



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 279 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SUSAN ATIENO NGOKO.....CLAIMANT

VERSUS

RAM HOSPITAL LIMITED.....RESPONDENT

RULING

Introduction

The application before me for determination is dated 3rd March 2017 and seeks the following orders –

- a. This application be certified urgent for hearing ex-parte in the first instance of grant of a temporary order in line with prayer (b) herein.
- b. There be a stay of execution of the judgment and/or decree of this honourable court pending inter partes hearing hereof.
- c. There be stay of execution pending hearing inter partes and determination of the (intended) appeal to the Court of Appeal.
- d. Costs of this application be provided for.

The application is supported by the grounds on the face thereof and the affidavit of DR. ANIL RATILAL TAILOR, the applicant's Managing Director. The purport of the application is that the applicant who is the respondent in this claim is aggrieved by the judgment of this court delivered on 19th January 2017 and intends to appeal against the said judgment. It is the applicant's contention that it will suffer substantial injustice should the applicant's prayers not be granted as the claimant would not be in position to refund the monies awarded in the judgment should the appeal be successful and the appeal would in such event be rendered nugatory and a mere academic exercise. The applicant further states that it seeks to avail itself of its statutory and constitutional right of appeal and *in extenso*, its constitutional right of access to justice.

The claimant has opposed the application. In the replying affidavit sworn on 14th March 2017 she deposes that the application has not been brought in good faith and is intended to delay her realisation of the decretal sum. She states that the sums awarded in the judgment being one month's salary in lieu of notice, leave for two years and 12 months' salary as compensation are her basic right and the court cannot be faulted for awarding her the same.

She further states that the notice of appeal is filed out of time and the date when it was sealed by the Deputy Registrar interfered with or altered. She states the copy served upon her was sealed on 21st February 2017 but served upon her counsel on 2nd March 2017. She annexed a copy of the notice as exhibit JN 2 of her affidavit. She states there is no explanation for the delay in service of notice of appeal upon her counsel one month after filing of the same. That this is contrary to the Court of Appeal Rules which provides that a notice of appeal be filed and served within 14 days. She states that the notice of appeal was filed and served out of time and stay of execution cannot be pegged on a faulty notice of appeal.

The claimant states she is currently operating a second hand clothes business within Kisumu City and will be able to refund the decretal sum should the applicant's appeal succeed, thus the applicant will not suffer any irreparable or substantial loss which in any event has not been demonstrated by the applicant.

The claimant deposes that judgment having been entered on 19th January 2017 there was inordinate delay in applying for stay on 3rd March 2017, there having been no stay of execution granted at the time of delivering judgment. The claimant states that the applicant detained her cattle and continues to reap huge profits from the sale of milk from the cows to her detriment and deprivation.

The claimant deposes that the applicant has failed to satisfy the basic conditionality set out in Order 42 of the Civil Procedure Rules and prays that the application be dismissed.

In a supplementary affidavit sworn on 11th April 2017 DR. ANIL states that the claimant has raised issues that are in the province of the appeal, that the assertions of the claimant's means of income and ability of restitution is unestablished, that the respondent has taken issues with quantum of damages awarded and it is only fair to allow the application.

Submissions

By consent of the parties the application was disposed of by way of written submissions, the court having ordered status quo by consent of parties on 30th March 2017.

Applicant's Submissions

The applicant filed submissions on 25th September 2017. In the submissions the applicant states that probability of success is not one of the grounds to be considered in an application for stay of execution, referring to the case of **FIROZE NURALI HIRJI -V- HOUSING FINANCE COMPANY OF KENYA LIMITED & ANOTHER**. It is submitted that the claimant's ability to reconstitute the decretal sum is a cardinal consideration, that the claimant has not proved that she has a second hand clothes business as her allegations to that effect is not backed by any credible evidence. The applicant referred to Section 107 of the Evidence Act which provides that he who alleges has the burden of proof as was stated in the case of **FIROZE NURALI HIRJI (supra)** and in **KENYA POSTS AND TELECOMMUNICATIONS CORPORATION -V- PAUL GACHANGA NDARUA, FLORENCE HARE MKAHA -V- PWANI TAWAKAL MINI COACH & ANOTHER** and **NATIONAL INDUSTRIAL CREDIT BANK LIMITED -V- AQUINAS FRANCIS WASIKE & ANOTHER**.

It is submitted that the claimant ought to have in the very least attached documentation to corroborate her claim of running a business.

