



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 918 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

BENTER AKINYI OPANDE.....CLAIMANT

VERSUS

KENYA UNION OF POST PRIMARY EDUCATION

TEACHERS (KUPPET).....1ST RESPONDENT

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS

(KUPPET NAIROBI BRANCH).....2ND RESPONDENT

RULING

Before me for determination is a Notice of Motion Application dated 11th March 2019. The Application is filed by the Respondents/Applicants under Certificate of Urgency seeking the following orders:

1. That this application be certified as urgent and heard ex-parte thereof being dispensed with at the first instance (*spent*).
2. That the Court be pleased to stay execution of the Judgment and Decree of the Employment and Labour Relations Court at Nairobi by Marete J. delivered on 20th December, 2018 in Employment and Labour Relations Court ***Cause No. 918 of 2012, Benta Akinyi Opande Vs Kenya Union of Post Primary Education Teachers and Another*** and any subsequent proceedings arising out of that suit pending the filing, hearing and determination of an intended Appeal of the said Judgment and Decree;
3. That the costs of this application do abide the outcome of the appeal.

The Application is premised on the grounds as set up on the face of the Notice of Motion application. The Applicant contends that Judgment in this matter was delivered in favour of the Claimant as against the 1st Respondent on 20th December 2018.

The Applicant further contends that it was dissatisfied with the Judgment and did file a notice of Appeal and made a request to the Deputy Registrar seeking certified copies of the Judgment and typed proceedings for purposes of lodging the Appeal.

The Applicants further aver that they are ready and willing to deposit the entire decretal sum of Kshs.550,535.00 as security in a joint interest earning account or in court and to abide by any such conditions as the Court may deem fit.

The Applicants contends that if the Orders sought in the instant Application are not granted they stand to suffer irreparable loss as the Claim will be rendered nugatory and shall be reduced to an academic exercise. They further contend that they have established a prima facie case with probability of success and urged the Court in the interest of justice to allow the same as prayed.

The Application is supported by the affidavit of WICKS MWETHI NJENGA, an Executive Official of the 1st Respondent sworn on 11th March 2019 in which he reiterates the grounds on the face of the motion.

The Application is filed under Sections 3A, 53 and 66 of the Civil Procedure Act, Order 42 Rule 6(2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling other provisions of the law.

The Claimant opposed the Applications and filed a Replying Affidavit deposed by BENTER AKINYI OPANDE, the Claimant herein on 3rd April 2019 and filed in Court on 4th April 2019. She deposes that the instant Application ought to be dismissed as it is only meant to delay and/or prevent her from enjoying the fruits of the Court's judgment delivered in her favour.

She further contended that being a full time Executive Officer and employee of the Kenya National Union of Teachers (KNUT) at its Head Office earning a gross monthly salary of Kshs.233,638/- as well as the proprietor of Kwale/Matuga/682 measuring approximately 1.59 Hectares, she is a woman of means and would therefore be able to repay the judgment sum in the event the intended Appeal succeeds.

She avers that the instant Application fails to meet the threshold for granting of the Orders sought and therefore urged the Court to dismiss the same with costs.

Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

It is submitted on behalf of the Respondents/Applicants that it has demonstrated that it has met the threshold to warrant granting of the orders sought in the instant Application as provided under Order 42 Rule 6 and in the Authority of **Butt Vs Rent Restriction Tribunal (1982) KLR 417**.

The Applicant further submitted that it is likely to suffer substantial loss should the Appeal succeed as the Claimant/Respondent has not produced an Affidavit of means to show that she is able to refund the decretal sum should the Appeal succeed. To buttress its argument the Applicant cited and relied on the decision of the Court of Appeal **National Industrial Credit Bank Limited Vs Aquinans Francis Wasike Court of Appeal Civil Application No. 238/2005**.

The Respondents further submit that the instant Application has been brought within reasonable time having been served with a Notice of Taxation on 13th February 2019 as there was no threat of execution until the Notice of Taxation was served. The Applicant further contends that it did make the Application immediately it learnt of the Judgment. The Applicant relied on the case of **Amal Hauliers Limited Vs Abdulnasir Abukar Hassan (2017) eKLR** where the Court held:

“It is only after the Respondent's counsel wrote to the Applicant's counsel on 19th June, 2017 about the intention to execute that the Applicant found it necessary to file the instant Application. There is thus no inordinate delay on the part of the Applicant.”

The Applicant further submitted that it has demonstrated willingness to deposit the entire decretal sum of 550,535 as security and to abide by any directions issued by the Court.

The Applicant further contended that it has an arguable Appeal with a likelihood of success, which appeal may be rendered nugatory should this Court not grant the orders sought in the instant application.

Claimant's Submissions

The Claimant submitted that the instant Application has not met the threshold for granting of the Orders sought as provided under Order 42 Rule 6. To fortify her argument the Claimant/Respondent relied on the case of **Masisi Mwita Vs Damaris Wanjiru Njeri (2016) eKLR**. The Respondent further cited the cases of **Cynthia Achieng Marere Vs Athanas Shibwom Asiavugwa (2015) eKLR** and **Utalii Transport Company Limited & 3 Others Vs NIC Bank Limited & Another (2014) eKLR**.

The claimant further submitted that the Applicant has failed to demonstrate that it will suffer substantial loss. Further that it has failed to show that she is a person of straw and that she will not be able to repay the said decretal sum should the Appeal be successful. To buttress this argument the Respondent relied on the decision in **Equity Bank Ltd Vs Taiga Adams Company Limited**.

The claimant contends that the intended Appeal has very little chances of success. It is further the claimant's submission that she is a person of means and would therefore be able to repay the decretal sum in the event the Appeal will be successful.

In conclusion the Claimant/Respondent urged the Court to dismiss the instant Application with costs for lack of merit.

Analysis and Determination

Having carefully considered the grounds in support of the application as set out on the face of the motion and the Supporting Affidavit, the averments in the Replying Affidavit and the submissions made by the parties, the following are the issues for determination:-

1. Whether there is an appeal lawfully filed by the Applicant
2. Whether the Application for stay ought to be granted.

Whether there is an appeal

The impugned Judgment in this matter was delivered on 20th December

2018 and a Notice of Appeal was filed by the Applicant on 11th February 2019. The Claimant posits that the same was filed out of time and without the leave of the Court. She further contends that in essence there is no appeal on record. The Claimant relied on the provisions of Rule 75(1) and (5) of the Court of Appeal Rules, 2010 and Order 50 Rule 4 of the Civil Procedure Rules, 2010.

The Applicant on the other hand on the issue of time submitted that it did lodge the Notice of Appeal immediately it became aware of the Judgment in this matter.

As rightfully put by the claimant Rule 75 of the Court of Appeal Rules provides that the notice of appeal be filed within 14 days from the date of the decision against which the appeal is sought. It is therefore true that the Notice of Appeal was indeed filed out of time and without leave of the Court. It is thus invalid.

In the absence of a valid notice of appeal there can be no appeal. The applicant has not even applied for the notice of appeal to be admitted out of time.

In the case of ***Kenya Union of printing, Publishing, Paper Manufacturers and Allied Workers Vs Highlands Paper Mills Limited (2018) eKLR***, the court held:

“There is currently no Valid Notice of Appeal filed by the Respondent/Applicant within the stipulated time and the question for stay pending appeal remains a moot point.”

In view of the foregoing, there is no reason to delve into the merits of the Application for stay pending appeal. The same is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE