



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1390 OF 2014

ANTHONY KARANJA WAINAINA.....CLAIMANT

VERSUS

ADRIAN COMPANY LIMITED.....RESPONDENT

RULING

Introduction

1. On 15th March, 2019, I delivered a judgment herein in favour of the Claimant in the sum of KShs. 2,810,000. The respondent was aggrieved by the decision and filed the Notices of Appeal on 20.3.2019 followed by Court of Appeal Civil Appeal No. 190 of 2019 challenging the whole judgment. In the meanwhile, on 14.6.2019, the claimant applied, successfully, for review of the said judgment to correct a typographical on the aggregate award from kshs. 2,810,000 by adding kshs. 116,666.70 which had erroneously been omitted from the items awarded. Thereafter the respondent filed the Notice of Motion dated 23.10.2019 seeking the following orders-

a. THAT there be stay of execution of the judgment delivered on 15th March 2019 and the decree pending the hearing and determination of this Application.

b. THAT there be stay of execution of the judgment delivered on 15th March 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. Benard Wachai Njoroge. In brief the respondent contended that the court entered judgment in favour of the claimant on 15th March 2019 and she has since file Civil Appeal No. 190 of 2019; that the appeal is arguable and has good chances of success; that she is apprehensive that the claimant may proceed with execution before the determination of the 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 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 his Replying Affidavit sworn on 15th November 2019. In brief he contended that the application should be dismissed because it lacks merits as the applicant has not demonstrated sufficient cause to justify granting of the stay order sought; that the applicant has not proved that she will suffer substantial loss; that he has the means of repaying the decreed sum if the appeal succeeds after the execution and annexed copy of title deed of his 10 acre land; that the application has been made after unreasonable delay of 7 months; and finally, the applicant has not offered any security by depositing the decreed sum in court.

4. The application was argued orally on 26.11.2019. Mr. Chiuri, learned counsel for the respondent relied on the supporting affidavit to urge the court to allow the application. He submitted that the applicant has an arguable appeal pending before the Court of Appeal; that there is a real danger of execution of the decree which if not stayed will render the appeal nugatory because the claimant will not be able to refund the sum after the appeal succeeds; that the title deed filed by the claimant is not supported by a Certificate of Search or a valuation report; that the document filed is not evidence of means to repay the decreed sum if the appeal succeeds; and finally, that the applicant is agreeable to comply with conditional stay of execution within 60 days.

5. Mr. Botany, learned counsel for the claimant relied on the said replying affidavit to oppose the application. He urged that the application has not met the threshold for granting stay pending appeal set out by Order 42 Rule 6 of the Civil Procedure Rules; that the claimant is able to refund the decreed sum if the appeal succeeds after the execution; that the claimant is a man of means and owns 10 acres of land in Kiganjo Kiambu valued approximately kshs. 5,000,000 per acre; that the claimant has filed a copy of the title deed to the said land to prove

that execution of the decree herein will not render the appeal nugatory; and finally, he contended that the offer of security was only made by the counsel from the bar.

Issues for determination

6. I have carefully considered the application, affidavits and the submissions by counsel. The only issue for determination is whether the application meets the threshold for granting stay pending appeal.

Analysis and determination

7. The legal threshold for granting stay by this court is set out by Order 42 rule 6 (2) of the Civil Procedure Rules 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 filed on 25.10.2019, more than 7 months after the delivery of the impugned judgment. The application was, however made 3 months after the impugned judgment was corrected and one month before the ruling on costs was delivered by the Deputy Registrar. Consequently, I find that, in the foregoing circumstances, the application 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 in the applicant’s Supporting Affidavit 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. 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.

11. The foregoing notwithstanding, the claimant took the liberty to urge that he is a man of means and even filed a copy of title deed for his 10-acre land in Kiambu which he estimated to be kshs. 5,000,000 per acre. Accordingly, I am of the view that the application fails on its face because the applicant has not proved the critical requisite for granting stay pending appeal, namely, that substantial loss will result to him if the order of stay is withheld.

12. Finally, I have considered the Applicant’s supporting Affidavit and I did not see any offer of security by the applicant. I therefore agree with the claimant that the offer of security was only made by the applicant’s counsel from the bar. However, even if security had been offered by the applicant, an offer of security alone is not sufficient ground for granting stay pending appeal unless the applicant proves that substantial loss will be occasioned on her if stay is denied.

13. In conclusion, I must return that the applicant has not met the legal threshold for granting stay pending appeal and proceed to dismiss it with costs. I also set aside the interim order stay granted on 26.11.2019.

Dated, signed and delivered in open court at Nairobi this 21st day of February, 2020

ONESMUS N. MAKAU

JUDGE