On the issue of substantial loss the applicant again referred to the case of **FIROZE NURALI HIRJI (supra)** in which the court stated that the relative financial positions of the parties is a relevant factor in determining substantial loss. It is submitted that the appeal would be rendered nugatory because of inability on the part of the claimant to refund the decretal sum as was held in the case of **NATION MEDIA GROUP LIMITED & 2 OTHERS -V- JOHN JOSEPH KAMOTHO & 3 OTHERS** where the court stated that the balance of convenience must also be considered and that where there might be long delay in recovering the decretal sum should an appeal succeed, the balance of convenience is in favour of the applicant. It is submitted that there is no hard and fast rule that money decrees cannot be stayed, relying on the decision in the case of **KENYA HOTEL PROPERTIES LIMITED -V- WILLESDEN PROPERTIES LIMITED**.

The applicant urged the court to grant the prayers sought.

Claimant's Submissions

In the submissions filed on behalf of the claimant on 1st August 2017, counsel for the claimant argues that there is no evidence on record that the claimant would not be able to repay the decretal sum should the intended appeal succeed. It is further submitted that the decree herein being monetary, it is impossible for the appeal to be rendered nugatory. The claimant relied on the decision in **CORPORATE INSURANCE COMPANY LIMITED -V- EMMY CHEPTOO LETTING & ANOTHER** where the court cited with approval the decision in **PAMELA AKINYI OPUNDO -V- BARCLAYS BANK** to the effect that "*an appeal cannot be rendered nugatory in a monetary decree if payment is made and it is not just to deny a successful party the benefit of judgment merely because he is poor.*"

In the same case the court cited the decision in **STEPHEN WANJOHI -V- CENTRAL GLASS INDUSTRIES LIMITED** where the court held that financial ability of a decree holder solely is not a reason for allowing a stay and that it is enough that a decree holder is not a dishonourable miscreant without any form of income.

It is the claimant's argument that according to the draft decree the applicant was only challenging the quantum of damages payable and thus the intended appeal, if it succeeds, may only reduce the amount awarded, that the applicant would not suffer irreparable or substantial loss and in any event, the amount involved is not a "*colossal*" amount as alleged by the applicant.

The claimant submitted that the grant of a stay order would on the contrary be prejudicial to the claimant since it would deny her the fruits of her judgment. The claimant relied on the case of **STEPHEN O. OKUMU & ANOTHER -V- G.G. NG'ANG'A** where an application for stay was dismissed as the applicant failed to prove substantial loss. The claimant further relied on the case of **KENYA SHELL LIMITED -V- BENJAMIN KARUGA KIBIRU & ANOTHER** where it was held that it is not sufficient for the applicant to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid.

The claimant further submits that the applicant has not explained the inordinate delay in filing the application for stay from 19th January 2017 when the judgment was delivered to 3rd March 2017 when the application was filed and the application ought to be dismissed on this basis. It is further submitted that the date of filing notice of appeal appears to have been interfered with, taking into account the date of service upon the claimant's counsel. It is further submitted that the amended notice of appeal was filed on 17th March 2017 pursuant to leave granted by the court on 16th March 2017 and was served upon the claimant on 21st March 2017, that the notice of appeal is incurably defective as the date it was lodged in the court registry is not indicated. It is submitted that the applicant is guilty of laches, that the

application is an abuse of court process, offends the law and does not amount to a notice of appeal. It is submitted that a stay cannot be pegged on a faulty document.

It is further submitted for the claimant that the applicant's willingness to deposit security as may be ordered by the court has not been confirmed and is in doubt. The claimant prays that the application be dismissed with costs.

Determination

I have considered the application and the submissions of parties. I have further considered the authorities cited. In my opinion the issues for determination are the following –

- 1) Whether a defective notice of appeal is deemed to be a valid notice of appeal

and whether an amended notice of appeal is deemed to have been filed within the period when the defective notice of appeal was filed;
- 2) Whether the failure to serve the claimant with the notice of appeal within the period provided for in the Court of Appeal Rules is fatal;
- 3) Whether the applicant is guilty of laches;
- 4) Whether the applicant is entitled to the orders sought.

1. Defective notice of appeal

Nyamurungi and Company Advocates, counsel for the applicant (respondent in the claim) lodged a notice of appeal against judgment delivered in this case on 2nd February 2017.

The notice of appeal however states that the respondent was dissatisfied with the judgment of Honourable Justice **MAUREEN ODERO** delivered on 19th January 2017 and intends to appeal against the whole of the judgment. The applicant thereafter on 8th March 2017 filed the present application under certificate of urgency. I declined to grant orders of stay ex-parte on grounds that there was no immediate threat of execution as the claimant's Bill of Costs was fixed for hearing on 10th March 2017 and therefore there was no possibility of execution. I fixed the application for inter partes hearing on 16th March 2017.

When the parties appeared before me on 16th March 2018, I notified counsel for the applicant that the notice of appeal upon which the application was anchored was defective and ought to be corrected before the application could be fixed for hearing. I then fixed the case for mention on 30th March 2017.

