



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.397 OF 2013

DAVID NDUNGU.....CLAIMANT

VERSUS

THIKA HIGH SCHOOL SUED THROUGH THE BOARD OF GOVERNORS.....RESPONDENT

RULING

1. The Respondent, Thika High School sued through the Board of Governors, by application and Notice of Motion dated 8th March, 2014 and filed under the provisions of section 12 of the Industrial Court Act [the Employment and Labour Relations Court Act] and Rule 16 of the Industrial Court (Procedure) Rules [the Employment and Labour Relations Court (Procedure) Rules, 2016] and seeking for orders that;

The court be pleased to grant a stay of execution of the decree pending hearing and determination of the intended appeal against the orders made by this court on 24th October, 2016.

Costs be provided for.

2. The application is supported by the affidavit of David Ngugi Muraya, the Principal of the Respondent schools on the grounds that judgement herein was delivered on 24th October, 2016 in favour of the Claimant for an accumulative sum of Kshs.377, 077.00 and costs which was an amount over and above what the Claimant was seeking hence the same is punitive. The Claimant was awarded general damages of Kshs.00, 000.00 and Kshs.100, 000.00 due to the Respondent violating section 51 of the Employment Act despite the fact that the Claimant had sought a certificate of Service and not the Kshs.100, 000.00 that was awarded. The Respondent intends to appeal against this award of Kshs.200, 000.00 as it is not merited. The Respondent has applied for certified copies of proceedings and such have not been issued by the court. The Respondent has since paid the sum of Kshs.275, 905.00 as part payment of the judgement but the Claimant has gone ahead to instruct auctioneer to proclaim its property in execution of the decree.

3. The respondent's intended appeal has high chances of success and where the judgement sum of Kshs.200, 000.00 is paid to him there is no chance that it can be recovered from him. There is no delay in filing this application.

4. In reply the Claimant filed his Replying Affidavit and avers that the application by the Respondent is an abuse of court process as the same is based on wrong provisions of the law, repealed laws which do not apply. The plea that there is an intended appeal with high chances of success is not the only principle that the Respondent must meet but the same must be arguable and not frivolous which is the case here.

5. Under the Court of Appeal Rule 82(2) there is no appeal filed within time from the date of judgement herein. The intended appeal is only meant to frustrate the Claimant who was terminated in 2013 and has

not enjoyed the fruits of his labours and judgement.

6. The Respondent has not met the mandatory provisions of Order 42 Rule 6(2) of the Civil Procedure Rules for the reasons that there is no demonstration of what substantive loss that shall result if the decree is satisfied and the application is filed with inordinate delay. The Respondent is not entitled to discretionary orders on the face that they have failed to issue the Claimant with a Certificate of Service. There will no prejudice upon the Respondent if the judgement is satisfied in full.

7. On 22nd September, 2014 parties recorded consent for the Respondent to pay the sum of Kshs.36, 353.70 within 30 days. The Respondent has since declined to pay this amount. The Respondent has now come to court with unclean hands and should not benefit from any discretionary orders. The decretal sum has not been paid in full and whereas the stay sought is for the sum of Kshs.200, 000.00 the total different now payable of Kshs.133, 826.80 has not been paid and no explanation has been given. To allow the respondent's application would perpetuate an injustice and right to enjoy a valid judgement.

8. Both parties made their oral submissions in court.

Determination

9. As noted above, the application is premised under section 12 of the Industrial Court Act which law has since been repealed and does not apply. The reliance on Rule 16 of the Industrial Court (Procedure) Rules also have since been repealed and do not apply. I will however deal with the substantive issues in the respondent's application.

10. Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow parties in execution to apply the provisions of the Civil Procedure Rules. A stay of judgement by extension should apply the same rules.

11. Under the Civil Procedure Rules an application seeking the relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary. Such discretion must be applied judicially in terms of defined principles of law. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant and in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules,

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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.

12. Judgement herein was delivered on 24th October, 2016 and application herein was filed on 8th March, 2017. Such is a period of five (5) months which cannot be said to comprise inordinate delay. However on record is not an appeal but Notice of Appeal which only demonstrates an intention to file an appeal. Such intention may or not come to fruition.

13. The question of substantial loss is important to address in an application seeking stay of execution pending appeal or an intended appeal. In ***Kenya Shell Limited versus Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018*** the Court of Appeal stated that:

It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.

14. Emphasis to this requirement can be found in the case of **Tropical Commodities Ltd & others versus International Credit Bank Limited (in Liquidation)** and **Reliance Bank versus Norlake Investment Limited** (Supra) that:-

...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...

15. The applicant must therefore establish the factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the application for stay where the intended appeal or the appeal once filed is successful. This is what substantial loss would entail.

16. In this regard, the Respondent was hazy about this aspect. The simple fact of what substantial loss shall be suffered is generally stated and nothing is set out in an effort to demonstrate what the Respondent shall suffer if the judgement amount is paid in full.

17. In reply, the Claimant has set out that the Respondent had enjoyed a consent order and has failed to abide its terms. The judgment of the court on 24th October, 2016 held the Respondent violated the provisions of section 51 of the Employment Act for failing to issue the Claimant with a Certificate of Service. This is an aspect the Respondent has relied upon with regard to seeking to appeal against the punitive order of the court and directions to pay a sum of Kshs.100, 000.00. Without standing on appeal, merits or demerits of the intended appeal and without a draft of such intended appeal, I note the orders made against the Respondent relate to non-issuance of the Certificate of Service. On the one part, the Certificate is not issued and the punitive order of the due award is not paid. The Respondent cannot benefit both way – fail to issue the Certificate and also fail to pay the award made as a result.

18. To thus allow the Respondent to enjoy an order of stay of judgement on the face non-compliance on a matter that is within their power to do – issuance of Certificate of Service – even as the contemplated appeal is to be filed would be to negate the very principle of the grant of stay. There is no demonstration of what substantial loss to be suffered has been shown. To allow the Respondent proceed as applied would only entrench impunity and affront to justice. Little effort in terms of compliance with non-monetary aspects of the judgement has not been addressed.

19. On the last principle on deposit of a security, the Respondent has not offered any. I take it this is not an option for the Respondent. Without making an offer upon which the court can consider, to grant stay of execution of a valid order of the court is not justified.

Accordingly, for reasons set out above, application dated 8th March, 2017 is hereby dismissed with costs.

Delivered in open court and dated this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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