



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 138 OF 2015

BETWEEN

JULIUS KIEMA KENGA.....CLAIMANT

VERSUS

1. BARCLAYS BANK OF KENYA LIMITED

2. THE ATTORNEY-GENERALRESPONDENTS

RULING

1. Judgment in this Cause was delivered in favour of the Claimant for a total sum of Kshs. 1,184,462, on 4th December 2015.

2. The Claimant was dissatisfied with the decision, and filed Notice of Appeal on 18th December 2015. The Notice of Appeal states the Claimant intends to appeal against the whole of the said decision. The Claimant requested for copies of typed and certified proceedings from the Court, on the same date, 18th December 2015.

3. The 1st Respondent was equally dissatisfied with the decision of the Court, and filed a Notice of Appeal dated 17th December 2015. The 1st Respondent states it intends to appeal against the whole decision. It similarly applied for copies of typed and certified proceedings from the Court, in a letter of the same date, 17th December 2015.

4. All was quiet until the Claimant taxed his bill of costs and applied for execution of decree in early 2018. The 1st Respondent filed an Application on 28th May 2018, seeking an order for stay of execution, pending Appeal. Supported by the Affidavit of Stella Gacharia, Deputy Company Secretary and Legal Counsel, sworn on 24th May 2018, The Application, is the subject of today's Ruling.

5. The 1st Respondent states it has met all the legal prerequisites for grant of an order for stay of execution. It has an arguable Appeal, as shown in exhibited Draft Memorandum of Appeal. There is a Certificate of Delay issued by the Court to the 1st Respondent, showing the 1st Respondent applied for certified copies of Proceedings and Judgment, on 17th December 2015, and the same were delivered on 12th June 2018. The 1st Respondent submits that the Claimant too, filed a Notice of Appeal, and it was only recently he sought to execute. In event the 1st Respondent's Appeal succeeds, the Claimant will not be in a position to refund the 1st Respondent the decretal sum. He stated in his evidence upon trial that he did not have a stable source of income. Lastly the 1st Respondent states it is ready to abide by any conditions the Court may give, including deposit of the entire decretal sum in a joint interest-earning bank account in the names of Parties' Advocates.

6. The Claimant's Advocate, Kioko Maundu, filed a Replying Affidavit sworn by himself, on 30th May 2018. The Advocate states he is authorized by his Client to swear the Replying Affidavit.

7. It is explained that the Claimant filed a Notice of Appeal against the Judgment on record on a precautionary basis. The Claimant was studying the decision, but ultimately did not intend to appeal against the Judgment.

8. Proceedings were ready for collection from the year 2016. The 1st Respondent went to sleep after applying for proceedings and only woke up after the Claimant initiated execution proceedings. It was the 1st Respondent's duty to follow up its request for proceedings and collect the same in 2016. The 1st Respondent participated in taxation of Claimant's bill of costs preceding the application for execution. The 1st Respondent's goods were proclaimed on 22nd May 2018. The 1st Respondent is guilty of inordinate delay. The period for filing an Appeal is long gone. The Claim is an old matter, having been initiated at the High Court Mombasa, in 1999. The Claimant asks the Court to dismiss the

Application.

9. Parties agreed to have the Application considered and determined, on the strength of their Affidavits and Submissions. They confirmed filing of Submissions on 22nd November 2018.

The Court Finds: -

10. The Court is persuaded that the 1st Respondent has come to Court after an inordinate delay. Judgment was delivered on 4th December 2015. Decree was extracted on 17th October 2016. The record shows proceedings were typed, certified and ready for collection in October 2016. The Claimant's bill of costs was filed on 31st August 2017. It was taxed. Certificate of Costs and Decree were served upon the 1st Respondent in March 2018. Proclamation followed on 22nd May 2018. The 1st Respondent filed its Application on 28th May 2018.

11. The Certificate of Delay dated 19th June 2018, issued to the 1st Respondent by the Deputy Registrar, does not seem to have issued regularly. It is not a proper Certificate of Delay which can be relied on, in considering this Application. It certifies delay, based on erroneous case history.

12. The 1st Respondent requested for copies of certified Proceedings and Judgment on 7th December 2015. The 1st Respondent also called for a Certificate of Delay, in its letter to the Deputy Registrar, dated 7th December 2015.

13. Certificate of Delay issued to the 1st Respondent, indicates copies of certified Proceedings and Judgment were delivered upon the 1st Respondent on 12th June 2018. This is about 2 weeks after the 1st Respondent filed its Application for stay of execution. It is stated that the period from 17th December 2015 to 12th June 2018, was required for the preparation and delivery of the said copies. This certification is manifestly erroneous, and cannot explain away delay.

14. This irregularity is shown through another Certificate of Delay, dated 17th October 2016, issued upon the Claimant. As stated elsewhere the Claimant filed a Notice of Appeal and asked for copies of Proceedings and Judgment, on 18th December 2015. This was a day after the 1st Respondent filed its own Notice of Appeal and applied for copies of certified Proceedings and Judgment. The Certificate of Delay issued upon the Claimant by the Deputy Registrar of the Court, states Proceedings and Judgment were delivered to Claimant's Advocates on 14th October 2016. The period between 18th December 2015 and 14th October 2016, was necessary to prepare and deliver the said Proceedings and Judgment, the Certificate states.

15. There were no separate sets of Proceedings and Judgment being prepared by the Court for Parties' collection. There ought not to be separate dates for certification. Proceedings and Judgment were ready for collection, latest 14th October 2016. It is the same Proceedings and Judgment under reference. The Court does not physically deliver its Proceedings and Judgments to Parties. Parties who apply for Proceedings and Judgments have an obligation to pursue such Proceedings and Judgments, and retrieve copies from the Court when they are ready. Why would the 1st Respondent collect its copies on 19th June 2018, 2 years after the Claimant collected his? Why would the Court issue a Certificate of Delay to the 1st Respondent, showing a different period which was necessary for the Court to prepare Proceedings and Judgment? Was there additional work required to be done by the Court, in preparing Proceedings and Judgment issued upon the 1st Respondent? Parties took part in taxation of costs in 2017. Typed copies of Proceedings and Judgment were on record during the period of taxation. Certificate of Costs was extracted. Decree was extracted. Execution commenced. The Court does not see why the 1st Respondent should have assumed, that because the Claimant had indicated his intention to appeal, the Claimant had foregone his right to execute.

16. The 1st Respondent has not given a satisfactory explanation on this prolonged delay. It seems the 1st Respondent was lulled into slumber by the Claimant's Notice of Appeal. Once the Claimant opted to execute, the 1st Respondent woke up and sought to stay execution. On realizing there was inordinate delay, the 1st Respondent obtained a Certificate of Delay, which does not disclose the correct position on the date when copies of Proceedings and Judgment, were typed, certified and ready for collection.

17. The Court does not think in light of this excessive delay, there is need to examine if the 1st Respondent, has met the other conditions relevant in grant of an order of stay of execution.

IT IS ORDERED:-

a. The Application filed by the 1st Respondent on 28th May 2018 is declined.

b. The Claimant is at liberty to execute decree.

c. No order on the costs.

Dated and delivered at Mombasa this 24th day of January 2019.

James Rika

Judge