grant of stay are not addressed. No cogent reasons have been outlined why the court should issue the orders sought.

In the further affidavit of the appellant, Mr Sajjad avers that the claimant filed a false claim against the appellant alleging that he was employed in November, 2004 until February, 2016 when he alleges there was unlawful termination of employment without notice. the grant of orders sought herein shall not prejudice the respondent and there is an arguable appeal.

The appellant filed written submissions.

Determination

The substance of the motion before court is seeking stay of execution of the judgement delivered on 3rd March, 2021; that the same be set aside, reviewed and or varied pending the hearing and determination of the intended appeal.

The appellant has attached the Memorandum of Appeal on three (3) grounds which in summary are that the trial court erred in failing to find that the respondent herein who was the claimant and employee's conduct justified dismissal; that the employee failed to disclose a reasonable claim in law and that the trial court failed to address the law and there was a miscarriage of justice.

The subject judgement is not attached and no Record of Appeal exists.

As set out above, on the orders sought, an applicant seeking stay of execution must satisfy the provisions of **Order 42 Rule (6) (1). Order 6 Rule 1(2)** which requires that;

No order for stay of execution shall be made under sub rule (1) unless-

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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant

on the affidavits filed by the appellant and sworn by Mr Sajjad, nothing is gone into with regard to the above provisions and which are couched in mandatory terms.

Further, the appellant by failing to attach any records from the trial court has failed to satisfy this court as to whether stay of execution was applied for and declined. To move this court at this instance without clarification or any submissions as to what action was taken to arrest the impugned judgement of 3rd March, 2021 is to move this court prematurely.

The appellant is also seeking for orders that the judgement of 3rd March, 2021 be set aside, reviewed and or varied. With tremendous respect, such duty is vested with the trial court unless the appeal is prosecuted and final orders issued.

On the records before court, to issue the orders sought would be to grope into the darkness without any material evidence. the application is materially premature and without merit.

The appellant has since enjoyed interim orders since May, 2021 without making any effort(s) to advance the appeal. Costs are due to the respondent.

Accordingly, application dated 19th May, 2021 is hereby found without merit and is hereby dismissed with costs to the respondent.

Delivered in court at Nairobi this 27th day of September, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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