



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1373 OF 2010**

*(Before Hon. Lady Justice Maureen Onyango)*

**TONY MOSES ADERA.....CLAIMANT**

**-VERSUS-**

**MILLIE G. A. ODHIAMBO**

**JACQUELINE ANAM**

**JEFFREY MAGANYA**

**WANJA MURIU**

**ANDIA ADEKA (Sued in their capacity as trustees of CRADLE**

**– The Children Foundation).....1<sup>ST</sup> RESPONDENT**

**ERIC OGWANO.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application before me for determination is dated 29<sup>th</sup> May 2017 and seeks orders of stay of execution pending appeal and leave to file notice of appeal out of time. The application is filed under certificate of urgency on 30<sup>th</sup> May 2017 and is supported by the affidavit of COLLINS NAMACHANJA sworn on 29<sup>th</sup> May 2017 and the following grounds.

1. The respondent being dissatisfied with the Award delivered by this court on 18<sup>th</sup> August 2016 intends to appeal against the whole of the said award.
2. Under the Court of Appeal Rules the notice of appeal ought to have been filed within 14 days from the date of the award.
3. The respondent's advocates came to learn of the award having been delivered through a letter dated 25<sup>th</sup> August 2016 from the claimant's advocates which was received on 29<sup>th</sup> August 2016.
4. In response the respondents' advocates filed an application dated 31<sup>st</sup> August 2016 seeking to set aside the award principally on the ground that the respondent was not aware that the matter had been set down for hearing on 18<sup>th</sup> April 2016, the hearing notice issued by the court having been received late by the respondent's advocates and that therefore the respondent did not participate in the hearing pursuant to which the award was delivered in favour of the claimant.
5. In its ruling delivered on 5<sup>th</sup> May 2017, the court dismissed the applicant's application of 31<sup>st</sup> August 2016 and refused to set aside the award. The court observed in part in its said ruling that "*the parties had agreed to proceed by way of written submission in view of the detailed pleading on facts of the case... This finding by the court is factual and has not been challenged by the applicant in the application.*"
6. That taking the contents of the court's ruling of 5<sup>th</sup> May 2017 into consideration, the applicant had made the application dated 31<sup>st</sup> August 2017 under the wrong impression that indeed there had been an oral hearing of the matter before the award was delivered. The only option now available to the applicant to challenge the award is by way of appeal.

7. However, the applicant is out of time in terms of lodging a notice of appeal against the award.

8. That the applicant has an arguable appeal with high chances of success.

9. In the meantime, there is need for stay of execution, if stay of execution is not granted the respondent/applicant stands to suffer substantial loss. The claimant had already threatened execution by a notice dated 19<sup>th</sup> May 2017.

In the supporting affidavit of COLLINS NAMACHANJA, advocate and partner in the firm of Namachanja and Mbugua Advocates, he reiterates the grounds on the face of the application.

The claimant filed a replying affidavit of DONALD O. RABALA advocate for the Claimants in which he deposes that the respondent has been casual, negligent and lackadaisical in their handling of this claim, characterised by non-attendance, filing and withdrawing applications then filing fresh ones and that this has been admitted in the affidavit of NAMACHANJA in support of the application.

He deposes that the respondent had frustrated the hearing of the case for more than 5 years, that there was an order for filing of submissions which the respondent failed to comply with and that the respondent was served but failed to attend court for judgment. It is submitted that it is due to the respondents' negligence that the period for filing appeal lapsed, that the grounds in support of the application and grounds of the intended appeal are not valid and do not meet the requirements of Order 41 Rule 6 of the Civil Procedure Rules.

### **Submissions**

The application was disposed of by way of written submissions.

### **Respondent/Applicant's Submissions**

In the submissions the applicant submits that the delay in filing appeal is not borne out of indolence or inactivity, that the respondent has an arguable appeal and is willing to secure the decretal sum if required to do so.

The respondent relies on the case of **BOLPAK TRADING COMPANY & OTHERS -VS- BENSON MASILA MUTINDA** where the court stated the principles applicable to applications of the nature herein.

