



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 69 OF 2019

(Before Hon. Justice Hellen S. Wasilwa 29th January, 2020)

MANPOWER NETWORKS LIMITEDAPPLICANT

VERSUS

ALFRED ALBAYO 1ST RESPONDENT

BAMBURI CEMENT2ND RESPONDENT

RULING

1. Pending for determination before me is the Notice of Motion Application dated 7th June, 2019. The Application is filed by the 2nd Defendant/Applicant under Certificate of Urgency seeking the following Orders:-

1. ***THAT this Honourable Court be pleased to certify this application as urgent and its service hereof be dispensed with in the first instance (spent).***
2. ***THAT this Honourable Court be pleased to stay execution of the Judgment of this Court delivered on the 28th February 2018 in MAVOKO SPMC NO 586 OF 2014 by Honourable L. Kassan pending the hearing and determination of this application.***
3. ***THAT this Honourable Court be pleased to stay execution of the Judgment of this Court delivered on the 28th February 2018 by Honourable L. Kassan pending the hearing and determination of the intended Appeal in the Employment & Labour Relations Court.***
4. ***THAT upon the court grant leave to appeal out of time, the draft memorandum of appeal attached to this application be deemed as properly filed.***
5. ***THAT costs of this application abide by the intended appeal.***

2. The Application is premised on the grounds that:-

- a) ***On the 28th February 2018, the subordinate court at Mavoko entered Judgment in favour of the Plaintiff/1st Respondent and against the 2nd Defendant/2nd Respondent.***
- b) ***The 2nd Defendant/Applicant is aggrieved by the said judgment and intends to appeal against it at the Employment & Labour Relations Court.***
- c) ***The Plaintiff's advocates on record have already written to the 2nd Defendant/ Applicant's advocates asking for the payment of the decretal sum.***
- d) ***The sum awarded is the subject of the appeal and its payment to the Plaintiff would render the appeal nugatory.***
- e) ***The 2nd Defendant/Applicant herein has an arguable appeal with a high probability of success.***
- f) ***The 2nd Defendant/Applicant stands to suffer irreparable loss and damage if a stay of execution is not granted by this Honourable court as the respondents will Execute for the sum awarded.***

g) The 2nd Defendant/Applicant is willing and ready to furnish the security of costs to this of court and will religiously abide by any directions given by this Honourable Court.

h) The application has been brought without any unreasonable delay.

i) The law provides for a stay of execution to issue pending the hearing and determination of an appeal and this application.

j) The judgment in the subordinate court was entered against the plaintiff in a work injury claim in the absence of the applicant who was not served by the court with a judgment notice as promised.

k) The applicant herein filed an application dated 18/5/2018 under a certificate of urgency in MACHAKOS HIGH COURT MISCELLANEOUS APPLICATION NO 164 of 2018 seeking among other orders; a stay of execution pending the hearing and determination application, a stay of execution pending the hearing of the appeal. The high court granted interim stay orders pending the hearing and the determination of the application until the 30/5/2019 when the court delivered its ruling and dismissed the Applicant's application on the grounds that the High court did not have jurisdiction to grant a stay pending appeal and to enlarge time in order to file an appeal out of time because it did not have jurisdiction to grant the orders on work injury claims whose jurisdiction lies with the Employment and Labour Relations Court.

l) The High Court having dismissed the Applicant's application for a stay there is no stay and the applicant can be executed at any time.

m) This application is not barred by Res judicata.

n) It is just, fair and mete that the orders sought herein be granted.

3. The Application is further supported by the Affidavit of **JAMES TSUMA**, the Operations Manager of the Applicant herein sworn on 7th June, 2019 wherein he reiterates the grounds on the face of the Application.

4. In opposition to the instant Application the 1st Respondent/Plaintiff filed a Replying Affidavit deponed by **ALFRED ALBAYO OLLABAYO**, on 15th July, 2019 in which he avers that the instant Application is bad in law, frivolous, incompetent. He further urged this Honourable Court to dismiss the same with costs.

5. It is further averred that the Application is misconceived as there is no threat to execution as the lower court decree is yet to be extracted and no auctioneer has been instructed to execute. It is further contended that the Applicant is only acting on misapprehensions.

6. He contends that judgment in this matter was delivered in his favour in Mavoko PMCC No. 586 of 2018 on 28th February, 2018 and that the Applicant intends to Appeal the said Judgment.

7. He further contends that the Applicant filed an Application dated 8th May, 2018 in Machakos High Court Miscellaneous Application No. 164 of 2018 seeking for leave to appeal out of time and stay of execution pending hearing and determination of the intended Appeal.

