



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL CASE NO. 2427 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 25th February, 2020)

ENOCK NDONGA.....CLAIMANT

VERSUS

BOARD OF DIRECTORS

PIONEER SCHOOL.....RESPONDENT

RULING

1. Before this Court, is the Respondent's Application dated 4/11/2019, wherein, the following orders have been sought-

a. Spent.

b. THAT this Honourable Court be pleased to order for stay of execution of the judgment delivered on 3rd December 2018, the Decree arising therefrom and all consequential orders arising therefrom pending the lodging, hearing and determination of the Respondent/Applicant's intended appeal.

c. THAT the costs of this Application be in the cause.

2. The application is supported by the grounds set out in the motion and the Supporting Affidavit of Beth Nyambura sworn on 4/11/2019. The Claimant has opposed the application vide his Replying Affidavit filed on 13/11/2019.

The Applicant's Case

3. The Applicant avers that on 3/12/2018, judgment was delivered in favour of the Claimant and the Respondent was ordered to pay the sum of KShs. 539,000.00 and cost of the suit. Aggrieved by the decision, the Applicant filed a Notice of Appeal against the said judgment.

4. The Applicant avers that it obtained certified copies of typed proceedings on 31/10/2019 but on this same date, M/S Taifa Auctioneers proclaimed several of its goods including office furniture, office equipment and motor vehicles registration numbers KAX 711R, KAW 910G, KBW 873B and KAW 910Q.

5. The Applicant states that it is apprehensive that the Claimant will execute the decree before this application is heard. As such, it stands to suffer irreparable loss and harm if the proclaimed goods are sold to settle the decretal sum, before this application is heard and determined.

6. The Applicant argues that if the entire decretal amount is paid to the Claimant, it may not be able to recover the same and the appeal will be rendered nugatory, as the Claimant is not a person of means.

7. It is averred that the Applicant is ready and willing to deposit Kshs. 100,000.00 as security in Court in a joint account in the name of both Advocates as may be directed by the Court.

The Claimant/Respondent's Case

8. The Claimant avers that the Application is an attempt to deter him from enjoying the fruits of the judgment. He further avers that the application has been made in bad faith as it is founded on an appeal that was filed outside the time stipulated in rule 75 of the Appellate Jurisdiction Act.

9. The Claimant is of the position that the letters of 5/6/2019 and 14/10/2019 were concocted to benefit the Respondent so as to create the impression that the Applicant had been avid in following up on the typed proceedings. This is evidenced by the fact that the Deputy Registrar only referred to the letter of 18/12/2018, in her letter of 19/9/2019.

10. The Claimant deposes that the application is an afterthought having been brought 11 months after the delivery of the judgment. He is of the position that the Deputy Registrar's letter of 19/9/2019 was received at a considerable time, as such, the assertion that the delay in filing the appeal was occasioned by the delay in receiving typed proceedings is unjustified. His position is fortified by the fact that the Applicant has never applied for a certificate of delay or filed a record of appeal.

11. It is averred that there had been correspondence between the parties at every stage, as such, the Applicant was aware of the inevitable direction this matter would take.

12. The Claimant avers that from the draft memorandum, it is evident that the appeal has a minimum chance of success, if any at all. He further avers that he would be prejudiced if the orders sought are granted owing to the resources used in prosecuting this matter and the length of time it took to get the impugned award.

13. The Claimant avers that the security of Kshs. 100,000.00 is insufficient as the amount due is Kshs. 774,497.00. As such, the Claimant urges this Court to impose the following conditions in the event the orders sought are awarded:-

a. The Applicant to pay to him the sum of KShs. 500,000.00 while the balance of the decretal award, assessed costs and interest of Kshs. 274,497.00 be banked at a joint interest earning account in the name of the Advocates for the Appellants and himself, within 7 days of granting of the order.

b. The Applicant to immediately obtain the certified proceedings, judgment, decree and certified costs herein with a view to preparing and filing a memorandum of appeal and the record of appeal within 2 months of granting of the order.

c. The Appellant to furnish adequate security for costs of the Appeal against the subject judgment.

14. He prayed for the Application to be dismissed with costs.

15. The Application was disposed of by way of written submissions with the Applicant filing its submissions on 10/12/2019. There is no record of the Claimant's submissions in the Court file.

The Applicant's Submissions

16. The Applicant submits that it will suffer a substantial loss if the orders sought are not granted. It urges that if the Claimant is awarded the decretal sum, he will not be able to refund should the appeal succeed hence occasioning a miscarriage of justice.

17. Further, that the Claimant has not adduced any evidence to prove that he has the financial capacity to refund the decretal sum in the event the appeal succeeds. As such, the intended appeal will be rendered nugatory.

18. To fortify the above assertion, the Applicant relies on the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** where the Court held that an Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. It further relies on the case of **Hassan Guyo Wakalo vs. Straman EA Limited [2013] eKLR** where the Court held that an applicant must demonstrate that the intended appeal will be rendered nugatory if the order for stay is not granted; has also been relied upon.

19. It is submitted that the Application has been brought without unreasonable delay and that the Applicant is ready to furnish security of Kshs. 100,000.00 in compliance with the requirement under order 42 rule 6 (2) (b) of the Civil Procedure Rules. He relies on the cases of **Peter Mutua Mwanzia vs. Mini Bakeries (Nairobi) [2017] eKLR**, **Jaber Mohsen Ali & Another vs. Priscillah Boit & Another [2014] eKLR** and **Butt vs. Rent Restriction Tribunal Civil App No. NAI 6 of 1979** which reinforce the position set out in Order 42 rule 6 (2) of the Civil Procedure Rules.

20. I have considered the averments of both Parties. Order 42 rule 6(2) of the Civil Procedure Rules states as follows:-

2. "No order for stay of execution shall be made under subrule (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.

21. In recognizing that the Applicant filed this application 11 months after delivery of judgement, the application was filed late. However, the Applicant is willing to deposit some security in this matter.

22. I will therefore allow the application for stay on condition that the Respondent releases ½ the decretal sum to the Claimant and deposits the other ½ in a joint interest earning account held in joint names of Counsels on record within 60 days. In default execution to issue.

Dated and delivered in open Court this 25th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ivy Kathungu for Appellant – Present

Kaunda holding brief Kamau for Respondent – Present