



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 124 OF 2018

(Formerly High Court Miscellaneous Application No.487 of 2018 at Nairobi)

(Being an application for stay of executioun pending intended appeal and extension of time to file an appeal against the judgment and decree by the Hon. Peter Muholi, Senior Resident Magistrate given on 15.08.2018 in Ben Simiyu -Versus- English Press Limited Civil Suit No. 207 of 2017 in the Chief Magistrates Court at Nairobi, Milimani Commecial Courts)

ENGLISH PRESS LIMITED.....APPLICANT

- VERSUS -

BEN SIMIYU BUYOBO.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

RULING

The applicant filed on 19.09.2018 the application by the notice of motion through Maina Makome & Company Advocates. The application was based on the supporting affidavit of Patricia Mugambi attached to the motion. The motion was brought under order 22 rule 22, order 42 rule 4, order 50 rule 6, order 51 rule 1 of the Civil Procedure Rules and Section 3A and 79G of the Civil Procedure Act and all enabling provisions of law. The applicant prayed for orders:

1. That the application be certified urgent and be heard ex-parte in the first instance.
2. That the Honourable be pleased to extend time and grant the applicant leave to lodge a memorandum of appeal out of time against the judgment entered against the applicant by the Honourable Magistrate Hon. Peter Muholi on 15th August 2018, in CMCC No. 2017 of 2017 Ben Simiyu Buyobo –Versus- English Press Limited.
3. That the Honourable Court be pleased to order stay of execution of the judgment or decree in CMCC No. 2017 of 2017 Ben Simiyu Buyobo –Versus- English Press Limited entered against the applicant on 15.08.2018, pending the hearing and determination of the application.
4. That the Honourable Court be pleased to order stay of execution of the judgment or decree in CMCC No. 2017 of 2017 Ben Simiyu Buyobo –Versus- English Press Limited entered against the applicant on 15.08.2018, pending the hearing and determination of the intended appeal.
5. That the application be heard inter parties on such date and time as the Honourable Court may direct.
6. That the costs of the application be in the cause.

The application was based upon the following grounds:

1. The claimant wishes to appeal against the judgment and the decree in issue as per the draft memorandum of appeal and in particular on quantum.
2. The delay in filing the proposed appeal was caused by miscommunication between the applicant's insurers and its advocates.
3. The applicant has an arguable appeal with high chances of success.
4. The applicant may not recover the decretal amount if it is paid out and the appeal is successful.

5. The applicant is willing to comply with such directions on conditions as to security.

The respondent filed grounds of opposition on 15.10.2018 through Waiganjo Wachira & Company Advocates. The grounds included:

1. The current application is an abuse of court process and is defective.
2. The application is an afterthought and is lacking in substance, unnecessary, vexatious and frivolous.
3. The application is meant to deny the respondent the fruits of his judgment.

It is submitted that the application was prompt and made only 4 days after lapsing of the time for filing the appeal. The reason for the delay was that the applicant's advocates and the insurers involved had a miscommunication hence the 4 days' delay in signing the relevant papers on the appeal. The respondent has not opposed the facts on the delay in any material respect. The Court finds that the delay of 4 days has been explained and the same would be excusable. Further the appeal raises arguable points and in particular whether the quantum of damages as decreed was fair. The Court would therefore grant the extension of time as prayed for.

For stay of execution of the judgment and decree, the applicant is amenable to such conditions as the Court may order for security for prompt satisfaction of the decree should the appeal fail. The respondent has not filed an affidavit to oppose the applicant's case that the decretal sum may not be recovered should the appeal be successful and the amounts already paid in execution of the decree.

The Court returns that there would be stay of execution of the decree subject to the applicant depositing the full decretal sum in an interest earning account in the joint names of the parties' advocates by 31.12.2018.

In conclusion the application dated 18.09.2018 and filed on 19.09.2018 is hereby allowed and determined with orders:

1. There be stay of execution of the judgement and decree given by Hon. Peter Muholi, Senior Resident Magistrate on 15th August 2018, in CMCC No. 2017 of 2017 Ben Simiyu Buyobo –Versus- English Press Limited subject to the applicant depositing the full decretal sum in an interest earning account in the joint names of the parties' advocates by 21.12.2018; and pending the hearing and determination of the intended appeal therein.
2. The extension of time and granting the applicant leave to lodge a memorandum of appeal by 21.12.2018 against the judgment entered against the applicant by Hon. Peter Muholi, Senior Resident Magistrate on 15th August 2018, in CMCC No. 2017 of 2017 Ben Simiyu Buyobo –Versus- English Press Limited.
3. The costs of the application to abide the outcome of the intended appeal.

Signed, dated and delivered in court at Nairobi this Friday 7th December, 2018.

BYRAM ONGAYA

JUDGE