



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 461 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 15th April, 2020)

GUYO HUKA.....CLAIMANT/RESPONDENT

VERSUS

MAWARA HOLDING LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Applicant filed a Notice of Motion on 28/10/2019 seeking the following orders:-

1. Spent

2. THAT the Notice of Appeal dated 22nd October 2019 and lodged at the Employment and Labour Relations Court Registry and lodged in court on 23rd October 2019 be deemed as duly filed.

3. THAT there be stay of execution of any order or decree arising out of the Ruling delivered on 23rd September 2019 pending hearing and determination of this application and the intended appeal.

4. THAT costs of this Motion to abide the result of the appeal.

2. The Application is premised on grounds that:

1. Being dissatisfied with the ruling dated 23/9/ 2019, the Applicant filed a Notice of Appeal dated 22/10/2019 after the stipulated period.

2. The applicant applied to be supplied with a copy of the typed proceedings to enable them file their appeal but the typed proceedings are yet to be availed. The time of filing a memorandum and record of appeal is likely to lapse pending receipt of the typed proceedings.

3. After the Ruling was delivered on 23/9/2019, its advocate applied for a copy of the ruling and presented a letter dated 25/9/2019 but the file was missing.

4. It has an arguable intended appeal as failure to be given a chance to defend the claim has caused it prejudice.

5. The intended appeal has a chance of success as it will advance its position that the Claimant absconded duty and deserted the place of work.

6. The application has been filed without unreasonable delay.

3. The application is supported by the affidavit of Peter Chege Kiarie, the Applicant's director, sworn on 22/10/2019 in which he reiterates the grounds set out in the application. He avers that when he learnt of the Ruling dated 23/9/2019, his advocate was out of the country and it was not possible to give him instructions to lodge an appeal within statutory time.

Respondent's case

4. In response to the application, the Respondent filed a Replying Affidavit sworn by Lourine L. Ochogo, the Respondent's advocate.

5. She deposes that the application is premised on bad faith as it has been brought more than a month after the Ruling was delivered thus it does not satisfy the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

6. She avers that the assertion that its advocate was out of the country when the Ruling was delivered on 23/9/2019, is a false hood for reason that the Applicant attended the mention for submissions on 4/7/2019 where he sought stay of execution which was denied and a further ruling set on 23/9/2019 for the review application.

7. She avers that they have sought payment of the decretal sum but their requests have been ignored. She contends that the Court should not grant stay of execution of the order of 23/9/2019 for non-disclosure of a good reason for delay in filing the application.

Applicant's submissions

8. The Applicant submits that the power to extend time is discretionary and the Court is to weigh the facts and circumstances before exercising its discretion. It relies on the case of **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR** where the Court held that there should be valid and clear reasons upon which discretion can be exercised.

9. It relies on the case of **Monica Malel & another v Republic & 2 others [2009] eKLR** where the Court of Appeal held:-

“Matters which the Court takes into account when considering whether or not to extend time are, generally:

a) The length of the delay

b) The reason for the delay

c) Possibly the chances of the appeal succeeding if the application is granted and

d) The degree of prejudice to the respondent if the application is granted.”

10. It submits that the delay in filing the application was not inordinate as it filed it on 28/10/2019. It further submits that it took 7 days to file the notice of Appeal.

11. It avers that the reason for the delay is that the Ruling was not within its knowledge and by the time it came to learn about it, its advocate was out of the country.

12. It submits that there is a chance that the appeal shall succeed if the application is granted for reason that there was a mistake on record as the prayer for review had not been claimed before. It further submits that there is evidence in support of the appeal. It relies on the case of **Omariba Elijah Kemonde v Secretary, Teachers Service Commission [2017] eKLR** where the Court held that there must be an averment that the appeal has a high chance of success.

13. It submits that the dismissal of its application for being res judicata has the ripple effect of causing it to compensate the Claimant who did not deserve compensation. It further submits that this will prejudice its interest to a fair trial and right to be heard.

14. It submits that the stay order being sought in the application is not similar to the one in the earlier application as the current order for stay is under Order 42 Rule 6 (1). It further submits that this is a stay to preserve the subject matter not to render the intended appeal nugatory as held in the case of **Butt v Rent Restriction Tribunal [1979] eKLR**.

15. It submits that it is willing to deposit the decretal amount in Court as security for stay and relied on the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**. In conclusion, it urges the Court to grant the orders prayed in the application for the interest of justice and fairness.

Respondent's submissions

16. The Respondent submits that prior to the Ruling of 23/9/2019, the Applicant was aware of the Ruling date. He submits that the allegation that the Applicant's counsel was out of the country is a lame excuse that is meant to explain the Respondent's indolence and lack of seriousness.

17. He submits that the issue of stay of execution of the order of 23/9/2019 was dealt with by the Court. He further submits that the court gave a solid reason for denial of the Application dated 19/3/2018 and reiterated that the matter was res judicata.

18. He submits that the principles in guiding the Court when deciding applications for stay of execution is clear. He relies on the case of **Machira t/a Machira & Co. Advocates v East Africa Standard (No.2) KLR 63 which was cited in Antoine Ndiaye v African Virtual University [2015] eKLR**.

19. He contends that the Applicant has not deposited the total decretal sum as security pending the hearing of the matter in Court as expected. He submits that the Court in **Abdi Ali Noor v Transami (Kenya) Ltd Nairobi Milimani Civil Case No. 267 of 2005 (unreported)** and **Motres Limited v Akamba Road Services Ltd & Another Nairobi High Court Civil Case No. 1824 of 2000 (Unreported)** ordered the applicants to deposit the entire decretal sum in Court as a condition for stay execution of decree.

20. He further submits that the mere financial burden occasioned by a judgment does not constitute substantial loss for grant of an order of stay of execution. It is his submission that the Applicant has not demonstrated how it may encounter any substantial loss.

21. He submits that the Applicant has failed to demonstrate the merits of its application but instead put more emphasis that its application if allowed would be successful. He submits that the Applicant has disregarded his interests.

22. I have considered the averments of both Parties. On 23/9/2019, I considered an application filed by the Respondent/Applicant where they sought stay of execution orders and review of the orders of the Court issued on 29/10/2019.

23. Upon considering the application, I rendered a ruling dismissing the application on the grounds that the application was res judicata, the same having been already determined by this Court.

24. The Applicants aver that they are dissatisfied with the said order of the Court and have preferred an appeal and now seek stay pending appeal.

25. I note that the Applicants are willing to provide security for the decree. In order to preserve the substratum of the appeal and not render it nugatory, I will allow the application for stay pending appeal on the condition that the Applicant deposits the entire decretal sum in a joint interest earning account held in joint names of Counsel on record within 30 days. In default execution to issue.

Dated and delivered in Chambers via Zoom on this 15th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties