



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1597 OF 2015

BANKING INSURANCE AND FINANCE UNION.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

RULING

Introduction

1. On 26th July 2019, Abuodha J delivered a judgment herein in favour of the Claimant in the sum of KShs. 8,203,999.00. The Respondent/Applicant was aggrieved and filed the Notice of Appeal on 30th July 2019 challenging the whole judgment. In the meanwhile, she filed the Notice of Motion dated 31.7.2019 seeking the following orders-

a. THAT this Honourable Court be pleased to issue an order of stay of execution pending the hearing and determination of this Application.

b. THAT this Honourable Court be pleased to issue an order of stay of execution pending the hearing and determination of the Appeal.

c. THAT costs of this Application be in the cause.

2. The grounds of the motion are set out in the body of the motion and the supporting affidavit sworn by Grace Kanyiri. In brief she contended that she has applied for certified copies of the typed proceedings to necessitate the filing of an appeal, however, the same are yet to be issued; that if the order for stay is not granted, the Claimant will proceed with the execution and thereby render the intended appeal nugatory thus occasion her irreparable loss since the grievants may not have the capacity to refund the money in the event the appeal succeeds.

3. The Applicant further contended that she is willing to deposit the decretal sum in court or in a joint account between the Claimant and FKE (the Federation of Kenya Employers), pending the hearing and determination of the Appeal. In her view, the intended appeal has merits and high chances of success.

4. Finally, the Applicant contended that there has been no inordinate delay in filing the Application herein and it is in the interest of justice that the orders sought are granted.

5. The Claimant has opposed the Application vide the Replying Affidavit of Tom Odero filed on 2nd September 2019. In brief he contended that the sum of KShs. 8,203,999.00 is not a colossal sum of money for a bank of the Respondent's stature; that the sum is to be shared among 24 grievants who should not be denied the enjoyment of the fruits of the judgment; and that the claimant will be able to settle the decretal amount on behalf of the grievants, should the intended appeal succeed.

6. In addition, the Claimant contended that the Applicant has not annexed a memorandum of the intended appeal to demonstrate that she has an arguable appeal; that the proposal to deposit the decretal sum as security is an attempt to get the grievants to submit; and the intended appeal is a waste of time, frivolous, vexatious and an abuse of the process of this Court.

7. Finally, the Claimant contended that the application is unfounded in law because the Applicant has failed to demonstrate special circumstances to justify the grant of stay of execution pending the appeal; and further, she has failed to demonstrate that the Claimant's lack of capacity to repay the decretal sum if the appeal succeeds.

Applicant's Submissions

8. Ms. Kanyiri, learned counsel for the Applicant, submitted that the legal threshold for granting stay pending appeal by the trial court is set out by order 42 rule 6 (2) read with rule 32 (2) of the ELRC rules which require that the applicant must demonstrate that substantial loss is likely to be suffered by the Applicant if the order is withheld; and that the application was made without delay. She contended that the application was made on 31.7.2019 and as such it was without any delay. She contended that a substantial loss will be occasioned if the stay is denied because the grievants will not be able to refund the decreed sum if the appeal succeeds. She contended that the grievants exited their employment through Voluntary Early Retirement (VER). She further contended that filing of the Notice of Appeal constitutes an appeal on record for purposes of granting the stay sought and contended that there was no requirement that one must have filed a memorandum of appeal.

Respondent's Submissions

9. Mr. Odera, counsel for the Respondent, submitted that the Notice of Appeal and the letter requesting for certified copies of typed proceedings were not sufficient to prove that the Applicant had an arguable appeal. He further submitted that the Applicant has failed to prove that the appeal will be rendered nugatory in the event the order for stay is not granted.

10. It was his further submissions that the Application had been brought in bad faith and that the Applicant has been holding the money since 2013. He urged this Court to dismiss the Application because the decretal sum was not substantial once it is distributed to the 24 grievants. Finally, he contended that the claimant will be able to refund the whole decreed sum on behalf of the grievants should the appeal succeed.

Applicant's Rejoinder

11. In her rejoinder, Ms. Kanyiri submitted that the Application is not brought under section 5 of the Judicature Act which provides for the threshold to be met when one seeks an order for stay in the Court of Appeal. She further submitted that order 42 rule 6 (4) provides that an appeal is deemed to have been filed when a Notice has been filed under the Rules of that Court. It was her submission that the right of appeal was a cardinal right under Article 50 (1) read together with Article 159 (2) of the Constitution.

12. She further denied that the Applicant had withheld the decretal amount since 2013, and contended that the judgment was delivered on 26th July 2019. Finally, she submitted that the Claimant has not demonstrated that the grievant would be able to repay the decretal amount in the event the appeal is successful.

Analysis and determination

13. After considering the application, affidavits and the submissions by the counsel, the main issue for determination herein is whether the Applicant has met the legal threshold for granting stay by the trial pending appeal. The legal threshold for granting stay by this court is set out by Order 42 rule 6 (2) which provides as follows-

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.

14. The Application for stay herein was made on 31.7.2019, 4 days after the delivery of the impugned judgment. Consequently, I find that it was made timeously and without any unreasonable delay.

15. On the other hand, I have considered the amount involved in the impugned judgment being over Kshs.8,000,000. The said sum is to be distributed to 24 grievants who are not direct parties herein and as such they will not be easy to trace them after the decreed sum is distributed to them. The claimant union has not demonstrated how she will be able to repay the decreed sum on behalf of the grievants in the event the appeal succeeds after the decreed sum is distributed to the respective grievants.

16. In *National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another [2006] e KLR*, the court held that-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

17. In my view an appeal becomes nugatory if the appellant fails to recover the subject matter or faces difficulties in recovering the same after the appeal succeeds. In this case, I am satisfied that the applicant has demonstrated that substantial loss will be occasioned on her if the stay order is withheld because should the appeal succeed after the decreed sum is distributed to the 24 grievants, she is likely not to recover it or she will face difficulties in recovering the same. In making the said finding I have dismissed the claimant's contention that the applicant has not demonstrated that she has an arguable appeal by filing a Memorandum of Appeal. It trite that filing of a notice of Appeal is sufficient for purposes seeking stay of execution pending appeal.

18. Finally, I have considered the Applicant's offer of security as condition for stay although the claimant dismissed that offer as tactic of forcing the grievants to submit. Considering the circumstances of the case, I find the offer by the applicant to deposit the decretal sum in court or in a joint account, between her counsel and the claimant welcome and well-intended.

19. In conclusion, I return that the applicant has met the legal threshold for granting stay pending appeal and proceed to make the following orders:

a) Stay is granted pending appeal herein on condition that the decreed sum **(Kshs.8,203,999.00)** is deposited in court within 15 days of today.

b) Costs shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 25th day of October 2019

ONESMUS N. MAKAU

JUDGE