



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2344 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

MUTUA PATRICK NZOKA.....CLAIMANT

VERSUS

KENYA TOURIST DEVELOPMENT CORPORATION....1ST RESPONDENT

THE MINISTER FOR TOURISM AND WILDLIFE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

The application before the court is dated 10th January, 2018, where the Applicant seeks for Orders that:

1. That this application be certified urgent and be dispensed with in the first instance
2. That pending the hearing and determination of this application this Honourable Court be pleased to grant a stay of the judgment delivered herein on the 7th day of December, 2017 by Mbaru J.
3. That pending the lodging, hearing and determination of the Applicant's intended appeal there be a stay of the judgment and Order delivered herein on 7th December, 2017 by Mbaru J.
4. That costs of the application be provided for.

The application is premised on the grounds that the Applicant is aggrieved by the judgment of Mbaru J. delivered herein on 7th December, 2017 and is intent on lodging an appeal against the said judgment. Further that the Honourable Judge erred in law and in fact in the judgment particularly that there was no factual or legal basis for finding that the termination of the Claimant's employment was tainted with malice on the part of the applicant; for failing to find that there was factual and legal basis for the Respondent's termination; for failing to consider that the respondent by his conduct wilfully neglected to perform his duties carefully and properly and was liable for termination under the provisions of the Employment Act, Cap 226 of the Laws of Kenya (now repealed), the Kenya Tourism Development Corporation Act, Chapter 382 of the laws of Kenya (now repealed) and the signed contracts of service between the parties and other enabling laws and government employment policies, for failing to find that the Respondent was granted sufficient time to respond and defend himself and accorded the right to be heard; the quantum of damages awarded for the alleged wrongful termination of employment was unjustifiably high.

That the applicant has already commenced the appellate process and are apprehensive that the Claimant may move at any time to execute the Judgment and the orders issued herein. The Applicant also contends that the balance of convenience weighs in favour of the Applicant in this matter owing to the substantial amount of money awarded.

The Application is supported by the Affidavit of John S. Karia the Head of Legal Services of the Applicant in which he reiterates the grounds on the face of the application and urges the Court to allow the orders sought.

The Application is opposed. The Claimant/Respondent has filed a Replying and a Further Replying Affidavit where he states the orders sought would cause him irreparable harm as he has been awaiting the conclusion of the matter for 12 years since 2006. Further that the applicant has not offered any security to warrant the orders sought.

He also contends that paragraphs (c) and (d) required the 1st, 2nd and 3rd Respondents jointly or severally to pay his deducted salary, allowances and emoluments within the period of employment other than as set out by the letter dated 14th January, 2004 and the full salary or the unpaid part of his salary and allowances during the period of interdiction. That this portion of the judgment has not been complied with and as such the Applicant/1st Respondent is in contempt and should not be granted audience in the instant application.

Submissions

The Applicant submits that the orders sought are discretionary which

must be exercised judiciously. That the Appeal will be rendered nugatory if the orders sought are not granted. Further that in the event the Claimant is unable to pay back the decretal sum if the appeal is successful, the Applicant stands to suffer substantial loss.

It is also submitted that the Applicant has an arguable appeal for which reason the Court should allow the application.

On behalf of the Respondent it is submitted that the Respondent is in contempt of Court and therefore the Applicant lacks audience to address the Court on any issues. They cite the case of *Lucy Waithira Mwangi & Others Vs Stephen Maina Kimanga & Others (2017) eKLR* where it was held that being aware of the orders of a court, and exerting no effort to honour them amounts to contempt of Court. Where a party is not content with the Judgment, one should channel their discontent through the right avenues. They are not at liberty to disobey any Court Order.

That on filing the Notice of Appeal dated 19th December, 2017, the Applicant did not obtain stay of execution of those parts of the Judgment that became executory within 30 days. It is submitted that no reason has been given for non-compliance with those parts of the judgment.

It is further submitted that the orders sought should not be granted for the reasons that the Applicant has not made out a case for substantial loss, no security has been offered and that the appeal is not arguable. That the Application should be dismissed with costs.

Determination

Stay of Judgment pending appeal is governed by Order 42 Rule 6(2) of the Civil Procedure Rules 2010 and Rule 5(2)(b) of the Court of Appeal Rules 2010.

Order 42 Rule 6(2)

No order for stay of execution shall be made under sub rule (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.

Rule 5(2)

2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

The instant application has been made in this court as such the applicable procedure is that provided in Order 42 Rule 6(2) of the Civil Procedure Act. The application was made timeously and the Applicant has taken positive steps to prosecute the appeal as I note from the record the typed proceedings are ready and a certificate of delay issued.

In light of the foregoing the prayer for stay of judgment is granted but with the following modifications: -

(i) That items (b), that is Kshs.12,960,000 be deposited into an internet earning account in the joint names of counsel for the claimant and counsel for the respondent within 14 days pending hearing and determination of the appeal

(ii) That items (c) and (d) that is all salary/allowances and emoluments be paid to the respondent/decretal holder together with interest as ordered in the judgment at item (e) of the judgment.

(iii) Costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE