



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1968 OF 2014

ZAKAYO MULINGE MUTUKU.....CLAIMANT

- VERSUS -

KENYA ELECTRICITY GENERATING COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th July, 2019)

RULING

The Court delivered the judgment on 10.04.2019 and with orders for:

- a) The declaration that the claimant was wrongfully, unfairly and unlawfully terminated.
- b) Payment of 12 months' salaries in compensation at last monthly gross pay (Per July 2014 payslip) plus one month pay in lieu of the termination notice to be computed by the parties and included in the final decree (and failing agreement the quantum be settled by the Deputy Registrar).
- c) The amount in (b) above to be paid by 01.06.2019 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- d) The respondent to pay the claimant's costs of the suit.

After delivery of the judgment, by consent of the parties the Court ordered:

- 1) The respondent to deliver a certificate of service to the claimant by 01.06.2019.
- 2) The amount awarded in the judgment is payable by the respondent to the claimant less lawful PAYE tax.

On 30.05.2019 the respondent filed an urgent application through Nchogu, Omwanza & Nyasimi Advocates. The application was under section 7 of the Appellate Jurisdiction Act, section 17 of the Employment and Labour Relations Court Act, rule 17(1), (2), (3), (8) of the Employment and Labour Relations Court (Procedure) Rules, 2016, section 1A, 1B, 3A, 63(e) and 95 of the Civil Procedure Act and all enabling provisions of law. The prayers were for orders:

- 1) That the application be and is hereby certified urgent.
- 2) That the Honourable Court be pleased and hereby grants leave for the law firm of Nchogu, Omwanza & Nyasimi Advocates to come on record for the respondent as per the consent order dated 20.05.2019 which is hereby adopted as an order of the court.
- 3) That the Honourable Court be pleased and hereby extends time for the Applicant to file a notice of appeal out of time and grants leave to file the notice of appeal out of time against the judgment of the Court delivered and dated 10.04.2019.
- 4) That the Honourable Court be pleased and hereby extends time to file the intended appeal (memorandum and record of appeal) against the judgment of the Court delivered and dated on the 10.04.2019.
- 5) That pending the *inter parties* hearing and determination of the application the Honourable Court be pleased and hereby grants stay of execution against the respondent or applicant.

6) That pending the hearing and determination of the intended appeal the Honourable Court be pleased and hereby grants stay of execution against the respondent or applicant.

7) That costs of the application be in the cause.

The application was based on the annexed affidavit of David Mwangi, the respondent's Legal Manager and upon the following grounds:

1) The judgment was delivered by the Court on 10.04.2019 against the applicant. The applicant was not notified by its previous advocates David Kiptum & Company Advocates about the delivery of the judgment. The respondent discovered about delivery of the judgment from online sources and upon notification by the claimant's advocates. The applicant received the judgment and perused it on 13.05.2019 and it was dissatisfied with the judgment and desires to appeal against the entire decision.

2) On 14.05.2019 the applicant instructed Nchogu, Omwanza & Nyasimi Advocates to take over the matter and to lodge the appeal. On 20.05.2019 the previous advocates forwarded the client's file to the new advocates and have advised the applicant to appeal.

3) Notice of appeal was to be filed within 21 days from the date of the judgment on 10.04.2019 (which lapsed on or about 01.05.2019).

4) The intended appeal will raise fundamental issues and has a high chance of success.

5) The Court ordered that the award be paid by 01.06.2019. The applicant fears execution may issue prior to lodging of the appeal.

6) If the judgment is executed the applicant will suffer irreparable damage if the judgment is executed.

7) The applicant will abide by directions as may be given by the Court.

8) The delay is not inordinate.

The claimant opposed the application by filing his replying affidavit on 10.06.2019 through Kamende D.C & Associates, Advocates. The claimant urged as follows:

1) There is no notice of appeal filed so that the prayer for stay of execution pending an intended appeal is premature.

2) The time for filing the notice of appeal had lapsed on or about 24.04.2019 and there is inordinate delay in filing the application.

3) The applicant has not applied for certified copies of proceedings and the judgment as alleged in paragraph 12 of the supporting affidavit.

4) There is no undertaking to pay or deposit judgment sum as required by law.

5) The supporting affidavit is by a person who does not confirm the authority of the applicant to make and swear the affidavit.

6) Judgment was delivered on 10.04.2019 and payment was to be by 01.06.2019 without and the application is filed on the eve of expiry of the allowed time. Grant of stay of execution is being prayed for but in bad faith.

