



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO. 397 OF 2014

SAMMY NZIOKA BITA

MUTIO GEORGE MUTIO

SILVESTER OTIENO

VICTOR OCHIENG.....CLAIMANTS

VERSUS

CASABLANCA RESTAURANT CLUB

VICTOR WAUDI T/A CASABLANCA RESTAURANT CLUB

CASABLANCA HOLDINGS LIMITED.....RESPONDENTS

RULING

Introduction

1. The application before me is the Notice of Motion dated 24/8/2017 brought by the second and third respondents. It seeks for stay of execution of the judgment delivered herein on 28/4/2017 pending appeal. It is supported by the affidavit sworn by the second respondent Mr. Victor Waudi. The ground upon which the motion stands are that the applicants have filed an appeal against the whole judgment before the Court of Appeal being Civil Appeal No.55 of 2017; the appeal has high chances of success; and unless stay is granted the appeal will be rendered nugatory and they will suffer substantial loss because the claimants will not be able to refund any part of the decreed sum.

2. The claimants have not opposed the application and they never attended the hearing of the motion on 30.10.2017 when Mr. Amuga learned counsel for the applicants proceeded *ex parte*.

Analysis and determination

3. After considering the Notice of Motion, Supporting Affidavit, the oral submissions by counsel, it is obvious that I delivered the impugned judgment against the applicants on 28/4/2017; that the applicants was dissatisfied and they lodged Appeal in the Court of Appeal on 17/8/2017; and that the claimants have since the said judgment not taxed their costs or showed any interest in executing the impugned judgment. The issue for determination is whether the applicant has met the threshold for granting stay pending appeal.

Threshold for granting Stay Pending Appeal

4. Under order 42 rule 6 of the Civil Procedure Rules, the trial court is barred from ordering stay of execution of the decree unless it is satisfied that:

(a) The application is brought without unreasonable delay.

(b) Substantial loss may result if stay is not granted.

(c) That applicant is willing to abide by terms of security for the due performance of the impugned judgments as the court deems fit to order.

Unreasonable delay

5. The application for stay was made on 25.8.2017, more than three months after the judgment, and it was done only after lodging the said appeal. The applicants have not explained why it took her more than three months to make the application for the stay. That delay is unreasonable. However,

I will excuse that delay because, the claimants had also not taken any lawful steps towards execution of the decree. They had not filed any bill of costs and even up to now his costs have not been determined.

Substantial loss

6. Substantial loss occurs where the decree holder is unable to refund the decreed sum after the applicant succeeds in his appeal. That means that the appeal is rendered nugatory and that is the mischief, which should be safeguarded by the order of stay of execution pending the appeal. In this case, the decree is for Ksh. 670,150 and the applicant contends that it is substantial amount which may not be refunded by the Claimants if the appeal succeeds after execution. The Claimants have not opposed the motion and therefore the alleged substantial loss is not contested. In the circumstance, I find and hold that substantial loss will result in this case if stay is withheld because the appeal on record will be rendered nugatory if it succeeds after execution and the claimants fail to repay the decreed sum.

Security

7. For the reason that the claimants did not participate in the hearing of application and they did not bother to demand any security for payment of the decreed sum in the event the appeal fails, I will not make any order for depositing of security.

Disposition

8. Having been satisfied that substantial loss will result if stay is denied, I allow the Notice of Motion dated 24/8/2017 with no order as to costs.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JANUARY 2018

ONESMUS MAKAU

JUDGE

DELIVERED AT MOMBASA THIS 22ND DAY OF FEBRUARY, 2018

LINNET NDOLO

JUDGE