



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 380 OF 2015

PETER KAROKICLAIMANT

VERSUS

ALBA PETROLEUM LTDRESPONDENT

RULING

INTRODUCTION

1. The application before me is the Notice of Motion by the defendant dated 7/12/2016 seeking for stay of execution of this court's judgment dated 18/11/2016 pending appeal. The Motion is supported by the affidavit sworn by Ms. Beatrice Achieng on 8/12/2016 and other grounds set out in the body of the Motion. The gist of the Motion is that he applicant has an arguable appeal which will be rendered nugatory if stay is denied, that the application has been made without inordinate delay and finally that she is ready to offer security for the due performance of the impugned judgment if the appeal fails.

2. The Motion is opposed by the claimant vide his replying affidavit sworn on 13/12/2016. The gist of the affidavit is that he impugned judgment is sound and regular and should not be stayed, that the sum awarded was not astronomical and its payment will be cripple the operations of the applicant, that if the respondent's appeal succeeds after payment of the decreed sum is paid the claimant is able to refund it; that the applicant is willing to deposit security is not a reason enough to warrant granting of stay order; and that the application is delaying tactic meant to delay the claimant's enjoyment of his judgment.

Submissions by the applicant

3. By her written submission, the applicant has submitted the claimant is on course to executing the impugned judgment. According to her the judgment was made in error and as such she has preferred an appeal. She has cited rule 42(2) of the civil Procedure rules (CPRs) to urge that she has met the requirement for the grant of stay order pending appeal.

4. Firstly she has argued that the impugned judgment was delivered on 18/11/2016. In her view therefore the application was made without any reasonable delay. Secondly, the applicant urged that decreed sum of ksh.1,618,152 is a substantial amount and if stay is denied and execution done, the claimant will not be able to refund the same if the appeal succeeds because he is not a man of means. For the said reason therefore the applicant is of the view that if her appeal will be rendered nugatory and loss of ksh.1,618,152 is substantial. Finally the applicant has submitted that she is ready to provide such security as the court may order. She cited Antonie Ndiaage vs African Virtual University to urge that ordering depositing of security is the best order in this case.

5. The claimant has submitted that the applicant filed her Notice of Appeal on time but failed to file the application for stay at the same time. According to him the application was filed after an inordinate delay and after the deputy registrar of this court gave a date for ruling on the bill of costs. He therefore urged that the delay in filing the application has not been explained and the applicant is not serious in pursuing her appeal.

6. In addition the claimant has submitted that the applicant has not demonstrated that if the stay is denied and execution proceeds she would suffer substantial loss and her appeal be rendered nugatory. In his view the applicant has failed to demonstrate that the claimant lacks the means to refund to the applicant the decreed sum should her appeal succeed. He urged that the applicant has failed to demonstrate that he has not means/assets to refund the decreed sum if the appeal succeeds.

7. As regards the offer by the applicant to deposit security as in condition for stay, the claimant urged that the court should weigh the pros and cons of granting the stay. According to him the sole question to consider is whether it is in the interest of justice to order stay of proceedings, and if it is, upon what terms it should be granted. That in conclusion the claimant prayed that if stay is to be granted then a sum of ksh.1,801,247 inclusive of the awarded costs should be deposited in court as security.

ANALYSIS AND DETERMIANTION

8. The issue for determination is whether the Motion herein meets the threshold for granting of stay pending appeal established under Order 42 rule 6(2) of the CPRs. The said rule provides that:

“6(2) no Order of stay of execution shall be made under sub rule (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 performance of such decree or order as may be ultimately be building on him has been given by the applicant...”

9. From the foregoing it becomes clear that the applicant must satisfy the court on two issues and then comply with any order of the court to depositing security for the performance of the impugned decree or order should his appeal fail. The first matter the applicant should satisfy the court is that the application for stay was not brought after an unreasonable delay. In this case the impugned judgment was passed on 18/12/2016 and the application was made on 8/12/2016 about 20 days next after the judgment. In my considered view, 20 days is not an unreasonable delay in the circumstances of this case because even the taxing officer had not yet determined the costs of the suit to pave way for execution.

10. The second matter the applicant must satisfy the court is whether he will suffer substantial loss of stay is denied. In my view substantial includes inability to refund the decreed sum of difficulties in making prompt refund of the decretal sum by the judgment creditor if the judgment debtor succeeds in his appeal. The burden of proving substantial loss is on the applicant who should prove that the judgment creditor has no means of refunding the decreed sum of the appeal succeeds.

11. In this case applicant has relied on the reasoning of the court that the claimant was not likely to secure an alternative employment with similar salary within a shorter period than one year. She however did not adduce any evidence to prove that the claimant has no means or assets with which he could refund the decreed sum if the appeal succeeds. Consequently, I am not satisfied that if stay is denied, the claimant will not be able to refund the decreed sum to the applicant should his appeal succeeds. I am however satisfied that considering the huge amount involved of ksh.1,618,152, and the fact that the claimant has not indicated any means by which he can promptly refund the decreed sum if the appeal succeeds, I am satisfied that denying the stay order may occasion substantial loss to the applicant and that will render the appeal nugatory. Delay in refunding the decreed sum to the successful applicant negates the whole purpose of the appeal and it should therefore be a good reason for ordering stay in my view.

SECURITY

12. Having been satisfied that the applicant may not make a prompt refund of the entire decretal sum if the appeal succeeds, I will now have to weigh the interests of each party herein. The decreed sum herein was compensation awarded for unfair termination of the claimants services. The said award is equitable and it is meant to cushion the terminated employee which in the process of securing an alternative means of livelihood. The question that arises is whether the objective of the law will be swerved if the entire compensation ward is deposited somewhere while the employee is languishing without any means of living. In my view the answer is no, life has to continue somehow. I will therefore order the applicant to pay to the claimant ksh.618152 plus the taxed costs and deposit as security ksh.1,000,000/ in this court as a condition pending the applicants appeal. The said payment and depositing of the security must be made within 14 days of this ruling and in default the stay order shall lapse automatically.

DISPOSITION

13. For the reason that the court is satisfied that the claimant may not make prompt refund of the whole decreed sum if the applicant's appeal succeeds, I have allowed the Notice of Motion dated 7/12/2016 subject to the conditions stated above.

Dated, signed and delivered this 29th September 2017

O. N. Makau

Judge