



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.53 OF 2018

(Before D. K. N. Marete)

LYDIAH MONGINA MOKAYA.....CLAIMANT/RESPONDENT

VERSUS

ST.LEONARD MATERNITY & NURSING LIMITED.....RESPONDENT/APPLICANT

RULING

This is an application dated 4th December, 2018 and seeks the following orders of court;

1. *THAT this Application be certified urgent and same be heard and orders given exparte in the first instance*
2. *THAT pending the hearing and determination of this application, there be a stay of execution of the judgment delivered on 9th October 2018 and all consequential orders thereto.*
3. *THAT the Application at hand be heard and determined on a priority basis.*
4. *THAT the cost of this application be provided for.*

It is grounded as follows;

- a) *THAT on 9th October 2018, this Honourable Court entered judgement against the Applicant herein for the sum of Kshs.1,000,000/= plus costs and interests.*
- b) *THAT the Applicant being dissatisfied with the said judgment lodged a Notice of Appeal on 4th December 2018.*
- c) *THAT the effect of the said judgment is that it will occasion the Applicant to suffer substantial loss that will render the intended appeal nugatory.*
- d) *THAT the Applicant is ready to comply with the directions of this Honourable Court, including providing security for the decretal sum.*
- e) *THAT the financial position of the Respondent is questionable and she may be unable to refund the decretal amount is the Applicant's intended appeal is successful.*
- f) *THAT the Applicant has a strong appeal with high chances of success, and its intended appeal will be rendered nugatory if orders for stay are not granted.*
- g) *THAT the delay in filing the current application is not deliberate as the Applicant's Managing Director was abroad leaving nobody to consult on the next cause of action when judgment was delivered.*
- h) *THAT in the circumstances of the foregoing, this application is extremely urgent and orders for stay ought to be granted pending the hearing and determination of the intended appeal.*

The claimant/respondent opposes the application vide his Grounds of Opposition dated 13th December, 2018 as follows;

1. *THAT there is no Appeal before this Honourable court as the Respondent has failed to comply with the provisions of Rule 75 of the court of Appeal Rules, 2010.*
2. *THAT a party that intends to appeal a decision of the court should lodge a Notice of Appeal within 14 days from the date of delivery of judgement.*
3. *THAT the Notice of Appeal was lodged on 4th December 2018 and the same is out of time as the same should have been filed by 24th October 2018 and this was not done.*
4. *THAT the Applicant has not sought leave of the court to lodge an appeal out of time and therefore the application before the court is incompetent.*
5. *THAT this Application is time barred and an inordinate delay has already passed at the time the Applicant is making the same.*
6. *THAT the application is an abuse of the process of this Honourable Court and should be dismissed with costs to the Claimant.*

In support of the application, the respondent/applicant in her Further Affidavit sworn on 17th December, 2018 explains that between 10th October and 4th November, 2017, he, as one of the Managing Directors of the applicant, was out of the country on official duties. On return, he fell ill and sought medical attention at Summit Medical Care Clinic, Nyansiongo only to resume duty on 26th November, 2018.

The respondent's Managing Director further deponed that he was aware of an application by the respondent for extension of time and filing and service of a Notice of Appeal and lodging of a record of appeal out of time that was pending at the court of appeal. It is the applicant's submission that this set of circumstances comes in to compliment the provisions of Order 42 Rule 6 that she is likely to suffer substantial loss in the event that this application is disallowed.

The applicant further seeks to rely on the authority of **John Wafula Simiyu vs. The Star Publication Limited** where the court

“This is because in my estimation, the respondent/applicant not only displays an arguable case but also makes an offer for security as directed by court. The application for stay of execution qualifies in the entirety of the four limbs set out for such purpose and therefore passes”

She again relies on the authority of **Lawi Kiplangat v National Housing Corporation [2017]eKLR** where Njuguna J. quoted with authority the following passage from **Mohsen Ali & Another v Priscillah Boit & Another [2014]eKLR**

“The question that arises is whether this application has been filed after unreasonable delay. What is reasonable delay is dependent on the surrounding circumstances of each case”

The claimant/respondent in her written submissions dated 21st January, 2019 overtly relies on the process of appeal by the applicant in opposition. On this she relies on the authority of **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others [2011]eKLR, Civil Application No. Nai.173 of 2010** where a notice of appeal was served on the respondent out of time and without leave of court, upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A observed that;

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...”

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned; the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision. That is

not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

It is her submission that a court would not issue a blanket stay of execution without the existence of an appeal or an intended appeal and where this is the case, article 159 of the Constitution of Kenya, 2010 is not curative of the defect.

The test for issue of stay of execution in the circumstance is three fold as follows;

- (i) Undue delay in the filing of an appeal.
- (ii) The occasion of substantial loss to the appellant in the event of non grant of stay of execution/nugatory.

(iii) Issue of security by the applicant.

It is not in dispute that as we speak, there is no appeal on record. There is not an undisputed or legitimate notice of appeal on record. This delay and defect has been substantially explained by the respondent/applicant in her affidavits in support of the application. One of the managing directors was out of the country at the material time and would not issue instructions on the way forward after the outcome of the matter. On return, he fell ill and was not able to be in office until very late when he issued instructions on the way forward.

The respondent/applicant does not explain why any other of her directors was not able to issue instructions in the circumstances. There is no explanation as to whether the director's presence and instructions were symbiotically tied together. I suspect that this could be a mere excuse or cover up for oversight, inaction and failure on the part of the respondent.

The applicant further submits a case of substantial loss in the event of non grant of stay of execution. This is on grounds that the claimant/decreet holder would not be in a financial position to redeem the decretal sum in the event of a successful appeal. This is the hornet's nest. Should this be a critical determinant for grant of stay of execution? The answer is no. Inasmuch as it is an issue for consideration, it is not a plus *in toto*. If it was, unendowed litigants will find it difficult to execute decrees in their favour. It would dismantle the ends of justice by completely shutting them out of the fruits of their judgements. It would disable execution and tarnish the ends of justice.

I agree with the claimant/respondent in this application. The process of appeal is irregular and distorted. It has not been pursued properly and has numerous gaps in law and procedure. It is not sustainable.

I am therefore inclined to dismiss the application with costs to the claimant/respondent.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Migiro instructed by Migiro & Company Advocates for the respondent/applicant.
2. Mr. Mwita holding brief for Miss Wachira instructed by Wachira Wanjiru & Company Advocates for the claimant/respondent.