



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2001 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 12th June, 2019)

JAYNE NYAGOHA EMISEMBE.....CLAIMANT/RESPONDENT

-VERSUS-

NAIROBI COUNTY BRANCH (KUPPET).....RESPONDENT/APPLICANT

RULING

1. The Application before the Court is an Amended Notice of Motion dated 13th February, 2019, brought under Sections 1A, 1B, 3A of the Civil Procedure Act 2010, Order 42 rule 6 of the Civil Procedure Rules, Section 7 of the Appellate Jurisdiction Act, Rule 4 of the Court of Appeal Rules and all the enabling provisions of the law seeking Orders:-

1. That this application be certified as urgent and heard ex-parte in the first instance.

2. That the Honourable Court be pleased to stay execution of the judgment and Decree of the Court delivered on 20th December, 2018, pending the hearing and determination of this application.

3. That the Honourable Court be pleased to stay execution of the Judgment and Decree of the Court delivered on 20th December, 2018 pending hearing and determination of the intended Appeal.

4. That the Honourable Court be pleased to extend the time to file of Notice of Appeal to the Court of Appeal out of time.

5. That costs of this application be in the cause.

2. The Application is premised on the grounds:

1. That on 20th December, 2018, the Honourable Court entered Judgment for the Claimant against the Respondent/Applicant for the sum of Kshs. 1,265,293.30 together with costs.

2. That being dissatisfied with the said Judgment and decree, the Applicant intends to appeal against the said Judgment and Decree to the Court of Appeal.

3. That the then Advocates for the Applicants M/S Ashitiva Advocates LLP informed the Applicant of the delivery of the Judgment on 30th January, 2019, when time to lodge the Notice of Appeal had lapsed.

4. That upon learning of the said judgment and its consequences, the Applicant's office bearers did consultation with its Branch Governing Council, the National Executive Board as well as seek independent legal advice on the way forward hence the cause for further delay.

5. That after all those consultations, the Applicant resolved to appeal against the impugned judgment and consequently instructed the Firm of Laichena Mugambi & Co. Advocates to take over the conduct of this matter.

6. That the delay to file the Notice of Appeal and the intended Appeal was not deliberate but was occasioned substantively by the delay in communication from the Applicant's previous Advocates, coupled with subsequent compulsory internal consultations within the union and seeking independent legal advice.

7. That the Claimant/Decree holder is on the verge of executing the said decree any time from now which is likely to put officers of the Union in jeopardy if the same is not satisfied yet the same is payable from the money which belongs to the members of the Union and is only held in trust by the office bearers.

8. That unless stay of execution pending Appeal is granted, the Applicant will suffer substantial loss including its officers being cited for contempt of Court Orders.

9. That the intended Appeal raises weighty issues of law and Management of the Union. The intended Appeal has high chances of success and unless the stay orders are granted the same will be rendered nugatory.

10. That this application has been filed within a reasonable time considering the time taken by the Applicant to deliberate, seek proper legal advice and decide on the appropriate action to take in this matter.

11. That it is in the interest of justice and fairness that this application be allowed.

3. The Application is supported by the Affidavit of Moses Owiti Mboru the Respondent's Executive Secretary wherein he reiterates the grounds on the face of the affidavit. He also states that should the orders sought not be granted the Applicant will not be able to pay the decretal amount at the moment since the decretal sum is colossal and requires budgeting. On the other hand, that the Respondent would not be able to refund the decretal amount should the appeal be successful.

4. Further, the Applicant contends that its expenditure and budgets squarely depend on membership contributions and support from the National Office. That unless the orders sought are granted the Applicant stands to suffer substantial loss. That the Applicant is ready and willing to deposit half the decretal amount in Court or in an interest earning account pending hearing and determination of the appeal. They urge the Court to allow the application.

5. In response to the application, the Respondent filed a Replying Affidavit wherein she states that the Respondent has not advanced any good reason as to why the Respondent's Advocates took over a month to inform the Claimant of the Judgment.

6. That the Applicant is bent on denying the Claimant the fruits of judgment and in any event, she is a person of means currently under employment and is capable of refunding whatever sums that may be due to the Respondent in the unlikely event the appeal is successful. Further that should the Court be inclined to grant the Orders then a substantial amount of the Decree should be released to her.

7. It is also the Claimant's contention that the Applicant has not demonstrated weighty issues of law and the general grounds of appeal that would guide the Court to grant the orders sought.

Submissions

8. The Applicant submit that they have met the requirements of Order 42 Rule 6 of the Civil Procedure Rules on the granting of Orders of Stay pending Appeal. They cite the case of **David K. Rotich & Another vs Thomas Kipchoge Kolwa (2015) eKLR** where they quoted the decision of the Court of Appeal in **Butt vs Rent Restriction Tribunal (1982) KLR 417** on discretionary Orders:-

"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may be nugatory. A stay which would otherwise be granted ought to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings."

9. That the mischief a stay of execution is meant to prevent is that in the event of the success of the Appeal, the same is not rendered nugatory. It is submitted that even if the claimant claims to be a person of means, she has not demonstrated her networth. That it is incumbent upon her to do so as she is the only one in a position to give the details of her resources or lack of them as stated in the case of **National Industrial Credit Bank Ltd Vs Acuinans Francis Wasike Civil Application No. 238 of 2005.**

10. That the Application has been brought within reasonable time and the Applicant is ready to offer security for due performance of the decree.

11. The Applicant also urges the court to extend time within which to file an Appeal as Article 159 of the Constitution of Kenya 2010 allows the Court to exercise discretion so as not to lock out litigants on the basis of technicalities. They urge the Court to allow the application.

12. On behalf of the Respondent it is submitted that the Respondent has satisfied the burden to demonstrating the substantial loss it will suffer if the orders sought are not granted and that the Claimant is a person of straw as held in the case of **Equity Bank Limited Vs Taiga Adams Co. Limited (2006) eKLR.**

13. It is also submitted that the Applicant does not have an arguable appeal likely to succeed and neither have they raised any weighty issue of law. That it is trite law that demonstration of the existence of even one arguable point will suffice in favour of the applicant as was stated in the case of Kenya **Railways Corporation Vs Edermann Properties Limited Civil Appeal N. NAI 176 of 2012.**

14. The Respondent also submits that if the orders sought are granted she is likely to be prejudiced as enjoying the fruits of judgment will be delayed. That the Application should be dismissed with costs.

15. I have considered the averments of both parties. The question on whether this Court can grant orders of stay and extension of time

within which to file an appeal to the Court of Appeal are provided for under Order 42 rule 6(2) of Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act of the Court of Appeal rules respectively.

16. Order 42 rule 6(2) of 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”.

17. The Applicant needs to show he approached Court without delay and that he stands to suffer irreparable harm if the order is not grant and is also willing to abide by any conditions set by the Court.

18. The Applicant filed this application on 13th February 2019 after the judgement of Court was delivered on 20th December 2018. Bearing in mind the Court recess period from 21-12-2018 to 11-1-2019, I would find that there was no inordinate delay in filing this application. The Applicant has also submitted that he stands to suffer irreparable harm, as Respondent is a person of low means.

19. The Respondent has submitted that she is not a person of low means and is capable of refunding the decretal sum if the Appeal succeeds. The Respondent averred that she is employed and is capable of refunding the decretal sum if the Appeal succeeds. The Respondent however failed to prove by affidavit her means and evidence of her earning to warrant the Court determine this issue.

20. I will exercise my discretion in the circumstances and allow stay on the condition that the Respondent deposits ½ the decretal sum in an interest earning account held in the joint names of the Counsels on record and the other half be paid to the Claimant or be executed as the case may be within 60 days.

21. On the issue of extension of time for filing an Appeal, Section 7 of the Appellate Jurisdiction Act states as follows:-

“The High Court may extend the time for giving notice of intention to appeal for a Judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such an appeal may have already expired”.

22. Rule 4 of the Court of Appeal Rules on extension of time states that:-

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court for the doing of any act authorised or required by these Rules, Whether before or after the doing of the act and a reference to these Rules to any such time shall be continued as a reference to that time as extended”.

23. The law therefore allows this Court or the Court of Appeal to extend time within which to file an Appeal.

24. For the same reason that judgement was delivered in this matter on 20.12.2018 and there was a Court recess from 21.12.2018 to 11.1.2019, the delay in filing an Appeal is explainable.

25. I therefore exercise my discretion and allow the Applicants to file the Appeal out of time as prayed and within 7 days from the date of this ruling.

26. Costs to abide the outcome of the Appeal if filed.

Dated and delivered in open Court this 12th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Olum holding brief Enonda for Claimant/Respondent – Present

Ayieko for Respondent/Applicant – Present