



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 199 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

CHARLES ONDIEKI MATOGO.....CLAIMANT

VERSUS

BIZONE PRINTING & PACKAGING LIMITED.....RESPONDENT

RULING

1. The Application before Court is the one dated 21.11.2017. The Application was filed by the Respondent/Applicants herein seeking stay orders as follows:-

- 1. That this application be certified as urgent, its service be dispensed with and the same be heard ex parte.***
- 2. That this Honourable Court be pleased to grant an extension of the order of stay of execution and enforcement of the Judgment and Decree granted on 25th September, 2017, pending the hearing and determination of this Application.***
- 3. That this Honourable Court be pleased to issue an order of stay of execution and enforcement of the Judgment and Decree of the Court of 25th September, 2017 and the consequential Orders arising therefrom pending the hearing and determination of the intended appeal; and***
- 4. That cost of this application be provided for.***

2. The Application is premised on the following grounds:-

- 1. That the Honourable Court delivered its judgment on 25th February, 2017 in favour of the Respondent as against the Applicant in this matter;***
- 2. That on 25th September, 2017 this Honourable Court entered judgment in the Respondent's favour in the sum of Kshs.470,162/= together with costs;***
- 3. That the Applicant being dissatisfied with the decision of the Court has preferred to appeal against the decision to the Court of Appeal;***
- 4. That the Applicant sought stay of execution of the judgement and orders of the Court pending appeal, which stay was granted for 30 days from the date of the judgment;***
- 5. That upon obtaining the extension, the Applicant filed an application under Certified of Urgency to the Court of Appeal under Rule 5(2) (b) for stay pending appeal;***
- 6. That the Court of Appeal is yet to give the Applicant audience on the Application which is still pending before the Court;***
- 7. That the Applicant, through its Advocates on record, M/S Ashitiva Advocates LLO, wrote a letter to the Deputy Registrar of the Court of Appeal under Rule 47(5) of the Court of Appeal Rules requesting to be heard on the issue of Urgency so that Application can be heard on priority basis;***

8. That the Applicant is still awaiting the response for the Deputy Registrar. Meanwhile, the Applicant is left completely exposed to execution by the Respondent, considering that the stay period lapsed on 25th October, 2017;

9. That the Applicant has reasonable apprehension of likelihood of execution by the Respondent. This will cause the Applicant to suffer great injustice if the orders sought in the application are not granted and the Respondent allowed to proceed with the execution;

10. That it is therefore just and fair that this Honourable Court grants the prayer for stay pending the hearing and determination of the intended appeal;

11. That this application has been made without unreasonable delay and that the applicant is ready and willing to abide by conditions as to security that this Honourable Court may impose;

12. That if the orders sought herein are not granted, the substratum of the intended appeal will be destroyed thereby rendering the intended appeal nugatory and substantial loss may result to the Applicant;

13. That this Honourable Court is constitutionally bound to ensure that the Applicant's right of Appeal is not unjustly compromised;

14. That it is just and equitable that the orders sought herein are granted.

3. The Application is also supported by the Supporting Affidavit of one Arnold Mugogo Counsel for the Applicant who has deponed that they are apprehensive that the Claimant/Respondents could proceed to execute the judgment of this Court dated 25/9/2017 wherein the Claimant was awarded judgment in the sum of Kshs.470,162/= with costs.

4. The Claimant opposed this Application. He filed his replying affidavit before Court on 16/12/2013 wherein he has deponed that the Respondent/Applicant's Application is a mere attempt to delay and deny him the fruits of his judgment.

5. He avers that the appeal filed has no merit and does not have any chances of success. He also depones that the Applicant has not offered any security and that since the Applicants have filed a similar Application before the Court of Appeal, this Court is functus officio and so the Application should not be allowed.

6. The Application proceeded by way of written submissions. I have considered the averments of both parties. In determining this application, I am guided by the law which is Order 42 Rule 6 of the Civil Procedure Rules which states as follows:-

1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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".

7. Thus from this provision, an appeal alone cannot operate as a stay of execution. The Claimant have deponed that this Court is functus officio since the Respondents have filed a similar appeal at the Court of Appeal. This in my view is not the correct position of the law since Order 22 Rule 22(1) of the Civil Procedure Rules states as follows:-

1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the Court of first instance, or appellate Court if execution has been issued thereby, or if application for execution has been made thereto".

8. I believe this Court is not functus officio and can proceed to hear and determine this Application.

9. The only consideration that I need to take into account then is the provision of Order 42 Rule 6. I note that the Applicants approached this Court within reasonable time.

10. I note too that the issue of security was not proposed by the Applicants and under Order 42 rule 6 envisages that this Court can order such security that is apt in the performance of the decree.

11. The ultimate goal of this Court is to ensure justice for all. In that respect, this Court should ensure that no substantial loss may result to the Applicant if the order sought is not granted.

12. The Applicant has already filed their appeal. In order to ensure that they don't suffer loss rendering the appeal nugatory and as academic exercise, I will allow stay order sought but on condition that the Respondent/Applicant do deposit the decretal sum in a joint interest earning account held in the names of Counsels on record within 30 days. In default execution to issue.

Dated and delivered in open Court this **30th day of May, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties