



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KERICHO
CAUSE NO. 155 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 6th June, 2017)

HENRY N. NYABOGA..... CLAIMANT

-VERSUS-

KENYA FARMERS ASSOCIATION LIMITED RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application under Order 51 Rule 4 and Order L Rule 1 of the Civil Procedure Rules, Section 3 A of the Civil Procedure Act and all other enabling provisions of law, it is dated 19th May 2017 where the Respondent Applicant seeks orders:

1. That this application be heard ex-parte in the first instance and as a matter of urgency on the ground, inter alia that execution of the Decree passed herein on the 8th of April 2017 against the Applicant is imminent. In the event of execution of the said Decree carried out the Appellant would suffer irremediable loss and damage.

2. That this Honorable Court do order stay of execution of the judgment and decree made by this honorable court on the 26th day of April 2017 pending the hearing and final determination of the Applicant's intended appeal.

3. That this application be served on the Claimant/Respondent and be heard inter parties on such date as such time as this Honorable Court may direct.

2. The application is supported by the annexed affidavit of David Tobiko Naeku and Benard Obutu advocate as well as on the following grounds:

1. That the Applicant has an arguable appeal with a high probability of success.

2. That if the said stay execution is not granted, the Applicant's appeal will be rendered nugatory and the applicant will suffer irreparable damage.

3. That unless this application is granted, the Respondent threatens to levy executions against the Applicant.

4. That the Applicant is ready willing and able to deposits such sum as this Honorable Court

may order to be deposited in a joint account to the order of both the Applicant and the Respondent's Advocates.

5. That substantial loss will result to the Applicant unless the order sought is granted.

6. That this Applicant has been made without any unreasonable delay.

7. That this application ought to be granted in the interest of Equity and Justice.

3. The Respondent has filed a Replying Affidavit dated 29th May 2017 deposed to by Henry Nyaboga Nyabuto where he avers that the Application herein has been overtaken by events because execution has already taken place.

4. He avers that at the time for filing the intended appeal had already lapsed and moreover, that the Applicant has not demonstrated to Court that they have made any steps toward the said appeal.

5. He avers that the application is bad in law, incompetent and incurably defective and the same offends the provisions of the law, they ask that it be struck out.

6. He avers that the Respondent/Applicants' own averments are self-defeating and that the affidavit is scandalous, frivolous and less than candid. The application does not merit the discretion of the Court and restate that it should be struck out.

7. The Respondent/Claimant states that they were unaware that judgment had been delivered until they were served with warrant of attachment of movable property. They did not receive communication as to judgment delivery and their advocates while aware of the Notice of Judgment did not note down that date of delivery of the judgment in the diary.

8. They state that they have instructed their advocates to file an appeal, and they have already asked for certified copies of the judgment and proceedings to facilitate the process.

9. They submit that the decretal amount is large and the Claimant/Respondent would not be in a position to refund it should the appeal be successful.

10. They submit that the application is urgent and should be heard on priority basis as the Respondent is threatening execution against the Applicant who will suffer irreparable loss and damage.

11. Having considered the averments of both parties, I note that Order 42 Rule (6) (2) of the Civil Procedure Rules states as follows:

“(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”.

12. The law is that, the Applicant must satisfy Court of the 3 matters listed above being that he has approached Court within a reasonable period, he has provided some security “if any as ordered by Court and that the Court is satisfied that substantial loss may result unless the orders sought are granted.

13. The Judgment of Court being stayed was delivered on 8/4/2015. The Applicant approached Court for the current order of stay on 19.5.2017. It is my finding that there was no delay on his coming to Court.

14. However as at the time of coming to Court on 31.5.2017 no appeal has been filed. The Applicant has

not moved the Court of Appeal for orders to expand time within which to file an appeal the period within which to file such an appeal having lapsed.

15. I therefore find that the orders being sought are untenable and I therefore dismiss this application with costs to the Claimants. Execution to proceed.

Read in open Court this 6th day of June, 2017 in Nairobi.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mbiti holding brief Oumo for Claimant Respondent – Present

Respondent – Absent