REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2069 OF 2015

ANASTACIA MUTINDI KIBUTU.....CLAIMANT

VERSUS

LIASON GROUP (IB) LIMITED.....RESPONDENT

RULING

Introduction

1. On 31st January, 2019, I delivered a judgment herein in favour of the Claimant in the sum of KShs. 2,288,569. Both parties were aggrieved by the decision and they filed the Notices of Appeal on 4.2.2019 and 11.2.2019 respectively, challenging the whole judgment. In the meanwhile, on 26.6.2019, the claimant applied for review of the said judgment to correct a typographical on the aggregate award from kshs. 288,568 to kshs. 2,288,568 and I allowed the application on 15.7.2019. Thereafter the respondent filed the Notice of Motion dated 22.7.2019 seeking the following orders-

> ***a. THAT there be stay of execution of the judgment delivered on 3rd May 2019 and the decree pending the hearing and determination of this Application.***
>
> ***b. THAT there be stay of execution of the judgment delivered on 3rd May 2019 and the decree pending the hearing and determination of the Appeal.***
>
> ***c. THAT costs of this Application be in the cause.***

2. The grounds of the motion are set out in the body of the motion and the supporting affidavit sworn by Mr. James Mwangi Waiganjo. In brief she contended that the court entered judgment in favour of the claimant on 3rd May 2019 and she preferred an appeal by filing a Notice of Appeal; that if the order for stay is not granted, the Claimant will proceed with the execution and occasion on her substantial loss and thereby render the intended appeal nugatory; that the appeal is arguable and has good chances of success; that the she is willing to abide by any conditions as to security that the court imposes on her; and finally, she contended that it is in the interest of justice that the orders sought are granted.

3. The Claimant has opposed the Application vide her Grounds of Opposition filed on 19th September 2019. In brief she contended that the application is an abuse of the court process, an afterthought and it is meant to delay the conclusion of the matter; that it has been made after unreasonable delay; and finally, the applicant has shown no sufficient cause or material to warrant granting of the orders sought.

4. The application was disposed of by written submissions which I have carefully considered alongside the application, affidavits and the whole court record. The issues for determination are:

a) Whether the application is an abuse of the court process.

b) Whether the application meets the threshold for granting stay pending appeal.

Analysis and determination

(a) Whether the application is abuse of the court process.

5. The applicant seeks for stay of execution of the judgment delivered on **"3rd May 2019"**. As earlier noted herein above, the judgment herein was delivered on 31st January 2019, and corrected on 15th July 2019. It follows that granting the order sought by the applicant will be

in vain because there was no judgment delivered on **"3rd May 2019"**. I therefore agree with the claimant that the application is an abuse of the process of the court and it falls on its face.

6. Nevertheless, assuming that the foregoing was a genuine mistake by counsel, I will proceed to consider the application on merits.

(b) Whether the application meets the threshold for granting stay pending appeal.

7. The legal threshold for granting stay by this court is set out under Order 42 rule 6 (2) which provides as follows-

> ***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.***

8. The Application for stay herein was made on 22.7.2019, more than 6 months after the delivery of the impugned judgment. The application was, however made 7 days after the impugned judgment was corrected and became ready for execution. Consequently, I find that it was made timeously and without any unreasonable delay.

9. On the other hand, I have considered the grounds of the application and the supporting affidavit and found no averment that the claimant lacks capacity to refund the decreed sum if the appeal succeeds after the execution is done. The applicant is obligated to satisfy the court by evidence in the form of affidavit that the decree-holder will not be able to refund the decreed sum should the appeal succeed after execution of the decree. In ***National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another [2006] e KLR***, the court held that-

> ***"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge."***

10. Applying the foregoing precedent to the instant application, I find that the applicant has not satisfied the court by evidence that she will suffer substantial loss if stay pending appeal is withheld. She did not even allege in her supporting affidavit that the claimant has no capacity to refund the decreed sum if the appeal succeeds. In my view an appeal becomes nugatory, and the appellant suffers substantial loss if he fails to recover the subject matter or faces difficulties in recovering the same after the appeal succeeds. Accordingly, I am of the view that even if the order sought had been properly drawn, the same would still fail because the applicant has not proved the foregoing critical requisite for granting stay pending appeal.

11. Finally, I have considered the Applicant's willingness to offer of security as condition for stay. However, offer of security alone is not sufficient ground for granting stay pending appeal. Without prove that substantial loss will be occasioned on the appellant if stay is denied, the order of stay will not issue not matter how good is the security offered.

12. In conclusion, I return that the applicant has not met the legal threshold for granting stay pending appeal and proceed to dismiss it with costs.

Dated and delivered at Nairobi this 31st day of January, 2020

ONESMUS N. MAKAU

JUDGE