



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 809 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 12th June, 2018)

FRANCIS MWINA KIMATU.....CLAIMANT

VERSUS

GENERAL INDUSTRIES LIMITED.....RESPONDENT

RULING

1. The Application in Court is the one dated 8/12/2017 file by the Respondents herein on 8/12/2017 through a Notice of Motion Application brought under Order 42 Rule 6, Rule 17 of Employment and Labour Relations Court (Procedure Rules 16, Section 3, 13(1) and (viii) and 17 of the Employment and Labour Relations Court Act and all enabling provisions of the law.

2. The Applicant seeks prayers for stay of execution of judgement/decree of this Court delivered on 21st November 2017 and all consequential orders arising therefrom pending an intended appeal against the judgment in this matter.

3. The Application is supported by the annexed affidavit of Samuel Kuria the Respondent's Human Resource Manager herein deponed to on 7/12/2017 and grounded on the following grounds:-

i. That this Honourable Court delivered its judgment on this matter on 21st November, 2017 awarding the Claimant 1 month salary in lieu of notice = 12,201.46/=, damages for unlawful termination equivalent to 12 month's salary = 146,418/= all totaling to Kshs.158,620/= and costs of the suit plus interest from the date of judgement.

ii. The Respondent/Applicant being dissatisfied with the said Judgment filed a Notice of Appeal on 4th December 2017 against the judgement and requested for copies of proceedings.

iii. The Respondent has an arguable appeal against the judgment/decree of this Court which has good chances of success.

iv. The Respondent will suffer irreparable loss if stay of executive of the judgment/decree hereof pending hearing and determination of the Intended Appeal is not granted as the Judgment/Decree is excusable at anytime.

v. If a stay of execution pending the hearing and determination of the intended appeal is not granted, the Appellant's appeal herein if successful will be rendered nugatory.

vi. No prejudice will be suffered as the decretal sum is already deposited in a joint interest earning account in the name of parties advocates hence earning interest for the successful party in the intended appeal.

vii. The Claimant's attachable assets and means to refund the decretal sum is unknown and the Respondent will suffer substantial loss if stay is not granted as the Claimant may not be able to refund the secured decretal sum if stay is not granted and the secured amount is released to the Claimant.

viii. The application has been made without unreasonable delay and secures the Respondent unfettered right of appeal in law.

ix. It is just and fair that this application be allowed.

4. The Applicants have submitted that they stand to suffer irreparable loss if the Application is not granted. They are also ready to deposit the decretal sum in an interest earning account in the names of the parties' advocates.

5. The Claimant/Respondents opposed this application. The Claimant filed his replying affidavit on 31.1.2018 stating that judgment was delivered on 21.11.2017 and that the Applicant had not lodged any appeal or Notice of Appeal within the stipulated period in the circumstances and that the Notice dated 27.11.2017 was not endorsed by the High Court Registry.

6. The parties agreed to dispose of this application by way of written submissions. The Applicants filed their submissions on 7/3/2018 and their main submission is that they have satisfied the grounds upon which stay orders can be granted. They cited the provisions of Order 42 rule 6.

7. They also aver that they filed the Notice of Appeal on 4/12/2017 but served it upon the Respondents on 5.12.2017 before it was signed by the Deputy Registrar. They contend that this is not fatal and they cited John Terer vs John Mbaraka & 2 Others (2010) eKLR where Gulamhusen Cassam & Another vs Shashikart Sachania & Another (1982 – 1988) was cited and the Court held that:-

“the advocate for the intending appellant in that case, Mr. Nowrojee filed a notice of appeal timeously but failed to serve it on the Respondent contending that he could not collect the Notice of Appeal filed in Court because the Registrar had not signed the second portion of it..... Madan, JA (as he then was) stated that “Rule 72 clearly shows that notice of appeal may be served on the party directly affected by the appeal without it being signed by the Registrar, either before or within seven days after lodging it. There is no prohibition in the Rules against serving notice of appeal even before it is lodged in the Superior Court. The Applicant’s Legal advice Mr. Nowrojee freely admitted that it was an error of judgement on his part to think that notice of appeal had to be signed by the Registrar before service”.

8. The Respondents had submitted that the Notice of Appeal having been filed later then there is no need to stay orders being granted.

9. I have examined all the averments and submissions of the parties. I notice that the Notice of Appeal was filed in time – 13 days after the impugned decision. Though served without the Registrar’s stamp, it is my finding that it was properly before Court and the omission of the Registrar cannot be used against the Applicants.

10. Order 42 rule 6(2) of the Civil Procedure Rules provides as follows:

“(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”.

11. Thus the only consideration for the Court on whether or not to grant stay are as provided above. The Applicants have established that they filed this application in good time. It is also apparent that they have filed an appeal and are willing to deposit security as may be ordered by Court including depositing the decretal sum in a joint account held in the Counsel’s names.

12. In order that the appeal filed may not be rendered nugatory, I will allow stay orders on condition that the Respondent releases ½ the decretal sum to the Claimant and deposit the other half in the joint name of the Counsel on record within 30 days. In default execution to issue.

Dated and delivered in open Court this 12th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wamboi holding brief for Liboro for the Respondents – Present

Claimants – Absent