### **Claimant's Submissions**

In the submissions filed on behalf of the claimant it is submitted that the applicant was not vigilant, has no arguable appeal and is guilty of delay. The claimant relies on the case **GYKA FUEL MART LIMITED -VS- BWANA MSHIRI SUNGURA [2013] eKLR**. The claimant further relies on the case of **SAMEER AFRICA LIMITED -VS- AGGARWAL & SONS LIMITED [2003] eKLR** and **BARCLAYS BANK OF KENYA -VS- EVANS ONDUSA ONZERE**.

### **Determination**

The issues for determination in the instant application are twofold: Whether the applicant has demonstrated sufficient grounds for failure to file notice of appeal in time and whether the applicant has an arguable appeal.

Order 50, Rule 6 of the Civil Procedure Rules provides for enlargement of time in the following terms –

#### **[Order 50, rule 6.] Enlargement of time by consent.**

**The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.**

Section 7 of the Appellate Jurisdiction Act provides extension of time in the following terms

#### **7. Power of High Court to extend time**

**The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.**

The principles for grant of orders for stay of execution are provided in Order 42, Rule 6 as follows

#### **[Order 42, rule 6.] Stay in case of appeal.**

**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

### **Delay**

The applicant states that delay in filing notice of appeal was occasioned by the fact that the award of the court was delivered in its absence and the respondent's counsel only learnt about it by letter dated 25<sup>th</sup> August 2016 from the claimant's counsel, that thereafter it filed an application for setting aside the judgment which was dismissed by ruling delivered on 5<sup>th</sup> May 2017, that it filed the instant application dated 29<sup>th</sup> May 2017.

The instant application has been filed almost one year (to be precise more than 11.5 months) after the date of the judgment sought to be appealed from. What I have to consider is whether these grounds are sufficient to warrant the extension of time for filing notice of appeal.

At paragraph 7 of the supporting affidavit, it is deposed that –

*“That however the applicant is now out of time for purposes of initiating an appeal in the Court of Appeal. The notice of appeal should have been filed within 14 days from the date of the award. The lapse in time has been taken up with the respondent seeking to set aside the award under the impression that there was an oral hearing pursuant to which the award was delivered and in which the applicant did not participate.”*

This means that counsel was negligent or reckless and did not read the judgment before filing the application dated 31<sup>st</sup> August 2016. Even after filing the application, Counsel did not read the judgment until the court in its ruling pointed out that the grounds in support of the application were at variance with the judgment; that the judgment was based on pleadings and submissions and not oral testimony as stated in the application.

Again, after the ruling on 5<sup>th</sup> May 2017, the applicant filed an application for stay of execution on 9<sup>th</sup> May 2017 which was withdrawn before filing the instant application on 30<sup>th</sup> May 2017.

I do not think misapprehension of a judgment by counsel that leads counsel to file a wrong application is justifiable grounds for extending time of appeal where the time has been lost due to the filing of two wrong applications in succession, one of which was dismissed and another one withdrawn, albeit upon the court pointing out the futility of the application. Counsel for the applicant made a blunder twice due to demonstrated lack of diligence.

I find that there was no justification for the delay in filing the notice of appeal as there was no intention to appeal at the time the applicant learnt about the judgment, the same having been an afterthought after dismissal of the application dated 31<sup>st</sup> August 2016.

### **Stay of Execution**

Order 42, Rule 6 (2) provides that before a court grants a stay of execution it must be satisfied that substantial loss may be incurred by the applicant.

The applicant herein has not demonstrated that the claimant/decreed holder will not be in a position to refund the monies paid to him should the appeal succeed. In any event at this stage, there is no appeal that has been filed. Having not justified the delay in filing notice of appeal, the application for stay must also fail as it would only be useful where the court enlarges the time for filing of the notice of appeal.

For the foregoing reason I find no merit in the application with the result that the application dated 29<sup>th</sup> May 2017 is dismissed with costs to the claimant/decreed holder.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF MAY 2018**

**MAUREEN ONYANGO**

**JUDGE**