7) Exhibit DM1 shows that Boniface Masinde Advocate being the applicant's advocate as at time the judgment was delivered informed the applicant on 29.03.2019 that the judgment would be delivered on 10.04.2019. The applicant has failed to explain its inaction effective 10.04.2019 when the judgment was delivered to 13.05.2019 when it says it got to peruse the judgment. The applicant does not therefore deserve the exercise of the Court's discretion in its favour.

8) The applicant has not demonstrated how it learned about the judgment online and the electronic sources or person who notified are not disclosed.

9) Further the delay in filing the application between 13.05.2019 and 14.05.2019, 20.05.2019 to 30.05.2019 has not been explained.

10) On 20.05.2019 the claimant's advocates wrote to the applicant's previous advocates forwarding the decree and the bill of costs and the advocates never protested when the same were delivered on 21.05.2019. Thus it is unfathomable that on 20.05.2019 the previous applicant's advocates signed consent for take-over of the case by the new advocates and the previous advocates accepted the documents on 21.05.2019.

11) The memorandum of appeal does not raise any fundamental legal issues as alleged by the applicant.

12) A stay of execution should not be granted without a notice of appeal. There is no national, international or public interest in the suit and inordinate delay has not been explained.

13) The suit had been closed but was reopened by the applicant prior to the judgment and who should be denied any further chance to obstructing justice and causing any further delay.

The parties filed their respective submissions for and against the application. Prayer (2) in the application was already allowed. The Court has considered the parties' respective cases and makes the following submissions.

First, it is submitted for the claimant that the Court granted the stay of execution in ordering that the payment be made by 01.06.2019. The Court returns that there was no order staying the execution but only that if payment was effected by 01.06.2019 there would be no interest payable. The claimant's submission that the doctrine of *res judicata* would apply will therefore fail. There was no stay of execution in terms of order 42 rule 6(6) granted informally immediately after the delivery of the judgment.

Second, the Court returns that immediately after delivery of the judgment on 10.04. 2019 the parties entered a consent order thus, "**The amount awarded in the judgment is payable by the respondent to the claimant less lawful PAYE tax.**" By that consent order, the Court returns that the parties agreed that the amount was payable less tax and the parties are bound accordingly. The Court returns that it is an afterthought to seek stay of execution in light of that consent order. The Court further returns that the seeking of extension of time to file a notice of appeal belatedly in terms of section 7 of the Appellate Jurisdiction Act is similarly misconceived. The parties are bound by that consent and there was no review application or established reason that the consent order as made on 10.04.2019 would not apply. Upon that ground alone the application should fail.

Third, there is no evidence that the applicant has applied for the certified copy of the typed proceedings and the judgment, and, there is no evidence that the applicant has filed a notice of appeal, even belatedly so. The Court considers that nothing stopped the applicant from lodging the notice of appeal at the earliest opportunity possible and thereafter seeking extension of time to deem it duly filed. As per rule 75(2) of the Court of Appeal Rules, 2010 every notice of appeal was to be lodged within 14 days from the date of the judgment herein. The applicant having not filed the notice of appeal, the Court returns that there is no pending appeal upon which the Court may anchor the order for stay of execution pending appeal against the judgment and decree herein and as prayed for. As provided in Order 42 of the Civil Procedure Rules, the lodging of the notice of appeal is a precondition for grant of stay of execution pending appeal.

Fourth, as submitted for the claimant, on 29.03.2019 counsel for the applicant notified the applicant that judgment would be delivered on 10.04.2019. The Court returns that the applicant has not shown a reasonable cause for its failure to know about the judgment until it says it learned about the same from online sources. In the intervening period the applicant has not shown effort in reaching out to its advocates for the relevant information. The Court has also considered the claimant's undisputed case that it is unfathomable that on 20.05.2019, the previous applicant's advocates signed consent for take-over of the case by the new advocates and the previous advocates accepted the documents on 21.05.2019. The sources of the online discovery by the applicant on 30.05.2019 about the delivery of the judgment have not been disclosed. The Court returns that in such circumstances, the applicant has failed to clearly explain the reasons for the delay in filing the notice of appeal.

Sixth, whereas the applicant has established that the Court had jurisdiction to extend time for filing the notice of appeal belatedly as per section 7 of the Appellate Jurisdiction Act and rule 41 of the Court of Appeal Rules, for the findings made in this ruling, the application will be declined.

In conclusion, the application filed on 30.05.2019 is hereby dismissed with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday 26th July, 2019.**

BYRAM ONGAYA

JUDGE