



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 34 OF 2018

LUCY WANJIRU NYAGA.....PETITIONER

- VERSUS -

BATIMENT GROUP LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd October, 2020)

RULING

The judgment was delivered on 14.06.2019 in favour of the petitioner. The respondent filed an application for review on 10.07.2019 which was dismissed with costs on 25.10.2019. The respondent has filed another application on 28.02.2020 and dated 28.02.2020 through S. Ndege & Company Advocates. The application is under order 51 rule 1, order 42 rule 6 of the Civil Procedure Rules, section 1A, 1B, and 3A of the Civil Procedure Act and all other enabling provisions of the law.

The prayers subject of this ruling are for orders:

- 1) That there be an order of stay of execution of the decree passed on 03.06.2019 and all other consequential orders issued by the Court pending the hearing and determination of the intended appeal arising from the ruling and orders given on 25.10.2019.
- 2) That the Honourable Court be pleased to issue such other orders as it deems fit in the interest of justice.
- 3) That costs of the application be provided for.

The application is based on the annexed supporting affidavit by Alex Monari and upon the following grounds:

- a) The applicant has appealed against the ruling delivered on 03.06.2019. there are arguable grounds of appeal.
- b) The petitioner has no known assets that can be liquidated to refund decretal amount which if paid and the proposed appeal is successful.
- c) The applicant will comply with such conditions as the Court will impose for stay of execution pending appeal.

The petitioner opposed the application by filing her replying affidavit on 02.03.2020 through Omondi Onenga & Company Advocates. The petitioner urged as follows:

- a) The application is incompetent, a non-starter and should be struck out *in limine*.
- b) Judgment was delivered on 14.06.2019. The Court dismissed the petitioner's application for review on 25.10.2019. Thereafter petitioner's advocates wrote for payment of the decretal sum by the letter dated 25.10.2019 but which was ignored.
- c) There is no appeal against the judgment delivered on 14.06.2019 and the same is not subject to orders of stay pending appeal as prayed for.
- d) The applicant filed on 31.10.2019 a notice of appeal against the ruling on review but no request for typed certified proceedings was applied for for.
- e) Warrants of attachment issued on 26.02.2020 and regularly so.

- f) The court cannot sit on appeal on its own decision in the ruling delivered on 25.10.2019 rejecting the application for review.
- g) Execution of a decree is a lawful process which should be allowed to go on.
- h) No material is before the Court to show that the alleged and purported appeal is arguable.

Parties filed their respective submissions. The Court has considered the material on record with respect to the application. The Court makes findings as follows:

- 1) As urged for the petitioner, there is no notice of appeal against the judgment and decree given on 14.06.2019. Further the applicant has not shown that the certified typed proceedings have been applied for. Order 42 rule 6 (4) is clear that for the purpose of an appeal under the Order, an appeal to the Court of Appeal is deemed to be made when a notice of appeal has been given under the rules of the Court of Appeal. The Court finds that there being no appeal against the judgment and the decree herein, the application for stay of execution of the decree was misconceived. The Court will not therefore delve into the satisfaction of the conditions in order 42 rule 6 as to substantial loss the applicant may suffer and whether security for due performance of the decree has been provided by the applicant if the purported appeal is not successful.
- 2) As to whether there exist arguable grounds of appeal, such are matters to be ventilated at the Court of Appeal and as urged for the petitioner, the Court should not sit on appeal on its own decision.
- 3) The Court is alert that having elected to seek review of the judgment and the decree, the applicant thereby opted not to pursue an appeal against the judgment and there is no case for stay of execution of the decree pending a purported appeal.

In conclusion the application filed and dated 28.02.2020 for the respondent in the petition is hereby dismissed with costs.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 23rd October, 2020.

BYRAM ONGAYA

JUDGE