



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1620 OF 2014

CHARLES GACHECHE GICHERU.....CLAIMANT

VERSUS

SBI INTERNATIONAL HOLDINGS AG (KENYA)...RESPONDENT

RULING

Introduction

1. On 9th November, 2018, I delivered a judgment herein in favour of the Claimant in the sum of Kshs. 1,671,709 as compensation under the Work Injury Benefits Act and damages for pain, suffering and loss of amenities. The respondent was aggrieved by the said decision and filed the Notices of Appeal on 19.11.2018 challenging the whole judgment. Thereafter he filed the instant Notice of Motion dated 27.8.2019 seeking the following orders-

a. THAT there be stay of execution of the judgment and the decree herein pending the hearing and determination of this Application.

b. THAT there be stay of execution of the judgment and the decree herein pending the hearing and determination of the intended Appeal.

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

2. The grounds of the application are set out in the body of the motion and the supporting affidavit sworn by Mr. Christopher Chengacha on 27.8.2019. In brief the respondent contended that the court entered judgment in favour of the claimant on 9th November, 2018 and she has since filed a Notice of Appeal challenging the judgment on the issue of quantum; that the appeal is arguable and has very high chances of success; that the claimant has already proclaimed his chattels in execution of the impugned decree and unless 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, because the claimant has no capacity to refund the decreed sum at ago if the appeal succeeds after execution; and finally, she contended that she is ready to offer security and abide by any conditions as to security that the court imposes on her.

3. The Claimant has opposed the Application vide his Replying Affidavit sworn on 5th September, 2019. In brief he contended that the application is incompetent and devoid of merits and as such it should be dismissed with costs. He contended that the application has been made after a long delay and is therefore an afterthought; that he is currently working for Kuehne+Nagel K Limited and as such he has the means of repaying the decreed sum if the appeal succeeds after the execution; and finally, he contended that the applicant never adduced any evidence during the trial or filed any submissions before the impugned judgment and as such the his evidence and submissions that led to the impugned judgment remain uncontested.

4. The application was first heard ex-parte on 28.8.2019 by the duty judge who gave interim stay order on condition that the applicant deposits the full decreed sum in court pending inter-partes hearing of the application. On 30.9.2019, the parties confirmed that the decreed sum was duly deposited in court and I verified the same from copy of court Deposit Receipt No 0613455 dated 24.9.2019 for Kshs. 2,312,091. On 22.10.2019 the parties agreed to dispose of the application by written submissions.

5. The applicant submitted that she is keen on pursuing the appeal and that is why she has complied with court orders to furnish security by depositing the decreed sum in court. she further contended that she applied for certified copies of typed proceedings and paid for the same on 26.11.2018 and wrote reminder on 12.2.2019.

6. She further submitted that if stay order is withheld, the appeal will be rendered nugatory because the claimant will not be able to refund the

decreed sum after the appeal succeeds. He submitted that the claimant has not shown that he has the ability to refund the amount either by affidavit or by proof of income other than the allegation that he is employed. In her view the amount is colossal and it will be difficult for the claimant to refund after spending the same.

7. She further contended that the application was made immediately after the costs were determined because that is when execution became possible. In her view, there was no need to burden the court with the application when there was no threat of an execution. Referring to Article 159 (2)(d) of the Constitution, she submitted that there was no inordinate delay in making the application and urged that substantive justice should not be sacrificed at the altar of technicalities.

8. She further submitted that she is aggrieved by the award of damages both under WIBA and Common Law and urged that the appeal should be allowed to be determined on the merits because the jurisprudence in the area is not clear. According to her the appeal has high chances of success. She relied on four precedents which were just dumped in the court file without any comment on the or highlighting the relevant portions.

9. The claimant submitted that the Notice of Appeal is incompetent and the applicant has not met the threshold for granting stay pending appeal as set out by Order 42 Rule 6 of the Civil Procedure Rules. He submitted that the applicant did not serve the notice of appeal under Rule 77 of the Court of Appeal Rules which requires that a notice of appeal shall be served within 7 days after filing. He further contended that the application for typed proceedings was never served on him as required under Rule 82 of the said Rules. The said rule requires that for the limitation period within which to file appeal to stop running, did not stop running, the appealing party must serve the same on the opposing party. He therefore urged that the application should be dismissed because there is no appeal on record warranting the stay order sought.

10. He further submitted that he is in gainful employment and as such he is able to refund the decreed sum if the appeal succeeds after the execution. On that basis, he contended that the execution of the decree herein will not render the appeal nugatory.

11. He urged that the applicant has no arguable appeal pointing out that she neither filed any witness statements and exhibits nor did she adduce any evidence during the trial. He further pointed out that the applicant did not also file any written submissions before the impugned judgment was entered.

12. Finally, he contended that the application was made after unreasonable delay from 9.11.2018 and prayed for the same to be dismissed with costs.

Issues for determination

13. I have carefully considered the application, affidavits and the submissions filed. The main issues for determination are: -

- a) Whether the notice of Appeal and the application are incompetent.
- b) Whether the application meets the threshold for granting stay pending appeal.

Analysis and determination

(a) Incompetent Notice of Appeal and Application

14. The applicant did not rebut the claimant's contention that the notice of appeal herein is incompetent for want of service and also due to lapse of the 60 days' period for lodging appeal. All what she submitted was that the court should not sacrifice justice at the altar of technicalities. She then urged the court to let the appeal be heard on the merits in order for jurisprudence in the area on the concerned herein may be clarified by the Appellate court. She therefore urged that the issue of the incompetence of the notice of appeal and the time for filing appeal should be left to the Appellate court to determine.

15. Rule 77 of the Court of Appeal Rules (Appellate Jurisdiction Act) which provides;

“(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be ex parte, within seven days after lodging the notice of appeal, direct that service may not be effected on any person who took no part in the proceedings before the superior court.”

16. In the case of *Mradula Suresh Kantaria vs Suresh Nanalal Kantaria Civil Appeal (Application) No. 277 Of 2005* the Court of Appeal held as following concerning failure to serve the notice of appeal on affected parties :

“It follows that although Rule 76 is a procedural rule based on the Appellate Jurisdiction Act, it has deeper roots in the Constitution so as to safeguard due process. Indeed, in the hierarchy of fundamental rights, the right of hearing ranks very high. For this reason, we think that failure to serve the notice of appeal renders a notice of appeal incompetent including the record of appeal itself. This is because Rule 76 (1) is a mandatory requirement and provides that all persons directly affected by the appeal, must be served with a notice of appeal or the Court is requested upon an application by the appellant which may be ex parte, to direct that service need not be effected on any person who took no part in the proceedings in the superior court.

17. In view of the forgoing provision and the Court of Appeal decision, I agree with the claimant that the Notice of Appeal herein is incompetent and as such there is no basis for granting stay orders as prayed. I further agree with claimant that failure to serve the application for copy of typed proceedings by the applicant meant that the limitation period within which to file an appeal did not stop running. **Rule 82** provides, inter alia, that an appeal shall be instituted by lodging a record of appeal within 60 days from the date when the notice of appeal was lodged. The rule has the following proviso: -

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

18. However, Rule 82 (2) provides a bottleneck, that an appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for copies of the proceedings was in writing and a copy of it was served on the opposite party. The said sub-rule (1) provides as follows: -

“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”

19. I have carefully considered the material before the court and found no evidence of service of the application for typed proceedings on the claimant. In fact, the applicant did not annex any copy of the said application for the typed proceedings to the instant application. Consequently, I return that the applicant has failed to demonstrate using a Notice of Appeal and served application for proceedings that she has an appeal on record which forms the basis for the application for stay of execution. It follows that, without any appeal or a competent Notice of appeal on record, a stay order would not issue under Order 42 of the Civil Procedure Rules, because the purpose of the stay order is to safeguard the right to hearing of an appeal and not for the sake of it. Accordingly the application herein is also incompetent and it must fall down on its face.

(b) Threshold for granting stay pending appeal

20. In view of the foregoing I will not consider the legal threshold for granting stay by this court which is set out by Order 42 rule 6 (2) of the Civil Procedure Rules 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.

21. In conclusion, I must return that the application is incompetent for the reasons stated above and proceed to dismiss it with costs. I also set aside the interim order stay granted on 28.8.2019.

Dated and delivered at Nairobi this 13th day of March, 2020

ONESMUS N. MAKAU

JUDGE