



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 93 OF 2016

CHARLES MWANIKI MUCHIRI.....CLAIMANT

VERSUS

COASTAL KENYA ENTERPRISES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 19th October, 2017)

RULING

The notice of motion was dated 24.01.2017 and filed through Mungu, Kimetto & Company Advocates. The application was under section 3A of the Civil Procedure Act and Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The application is for orders:

- a. That the application be heard ex-parte in the first instance.
- b. That the honourable court be pleased to grant orders of stay of execution of the judgment in this matter pending the determination of the intended appeal to be filed by the Applicant.
- c. That security for costs be dispensed with pending the hearing and determination of the intended appeal.
- d. That costs of the application be in the cause.

The application was supported by the affidavit of Mohamedmunir Abdulaziz Hobaya attached thereto. The same Hobaya filed further supporting affidavits on 17.03.2017 and on 05.04.2017. The grounds to support the application are as follows:

- a. The applicant has an arguable appeal with high probability of success.
- b. The claimant's economic resources are not known and if decretal sum is paid to him it will be difficult to recover the same if appeal is successful.
- c. Application was without unreasonable delay.
- d. If the applicant pays the decretal sum of Kshs. 15,997, 960.00 the claimant will not be able to refund the same if the appeal is successful. Further paying out such amount of money will cripple the applicant's operations
- e. The notice of appeal had been filed.

The claimant opposed the application by filing his replying affidavit on 17.02.2017 through Kivuva Omuga Waweru & Company Advocates. The grounds of opposition are as follows:

- a. The application is premature as execution cannot issue as costs have not taxed and no order for execution prior to such taxation had been obtained as provided in section 94 of the Civil Procedure Act, Cap.21.
- b. The applicant has no arguable appeal as liability at 100 % cannot be appealable because no evidence by the respondent was provided to oppose that finding, and, the respondent cannot appeal on quantum because no respondent's submissions had been made in that regard.
- c. That the decree being a money decree the applicant has not shown that it is ready to provide such reasonable security for performance of the decree in the event of the failing of the intended appeal.
- d. The plaintiff or claimant is entitled to enjoyment of the fruits of his successful litigation. The suit was filed way back on 29.06.2011 and in view of the lapsed time the claimant should be allowed to enjoy the fruits of the successful litigation.

Applications for stay of execution pending appeal will be tested by this court against the provisions of Order 46 Rule 6 of the Civil Procedure Rules. The judgment was delivered on 09.12.2016 and the application filed on 24.01.2017 .The court finds that there was no inordinate delay in filing the application especially that the claimant has not urged that there was such delay in filing of the application.

The court's finding is that the applicant did not offer the relevant security for due and prompt satisfaction of the decretal sum, should the appeal fail. The reasons advanced for the applicant is that the applicant's enterprise will suffer as it will lack operational funds in view of the decretal amount. The court finds that the applicant did not exhibit its financial statements to establish that allegation. It is submitted for the claimant that the court should follow the ruling in **Republic –Versus- The Commissioner for Investigations & Enforcement Ex-Parte Wananchi Group Kenya Limited [2014]eKLR** (Odunga J) that if there is absolutely no offer of security coming from the applicant in satisfaction of the said requirement in absence of which there would be no order for stay of execution, then no order of stay can be granted. The applicant had paid Kshs. 2, 000, 000.00 in part settlement of the decretal amount. The court has considered that payment and further considers that the applicant has not thereafter provided or offered to provide any security for prompt payment of the remainder of the decretal sum. Accordingly, the court returns that the application will be liable to fail for want of security as prescribed in the rule.

The remaining condition for stay of execution to be granted is whether the respondent has established substantial loss if the orders are denied. The court has already found that no financial statements have been exhibited to show the difficulties the applicant's enterprise would suffer if the money is paid to the claimant. The court has considered the diminished capacity by the claimant to engage gainfully as per the findings in the judgment. The court returns that on a balance of justice, the claimant should not be delayed any further from the enjoyment of the fruits of his successful litigation.

In conclusion, the application dated 24.01.2017 for stay of execution pending appeal is hereby dismissed with costs.

Signed, dated and delivered in court at Nyeri this **Thursday, 19th October, 2017.**

BYRAM ONGAYA

JUDGE