



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1014 OF 2014

FREDRICK OJODE..... CLAIMANT

VERSUS

KENYA POSTS AND TELECOMMUNICATION CORPORATIONS..... RESPONDENT

RULING

1. The application dated 19th August 2016 seeks stay of the judgment delivered by Nduma J. on 1st April 2016.
2. The application is based on the grounds set out on the face of the Notice of Motion to wit, *inter alia*:
 - (a) The applicant has filed a Notice of Appeal dated 14th April 2016.
 - (b) Intended appeal raises triable issues with high chance of success.
 - (c) The applicant which is a public corporation will suffer substantial loss if the judgment is executed.
 - (d) That Claimant will be unable to repay the amount if paid, and render the appeal nugatory.
 - (e) That application has been brought without undue delay.
3. The application is further supported by an affidavit of Samuel Mburu, a legal officer of the applicant sworn on 19th August 2016. He deposes that the court awarded the Claimant Kshs.820,913/= with interest and costs and the applicant is aggrieved by the decision.
4. That the applicant is ready and willing to provide security that the court may deem reasonable.

Response

5. The Claimant raises preliminary objection to the application to the effect that the application does not lie in law by virtue of the mandatory provisions of Rule 82 of the Court of Appeal Rule, 2010. That same is premature, misconceived, vexatious and flagrant abuse of the court process.
6. The parties filed written submissions.

Determination

7. There can be no doubt that a trial court has jurisdiction to stay execution of its judgment, pending hearing and determination of intended appeal. A Notice of Appeal properly filed suffices for this purpose.

8. The issues for determination are;

- (i) Whether there is any appeal pending before the Court of Appeal.
- (ii) If the answer to (i) above is in the affirmative
- (iii) Whether the applicant has an arguable appeal
- (iv) Whether the appeal will be rendered nugatory if the order for stay is not granted
- (v) Whether the applicant is likely to suffer substantial loss if the stay is not granted and
- (vi) Whether the application has been brought without inordinate delay.

9. In this case, the applicant lodged the Notice of Appeal on 14th April 2016. The said Notice of Appeal lapsed after the applicant failed to file a memorandum of appeal and record of appeal within 60 days of 14th April, 2016 in accordance with **Rule 82 (1)** of the Court of Appeal Rules, 2010.

10. The finding is based on the decision of E. M Githinji, G. B. M. Kariuki and Mwilu JJA in **Nairobi Bottlers Limited vs. Anthony Surre Lukeye [2016] eKLR** stating that a Notice of Appeal ceases to exist where a party fails to file the Memorandum of Appeal and Record of Appeal in accordance with **rule 82** of the Court of Appeal, Rules 2011.

11. The Judge stated:

“As at the time when the applicants brought the motion to strike out the notice of appeal, there was not in being a notice of appeal, the same having been deemed to have been withdrawn under Rule 83. In effect, therefore, there was no notice of appeal in being capable of being struck out.”

12. This is the situation in the present case, the applicant having failed to file the Memorandum of Appeal within 60 days and there being no averments in the affidavit sworn in support of the application that an application for extension of time has been made and granted.

13. In any event, the court has considered the Notice of Motion and the supporting affidavit and the applicant does not state at all the grounds upon which the appeal is based to demonstrate to this Court that it has an arguable appeal.

14. Furthermore, the applicant has also failed to demonstrate that it will suffer substantial loss if the decretal sum is paid to the Claimant and the appeal is eventually successful. The onus is on the applicant to prove that on a balance of probability and it has not discharged this onus.

15. Accordingly, the application lacks merit and is dismissed with costs.

Dated and Delivered at Nairobi this 17th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE