



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1994 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

MAURICE SIKITU OKUMU.....CLAIMANT/RESPONDENT

VERSUS

DOVEYPHARMA LIMITED.....RESPONDENT/APPLICANT

RULING

1. Pending before me for determination is the Respondent's Notice of Motion Application dated 21st February, 2020. The same is brought under Certificate of Urgency and under the provisions of Articles 25 and 50 of the Constitution of Kenya, 2010, Section 17 of the Employment & Labour Relations Court Act, Sections 1A, 1B and 3A of the Civil Procedure Act, Orders 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules. Seeking Orders that: -

- 1. Due to the urgency of this Motion, the same be certified urgent, service of the same be dispensed with and the motion be heard ex-parte in the first instance (Spent)**
- 2. Upon hearing ex-parte, there be a stay of execution of the Judgment and decree of this Honourable Court made on 16th January, 2020, and all other consequential orders emanating therefrom pending the hearing and determination of this Application.**
- 3. Upon hearing interpartes, there be a stay of execution of the Judgment and decree of this Honourable Court made on 16th January, 2020, and all other consequential orders emanating therefrom pending the hearing and determination of the intended Appeal to the Court of Appeal.**
- 4. Costs of this Application be provided for.**

2. The Application which is premised on the grounds that:-

- a. On 16th January, 2020 this Honourable Court delivered in favour of the Claimant as against the Applicant.**
- b. The Applicant being aggrieved by the said decision intends to Appeal the same and has since filed its Notice of Appeal dated 16th January, 2020.**
- c. Subsequent to filing the Notice of Appeal the Respondent/Applicant did receive a letter from the Claimant's Advocates seeking payment of Kshs. 643,111/- being the Judgment sum of Kshs. 522,111/- and costs of Kshs. 121,000/-.**
- d. The Respondent/Applicant maintains that it has met the threshold and/or principles for granting of stay of execution as set out under Order 42 Rule 6 (2) of the Civil Procedure Rules.**
- e. If stay is not granted the Respondent/Applicant stands to suffer irreparable damage and the eventual success of the intended Appeal would be rendered an academic exercise.**
- f. The Respondent/Applicant has a right to Appeal the decision of this Honourable Court and that no prejudice would be occasioned upon the Claimant/Respondent should this Court grant the Orders sought.**

g. The Respondent/Applicant urged this Honourable to allow its Application in terms of the Orders sought therein.

3. The Application is further supported by the Affidavit of **HARUN MUIRURI**, the Respondent's Managing Director sworn on 21st February, 2020, in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the Claimant filed a Replying Affidavit deponed by **MAURICE SIKITU OKUMU**, the Claimant herein sworn on 12th August, 2020, in which she avers that the instant Application is incompetent and a non- starter for the reasons that:-

I. The requisite Notice of Appeal was served upon Counsel on record for the Claimant out of time contrary to the provisions of the Court of Appeal Rules.

II. The letter requesting for typed proceedings was lodged after the lapse of the requisite limitation period of 14 days from the delivery of the Court's Judgment.

5. It is on this basis that the Claimant maintains that there is no proper Notice of Appeal on record on which the Respondent/Applicant's intended Appeal can be hinged and thus granting of stay orders would be in vain.

6. The Claimant further maintains that the intended Appeal as filed does not raise any triable issues as contained in the draft Memorandum of Appeal.

7. The Affiant further avers that the instant Application as filed fails to meet the threshold for the grant of the Orders sought and is therefore devoid of merit. He further urged this Honourable Court in the circumstances to dismiss the Application in its entirety thus allowing him to enjoy the fruits of the Judgment in his favour.

8. In a brief rejoinder the Applicant filed a Further Affidavit deponed by **HARUN MUIRURI** on 7th October, 2020, in which he avers that there was no delay in filing its Appeal at the Court of Appeal as Judgment was delivered on 16th January, 2020 and the notice of Appeal filed on 20th January, 2020 in accordance with the provisions of Rule 75 (2) of the Court of Appeal Rules.

9. He further averred that the delay in service of the notice of appeal is excusable as it was occasioned by a mix up at the Advocates offices and that the delay did not occasion any prejudice to the Claimant in any event.

10. The Respondent contends that the Notice of Appeal and letter were nonetheless properly served and received by the Claimant's Advocate and that late service is a procedural technicality which under Article 159 (2) (d) of the Constitution of Kenya, 2010 ought not to be used to deny it substantive justice.

11. The Respondent maintains that its Memorandum of Appeal raises arguable points of fact and law and hence should not be denied. It further maintains that the Application has been filed without delay and that it has met the requisite threshold for the grant of the Orders sought.

12. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

13. The Respondent/Applicant submitted having met the threshold for the grant of the Orders sought in its instant Application as provided under the provisions of Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules, 2010.

14. The Respondent/Applicant urged this Honourable Court to exercise its unfettered discretion and allow its Application as filed having demonstrated that it has met the minimum threshold for the grant of the orders sought. To buttress this argument the Respondent/Applicant cited and relied on the Court of Appeal decision in the case of **Equity Bank Limited Vs West Link Mbo Limited (2013) eKLR** where the Court held that the Court has consistently underscored that the power to grant a stay is wholly discretionary and can be exercised on sound principles.

15. It is further submitted that the Respondent/Applicant has a right to exercise its right to Appeal as protected under Articles 25 (c) and 50 (1) of the Constitution of Kenya, 2010 and that if the Orders sought are not granted such an appeal would be rendered nugatory. For emphasis the Respondent/Applicant cited and relied on the Court of Appeal decision in the case of **Silverstone Vs Chesoni (2002) eKLR**.

16. The Applicant contended that it was willing to furnish security for the due performance of the decree emanating from the impugned Judgment subject to this Court's directions.

17. In conclusion the Respondent/Applicant maintained that having met the threshold for the grant of the Orders sought this Court ought to allow the instant Application as prayed.

Claimant's Submissions

18. The Claimant on the other hand maintained that the Respondent on its own admission admitted having served its Appeal upon the Claimant out of time contrary to the mandatory provisions of Rule 77 (1) of the Court of Appeal Rules.

19. The Claimant further maintains that this failure by the Respondent/Applicant renders its intended Appeal still non-existent and thus any stay orders granted would be in vain.

20. The Claimant further submits that the Respondent/Applicant has failed to prove that he has an arguable Appeal as against the Court's decision.

21. The Claimant contends that the Respondent/Applicant has further failed to meet the threshold for the grant of the Orders sought in the instant Application thereby urging this Court to dismiss the Application in its entirety with costs to the Claimant.

22. I have considered the averments of the Parties herein. The Applicants contends that they are dissatisfied with the judgement and ruling of the Court and hence have filed a Notice of Appeal dated 16/1/2020.

23. The judgement in this case was delivered on 16/1/2020 and this application filed on 21/2/2020 which was within a reasonable time.

24. Order 42 rule (6)(2) of the Civil Procedure Act provides 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”.

25. In terms of this order, the Applicant filed the application within a reasonable period and is also ready and willing to deposit any security as ordered by Court.

26. The issue of the pending appeal also gives a good reason for stay as the substratum of the Appeal is not destroyed.

27. I therefore allow this application for stay on condition that the entire decretal sum is deposited in an interest earning account held in joint names of Counsels on record within 60 days.

28. Costs in the appeal.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muriithi for Respondent/Applicant – Present

No appearance for Claimant