8. The 1st Respondent further avers that the said Application was heard and dismissed on 30th May, 2019 for want of jurisdiction. It is on this basis that he contends that this matter is res judicata having already been decided.

9. He further contends that the instant Application is an after thought and a delaying tactic only meant to delay him from enjoying the fruits of the Judgment entered in his favour. He further contends that the intended Appeal has no chances of success and that he stands to suffer prejudice if the same is allowed.

10. In conclusion, the 1st Respondent urged this Honourable Court to dismiss the instant Application with costs.

11. In further opposition to the instant Application, the 2nd Respondent/1st Defendant filed a Replying Affidavit deponed by **BETTY KANYAGIA** on 20th September, 2019 in which she contends that the instant Application has no merit and that the same ought to be dismissed with costs.

12. She further avers that the grounds of Appeal as presented in the Draft Memorandum of Appeal cannot hold and do not meet the threshold as set out by law. She therefore urged this Court to dismiss the Application with costs.

13. She further contended that the Applicant has also failed to meet the threshold for grant of the orders sought in its Application dated 7th June, 2019.

14. In a brief rejoinder, the Applicant filed a Further Affidavit deponed by **JAMES TSUMA** on 24th September, 2019 in which he avers that ALFRED ALBAYO OLLABAYO is a stranger to this proceedings as the Plaintiff in the lower Court matter was ALFRED ALBAYO and not ALFRED ALBAYO OLLABAYO.

15. He further contended that there is indeed a threat of execution as the 1st Respondent's advocates have already served the applicant with its letter dated 6/4/2018 demanding for payment of the decretal sum and costs amounting to Kenya Shillings Four Hundred and Twenty Five

Thousand and Two Hundred and Five (Kshs. 425,205).

16. He further averred that the assertion that this matter is barred on account of being res-judicata is not true as the High Court at Machakos stated that it lacked jurisdiction to hear the Application for stay and therefore this Application is yet to be heard and determined.

17. The Applicant further insisted that he is not forum shopping as alleged by the 1st respondent but is in pursuit of its constitutional right to appeal the lower court decision.

18. He therefore urged this Honourable Court to allow the instant Application as prayed.

19. In disposing off the Application the parties agreed to file written submissions.

Submissions by the Parties

2. The Applicant submitted that he has satisfied the mandatory conditions for grant of the reliefs sought as set out under Order 42 of the Civil Procedure Rules, 2010. To buttress this argument the Applicant relied on the findings in the cases of **Focin Motor Cycle Company Limited Vs Ann Wambui Wangui & Another (2018) eKLR**, **National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR** and **Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Another (2016) eKLR**.

21. The Applicant further submitted that the instant Application is no barred by the doctrine of res-judicata the same having never been decided on merit. To fortify this argument the Applicant relied on the Court findings in the case of **ANM Vs PNM (2016) eKLR**.

22. In conclusion, the Applicant urged this Honourable Court to allow its Application as prayed.

Submissions by the 1st Respondent

23. The 1st Respondent on the other hand submitted that the Applicant has failed to meet the threshold for granting of the Orders sought in the Application as set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010. To fortify this argument the 1st Respondent cited and relied on the findings in the following authorities **Antoine Ndiaye Vs African Virtual University (2015) eKLR**, **Mutua Kilonzo Vs Kioko David (2008) eKLR** and **Masisi Mwita Vs Damaris Wanjiku Njeri (2016) eKLR**.

24. The 1st Respondent further submitted that if this Court is inclined to grant the Applicant the prayers sought, they urged this Court to grant the same on condition that the Applicant pays half of the decretal sum which is Kenya Shillings: Two Hundred and Twelve Thousand Six Hundred and Two and Fifty Cents (Kshs. 212,602.50) to the 1st Respondent and the balance be deposited in a joint interest earning account in the name of both firms. For emphasis the 1st Respondent cited the case of **Polytanks Limited Vs Everlyne Wanza Musau & 3 Others (2017) eKLR**.

25. In conclusion, the 1st Respondent urged this Honourable Court to dismiss the Application dated 7th June, 2019 with costs.

26. The main issue here is whether the application is resjudicata, the same having been initially filed before the High Court in Machakos and having been dismissed for want of jurisdiction.

Indeed the High Court in Machakos is a Court of concurrent jurisdiction. The High Court in Machakos dismissed the stay application after considering it and for whatever reason the application was dismissed, this court cannot revisit it. I find the application res-judicata and I dismiss it accordingly.

Dated and delivered in open Court this 29th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mrs. Oyamo holding brief Maina for Applicant

Mr. Makori holding brief Juma for 1st Respondent

Odhiambo holding brief Oweya for 2nd Respondent