



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 189 OF 2015

PETER OMONDING BARASA .....CLAIMANT

VERSUS

SEA HARVEST [K] LTD .....RESPONDENT

RULING

INTRODUCTION

1. The application before me is the respondent's Notice of Motion dated 20/2/2017. It seeks for stay of execution of the judgment delivered herein on 18/11/2016 pending appeal. It is supported by the affidavit sworn by the respondent's Director Mr. Paolo Rocca. The gist of the motion is that she has filed a Notice of Appeal and unless stay is granted, he will suffer substantial loss and his appeal will be rendered nugatory. In addition the respondent is willing to abide by any condition and terms of security as the court may deem fit to impose.

2. The claimant has opposed the application vide his replying affidavit sworn on 27/2/2017. The gist of the objection is that the application for stay has been made after an inordinate delay. In addition the claimant contends that the Notice of Appeal is incompetent because gist was never served within 7 days after lodging it in court and no appeal was filed within the time required by the law. Finally the claimant contends that the applicant has not met the threshold for granting stay pending appeal.

ANALYSIS AND DETERMINATION

3. After considering the Notice of Motion, Supporting Affidavit, Replying Affidavit and the rival submission filed by the two parties, it is not disputed that I delivered the impugned judgment against the applicant on 18/11/2016; that the applicant was dissatisfied and she lodged a Notice of Appeal on 28/11/2016; that the Notice of appeal was never served upon the claimant until 22/2/2017; and that the claimant proclaimed the respondent's movable property on 14/2/2017 in execution of the impugned judgment after which the applicant brought the Motion now before me. The issue for determination is whether the applicant has met the threshold for granting stay pending appeal.

**Threshold of Stay Pending Appeal**

4. Under order 42 rule 6 of the Civil Procedure Rules, the trial court is barred from ordering stay of execution of the decree unless it is satisfied that:

- (a) The application is brought without unreasonable delay.

(b) Substantial loss may result if stay is not granted.

(c) That applicant is willing to abide by terms of security for the due performance of the impugned judgments as the court deems fit to order.

### **Unreasonable delay**

5. The application for stay was made three months after the judgment, and it was done only after proclamation of the applicants assets in execution of the impugned decree. The applicant has not explained why it took her more than three months to make the application for the stay. That delay is unreasonable. However, I will excuse that delay because, the claimant had also not taken any lawful steps towards execution of the decree. He did not file any bill of costs and even upto now his costs have not been determined. Consequently the execution of the decree before the costs awarded are determined rendered the execution premature and unlawful. It is therefore declared null and void and hereby set aside.

### **Substantial loss**

6. Substantial loss occurs where the decreed holder is unable to refund the decreed sum after the applicant succeeds in his appeal. That means that the appeal is rendered nugatory and that is the mischief which should be safeguarded by the order of stay of execution pending the appeal. In this case, the decree is for ksh.1,038,153 and the applicant contends that it is substantial amount which may not be refunded by the claimant if the appeal succeeds after execution.

7. However, the claimant has deposed and submitted that no appeal was ever filed by the applicant within 60 days prescribed by rule 82 of the Court of Appeal procedure rules and that the Notice of Appeal filed was never served within the 7 days prescribed by rule 77(1) of the said rules. Consequently, it is my finding that there is no valid appeal pending for purposes of determining whether or not substantial loss may result if stay is declined. In the circumstance, I hold that substantial loss will not result in this case if stay is denied because there is no appeal on record which may be rendered nugatory if executions proceed. The failure to serve the Notice of Appeal rendered it invalid 7 days after it was lodged in court. Secondly failure to request for certified copies of proceedings and serve the letter upon the claimant as required by rules meant that the time provided for filing the appeal did not stop running. Consequently failure to file the record of appeal within 60 days after the delivery of the impugned judgment completely locked out the applicant from filing appeal against the impugned judgment.

### **Security**

8. For the reason that no appeal is pending before the Court of Appeal and that no conditional stay is ordered, I will not deal with the issue of security.

### **DISPOSITION**

9. For the reason that I am not satisfied that substantial loss will result if stay is denied, I dismiss the Notice of Motion dated 20/2/2017 with no order as to costs. In addition the execution of the decree through proclamation of the applicant's movable assets is set aside for being done prematurely before costs of the suit awarded are determined.

**Dated, signed and delivered this 17<sup>th</sup> November 2017**

**O. N. Makau**

**Judge**