



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2428 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 1st October, 2018)

HARON NJOROGE GACENGECHI CLAIMANT

-VERSUS-

CONSOLATA INSTITUTE OF PHILOSOPHYRESPONDENT

RULING

1. The Application before the Court is one dated 5th April, 2018, seeking for Orders:

- 1. THAT this Honourable Court be pleased to certify this application as urgent and dispense with the service at the first instance.**
- 2. THAT the Honourable Court be pleased to set aside and/or discharge the orders issued on 17th June, 2015 which granted the Respondent a Stay of Execution pending appeal.**
- 3. THAT Kshs. 896,473.00 be released to the Claimant together with the interest accrued thereon in the joint account No.1002955861 in the names of John Murimi Njomo and Hilda Kamau, at the NIC Bank, Kenyatta Avenue Branch, to the Claimant.**
- 4. THAT the costs of this application and of the entire suit be awarded to the Claimant.**

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

- a. The Respondent has not filed the appeal for over two years and in particular two years and nine months since the stay orders were granted pending appeal.**
- b. Typed proceedings have been ready for collection since 2nd October, 2017 and sixty days within which to lodge a record of appeal started running since the typed proceedings were ready for collection.**
- c. The Respondent has not lodged the appeal to date nor have they taken any steps for the intended appeal to be set down for directions.**
- d. The Respondent's delay of over two years continues to prejudice the Claimant by preventing the claimant from enjoying the fruits of the judgment. The Claimant has since suffered a stroke requiring constant medication.**
- e. It is in the interest of justice that the order for stay of execution be vacated.**
- f. That this Honourable Court has unfettered powers and discretion to grant the prayers sought.**

3. The Application is also supported by the Claimant/Applicant's affidavit wherein he reiterates the grounds on the face of the application and adds that judgment herein was delivered on 11th March 2015 wherein he was awarded the sum of Kshs. 896,473.00 together with costs of the suit.

4. That the Respondent herein filed a Notice of Appeal against the judgment and by a letter dated 30th March 2015 to the Deputy Registrar of the Court copied to the Claimant's advocates on record, to be furnished with copies of the proceedings. That the Respondent also made an application seeking stay pending appeal and the Court issued an order on 17th June 2015 for stay of execution of the judgment pending the hearing and determination of the intended appeal on condition that the decretal sum be deposited in a joint interest earning account in the name of the advocates on record.

5. That by a letter dated 2nd October 2017 sent to my advocates on record and a copy to the Federation of Kenyan Employers who are on record for the Respondent herein, parties were notified that proceedings were ready for collection upon payment of Kshs. 1,050.

6. The Applicant avers that though the typed proceedings have been ready for collection, the Respondent has not taken the requisite or any steps to prosecute their appeal and the resulting delay is prejudicing him as he is not able to enjoy the fruits of judgment.

7. He contends that he is also prejudiced for the reasons that:

1. He instituted this suit after he was unfairly dismissed from employment. Consequently, he has not been in gainful employment since termination in 2011.

2. He suffered a stroke on 9th October, 2015 requiring that he remains in constant medication.

3. Due to his medical condition, he is not in a position to seek employment because one side of his body is not functional.

4. He is therefore in dire need to access the judgment amount which is his only hope for funds to meet his basic needs including medication.

8. The Respondent opposes the application and has filed grounds of opposition dated 8th May, 2018, to wit:

1. The Respondent has not contravened the provisions of Section 82 of the Court of Appeal Rules emphasising on the proviso that indicates that

"...Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy".

2. Application is without merit and the Respondent relied on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules provides the circumstances under which the Court can grant a stay of execution which the Respondent has complied with.

3. Application is frivolous, vexatious and an abuse of Court process: The Respondent indicated that the Claimant Applicant had not complied with the mandatory provisions of Order 42 Rule 6(1) particularly providing that:

"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 "

Submissions

9. The Applicant submits that they are entitled to the orders sought for the reason that since the Respondent has not filed any appeal before the Court of Appeal yet proceedings and judgment were supplied by the Court on 2nd October, 2017 and sixty days within which to lodge a record of appeal started running since the typed proceedings were ready for collection.

10. The Applicant relies on the case of **Kenya Shoe & Leather Workers Union v HR Strategic Partners Limited [2011] eKLR** where the ELRC held that:

"Rule 82 of the court of Appeal Rules provides that where a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, he shall be deemed to have withdrawn the appeal. I find that the notice of appeal filed by the Respondent has been withdrawn by operation of law under Rule 82 of the Court of Appeal Rules following the Respondents failure to lodge appeal within the prescribed period "

11. The Respondent's contention that they have never received any Notice from the Court informing them that typed proceedings and judgment were ready is extraneous for the following reasons:-

1. This is a matter that can only be canvassed by way of facts and evidence. The Respondent filed Grounds of Opposition and has not filed an affidavit. There is thus no evidence on record that the notice was not issued.

2. Contrary to the mere allegation that no notice was issued, the Applicant has furnished the court with evidence that the proceedings were ready for collection as at 7th October 2017 as per the letter issued by the Deputy Registrar of this

honourable court.

3. The Respondent ought to have taken reasonable steps to follow up on the proceedings. Failure to take any such steps is a clear demonstration that the Respondent is not interested in pursuing the appeal and therefore the Applicant is entitled to the orders sought for him to enjoy the fruits of the judgment.

12. It is submitted that this Court has jurisdiction to entertain the application for the reason that since the Respondent has not yet lodged an appeal despite filing a Notice of Appeal against the judgment. Further that the Respondent's right to pursue its appeal should not delay the Applicant's rights to realize the fruits of his judgment. That this Honourable Court has the requisite jurisdiction and power to grant the Orders sought and it is prayed that the Court allow the Application and grant the orders sought.

13. On behalf of the Respondent it is submitted that the Claimant's application does not take into account the Respondent's right to appeal and rights to a fair hearing before a Court as enshrined under Article 50 of the Constitution.

14. That the grounds presented to the Court in seeking for stay of execution were that the Respondent had an arguable appeal and that execution of the decretal sum would render the appeal nugatory and that the Respondent was apprehensive that if the appeal was found successful in favour of the Respondent, the Claimant had not demonstrated that he shall be able to refund the said decretal sum. The Court on considering the merits of the said Application and submissions filed by parties granted the stay of execution.

15. That the prayers sought in the Claimant's application seek to deprive the Respondent the right to appeal and granting of the Orders sought would render the Appeal nugatory and prejudice the interests of the Respondent.

16. It is submitted that the Claimant's Application has no basis in law and is an abuse of Court process. That Rule 32(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that "Rules on execution of an order or decree shall be enforceable in accordance to the Civil Procedure Rules". Order 22 Rule 25 of the Civil Procedure Rules, 2010 provides that: -

"Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed the court may; on such terms as to security or otherwise, as suit it thinks stay execution of the decree until the pending suit has been decided".

17. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that:

"(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".

18. That on the 17th June, 2015, this Honourable Court granted a conditional stay of execution pending the hearing and determination of the intended Appeal. They aver that the Respondent satisfied the conditions placed by the Court. That the interests of the Claimant have been secured by the conditions of the Stay and no prejudice shall be occasioned to the Claimant that cannot be remedied by costs. On the other hand, that the Respondent's rights shall be prejudiced if the prayers sought are granted.

19. It is further submitted that the Claimant has no legal and statutory provisions to set aside the Stay Orders granted in the trial Court. That an application seeking to set aside Stay Orders pending the hearing and determination of an appeal ought to be filed before the Appellate Court for determination. The Claimant's Application herein offends the provisions of Order 42 Rule 6(1) which provides that: -

"... 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."

20. The grounds of the Claimant's application that the Respondent has failed to file an appeal are misguided and the Respondent wishes to rely on the provisions of Order 42 Rule 6(4) which provides that:-

"(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".

21. That the Claimant's application relies on the grounds that the Respondent has failed to file an Appeal for over two years and that the typed proceedings have been ready for collection since 2nd October, 2017 and that the 60 days within which the record of Appeal ought to have been filed has lapsed. It is submitted that the Court to peruse and take judicial notice of the following: -

a. The Claimant's annexure HG 3 - being a letter from the Deputy Registrar dated 2nd October, 2017 informing the Claimant that the copies requested for are ready for collection (on which the application to set aside stay orders is based) reveals the following:-

- **The said letter of 2nd October, 2017 is addressed to the Claimant and not the Respondent. The said letter of 2nd October, 2017 is in response to the Claimant's letter Ref. LIT/59/17 dated 3rd August, 2017 and not the Respondent's letter requesting for typed proceedings dated 3rd March, 2015**
- **The Respondent is not aware of the contents of the letter ref. LIT/59/17 dated 3rd August, 2017 referred to in the said letter of 2nd October, 2017 and what copies the Claimant was requesting for.**

b. The Respondent was not aware of the letter dated 2nd October, 2017 from the Deputy Registrar (until the service of this application) as they were not served with a copy of the same and there is no evidence given by the Claimant Applicant to prove that the letter of 2nd October, 2017 was served upon the Respondent.

c. The Claimant in his submissions has alluded that the Respondent's grounds of opposition should not be considered as the Respondent has not filed an affidavit to support the above facts. It is the Respondent's submission that the above facts and the notice letter to inform the Claimant that the typed proceedings already form part of the Court record as this process is administrative in nature and such letter emanates from the court and forms part of the court record. That the Respondent has no direct control over this process and should not be prejudiced as a result.

22. It is submitted that despite not receiving the said notice from the Deputy Registrar, the Respondent confirms that they have received copies of the certified typed proceeding certified on the 28th June, 2018. That it is from this date that the 60 days to file the Record of Appeal commences in accordance with the provisions of Section 82 of the Court of Appeal Rules.

23. Further, that the Respondent have complied with the conditions of stay as provided under Order 42 rule 6 and that the Applicant has not shown the Court how he intends to refund the decretal amount in the event the appeal is successful and for that reason, the Application should be dismissed with costs.

24. I have examined all averments for both parties. The Applicants seek this Court's intervention to set aside stay orders granted on 17.6.2015 and allow the Applicant/Claimant to access the decretal sum deposited in Court. Indeed the judgement of this Court was delivered way back on 11.3.2015. Stay orders pending appeal were granted on 17.6.2015. To date, over 3 years since the Respondents have not filed any appeal.

25. The Respondent filed a Notice of Appeal against the judgement on 30.3.2015 and also sought to be furnished with typed proceedings of the record. The Respondents contend that they did not file the record of appeal because the typed proceedings have never been provided.

26. It is however on record that the Deputy Registrar notified the Claimant's Counsel that the proceedings were ready on 2.10.2017 for collection yet the Respondents never filed the appeal as envisaged.

27. That notwithstanding, the issue for determination is whether this Court has jurisdiction to grant the orders sought.

28. Order 42 rule (6)1) of the Civil Procedure Rules provide as follows:-

"6.(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.

29. My understanding of this provision is that this Court having granted stay orders pending appeal, it is only the Court of Appeal that can set aside such stay orders.

30. I believe this Court cannot vary its orders having allowed the stay on condition of stay and thus basically transferring this matter into the hands of the Court of Appeal.

31. For the above reason, I do not think that I have jurisdiction to grant orders sought as this Court is functus officio. I will let the matter rest and dismiss this application accordingly.

32. Costs to abide the outcome of the appeal.

Dated and delivered in open Court this **1st day of October, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kanyiri for Respondent – Present

Orenga holding brief for Njomo for Claimant