When parties appeared before me on the next date counsel for the applicant informed the court that the respondent had complied with the directions of 16th March 2017 but the respondent wished to file a supplementary affidavit. Counsel also prayed for status quo. Since counsel for the claimant had no objection, I granted both prayers.

It is now the contention of the claimant that the notice of appeal is defective as it does not state the date it was lodged. I think that since the claimant did not object to the directions of the court to the applicant to amend the notice of appeal and did not raise objection when it was served with the same, it should not be heard complaining about the validity thereof. I think that the notice of appeal having been filed timeously and the same not having been withdrawn or struck out but rather amended, the date of filing which was 2nd February 2017 is not affected by the amendment. I hold accordingly.

2. Failure to serve notice of appeal within 7 days

Rule 74 of the Court of Appeal Rules provides that a notice of appeal shall be served within 7 days of being lodged. In the present case the notice of appeal lodged on 2nd February 2017 was not served upon the claimant until 2nd March 2017 one month after it was lodged.

Although the applicant had opportunity to explain the delay in service of the notice of appeal in his supplementary affidavit the same having been raised by the claimant in her replying affidavit, it did not do so. This issue has further not been addressed in the applicant's submissions.

The court thus finds that there was no valid reason for the inordinate delay in the service of notice of appeal upon the claimant. The applicant merely glossed over this issue stating that it is immaterial to the success of the appeal.

I will come back on the issue whether this should impact on the granting of the substantive orders sought in the application.

3. Whether the applicant is guilty of laches

The application herein was filed on 8th March 2017, some 48 days after delivery of judgment. The date for judgment had been taken in court in the presence of both parties but the respondent did not attend court on the 19th January 2017.

Again the applicant has not explained why it took so long to file the application for stay of execution if it indeed genuinely intended to file an appeal. Was this delay and the delay to serve notice of appeal on the claimant deliberate? The claimant alleges so; the applicant is mum on the issue, although again it had opportunity to explain this in this application or in the supplementary affidavit filed in response to the claimant's replying affidavit in which all these issues were raised.

Again I will come back to this issue.

4. Whether the applicant is entitled to the orders sought

Order 42 Rule 6(1) and (2) provide that no appeal shall operate as a stay of execution and further no stay of execution shall be granted unless the court is satisfied that substantial loss may result to the applicant if the orders are not granted and the application is made without inordinate delay and further that such security as the court orders for the due performance of the decree or order has been given.

The applicant has submitted that its grounds for seeking stay is that the award is colossal, that the applicant has no means of livelihood and that the appeal may be rendered nugatory or merely academic.

The fact that the award is colossal or that the applicant is of no known means are not factors under Order 42 Rule 6(1) and (2). The applicant must satisfy the court that it will suffer substantial loss.

As was held in the case of **oSTEPHEN WANJOHI -V- CENTRAL CLASS INDUSTRIES LIMITED**, financial ability of the decree holder is not the only reason for allowing stay. Again as held in the case of **PAMELA AKINYI OPUNDO -V- BARCLAYS BANK**, an appeal cannot be rendered nugatory in a monetary decree if payment is made merely because the decree holder is poor. I think the court must look at the application in totality.

Looking at this application in totality means that I have to consider if the decretal sum of Kshs.217,452.45 is colossal as alleged by the applicant which is a hospital, whether the application was brought without delay, whether the applicant has satisfied the court that it will suffer substantial loss and whether it has complied with all or some essential steps in the proceedings within the prescribed time.

The court must also consider the balance of economic strength between the applicant and the claimant in considering the application as the ultimate effect of granting the orders would deny the claimant the right to enjoy the fruits of her judgment.

Again in looking at the totality of the circumstances, the court cannot be blind to the grounds of appeal where they have been filed and are on record, albeit in draft form. As observed by the claimant, the grounds in the draft memorandum of appeal only question the quantum and not the validity of the decision of this court. The prayers in the draft memorandum of appeal are not to set aside the decision but to substitute the quantum. The applicant is therefore aware and expects that it will still be required to pay the claimant, the only issue in dispute being the amount payable.

It is further not lost to the court that this application was filed on 8th March 2017 after the applicant had been served with notice of taxation. It will therefore not be fair fetched for the court to find that the applicant only went into slumber only to be awakened by the threat of execution.

Further, when it filed the notice of appeal, it was so reckless as to refer to the name of the wrong Judge in the notice of appeal.

In totality, I find that the applicant has not satisfied me that it will suffer substantial loss to justify denying the claimant the fruits of her judgment. I further find that the applicant has not explained the delay in service of the notice of appeal and further that the applicant has not explained the delay in filing this application for stay 48 days after judgment and only 2 days before the date of taxation of the claimant's bill of costs.

For these reasons I find the application to be without merit with the result that the same is dismissed with costs to the claimant.

DATED AND SIGNED AT NAIROBI ON THIS 7TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 19TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE