



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC CAUSE NO. 245 OF 2013

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

JOSEPH MORARA AMOKE APPLICANT

-VERSUS-

INVESCO ASSURANCE COMPANY LIMITEDRESPONDENT

RULING

The application before me for determination is a motion dated 21st February 2017 filed by the Claimant/Applicant seeking the following orders-

1. That the honourable court be pleased to certify this application as urgent and same be heard ex-parte in the 1st instance.
2. That this honourable court be pleased to dismiss the intended appeal for want of prosecution and the intended be deemed to have been abandoned.
3. That upon hearing this application inter-parties the honourable be pleased to lift the stay of execution and order that the decretal sum deposited in court be released to the applicant/claimant.
4. That the honourable be pleased to allow the applicant access at least some (part) of the money from the sum already deposited to ameliorate him from the effect of failure of the respondent in prosecuting the appeal within reasonable time.
5. That costs for this application be provided.

The application is filed under Order 51 Rule 1 & 2 of the Civil Procedure Rules 2010, section 3A, 3B and 79B of the Civil Procedure Act, and all enabling provisions of the law. The application is supported by the grounds on the face thereof and the supporting affidavit of the Claimant/Applicant.

In both the grounds and affidavit in support of the application the Claimant/Applicant states that the Respondent was granted stay of execution and leave to appeal against this court's decision made in his favour in July 2016 but to date has not taken any steps to prosecute the appeal, that the Respondent has lost interest in the appeal and the same ought to be dismissed and the stay of execution orders vacated. He states that he has been denied the fruits of his judgment and subjected to financial hardship and torture.

The Respondent opposes the application and on 10th March 2017, filed a replying affidavit of ROSEMARY OKUMBE, its Deputy Company Secretary who deposes that the Respondent having been

dissatisfied with the judgment of this court in favour of the Claimant/Applicant exercised its constitutional right of appeal by filing notice of appeal on 9th March 2016, that it filed two applications for stay of execution pending hearing and determination of the intended appeal which was granted by the court conditional upon the deposit of the entire decretal sum in court. Ms. Okumbe further deposes that the Respondent complied by depositing the decretal sum of Kshs. 1,952,640 in court as a sign of good faith.

Ms. Okumbe deposes that the Respondent filed the Memorandum of Appeal on 5th July 2016 and that the delay in prosecuting the appeal has been occasioned by the Kisumu Sub-Registry by its failure to supply certified copies of proceedings and judgment to the Respondent for purposes of preparing the record of appeal, that under Rules 86 and 87 of the Court of Appeal Rules the Respondent cannot move the appellate court without the record of appeal, and that the Respondent has therefore not been slack nor has it neglected or abandoned the appeal as to be guilty of want of prosecution of its intended appeal.

The application was argued in court on 13th March 2017. The Claimant/Applicant appeared in person while the Respondent appeared through Mr. Maro holding brief for Mr. Muma instructed by Muma & Kanjama Advocates.

The Claimant submitted that he has been in court for 5 years, that judgment was delivered in his favour in February 2016 and the Respondent was granted leave to appeal in June 2016. He submitted that he has since been waiting for 8 months but did not hear from the Respondent. He submitted that the Respondent is not interested in prosecuting the appeal since it deposited the decretal sum in court and that the Respondent wants him to suffer. He urged the court to revoke the orders of stay of execution so that he can benefit from the fruits of his judgment and move on with his life.

Mr Maro for the Respondent submitted that it was not the intention of the Respondent to subject the Claimant/Applicant to suffering as he claims. He submitted that the right of appeal is protected by the Constitution and dismissing the appeal as prayed by the Applicant will deny the Respondent its constitutional right to justice. He submitted that from the chronology of events since the delivery of judgment in this case it cannot be said that the Respondent is uninterested in prosecuting the appeal. He prayed for more time for the appeal to mature. He submitted that since the decretal sum has been deposited in court the Claimant/Applicant will be able to access it once the appeal is concluded.

Determination

I have carefully considered the application together with the grounds and affidavit in support thereof. I have further considered the replying affidavit and submissions of the parties.

The issues for determination are the following:

1. Whether the Respondent has been indolent in prosecuting the appeal
2. Whether the applicant is entitled to the orders sought

The record in court reflects that the Respondent filed a Notice of Appeal on 9th March 2016 following the delivery of judgment on 26th February 2016. This was within the prescribed period. The record further shows that the Respondent applied for typed proceedings and judgment by letter dated 9th March 2016 and the letter was copied to the Applicant. The Respondent sent a reminder to the Deputy Registrar by letter dated 22 July 2016.

From the foregoing I am satisfied that the Respondent has taken reasonable and sufficient action to obtain proceedings for purposes of lodging appeal. There is no proof that the delay in filing appeal has been deliberate and motivated by the motive to deny the Applicant the fruits of the decree as he alleges.

Appeal is a right of a party and the court will not deny a party the right merely because it has taken long unless there is proof of either ill motive or deliberate failure by the Respondent to file the appeal.

Conclusion

On the foregoing grounds I find no merit in the application and dismiss the same. I however take cognisance of the fact that there has been delay by the court in supplying proceedings to the Respondent. It has been almost one year between the time the Respondent applied for proceedings on 9th March 2016 to 21st February 2017 when the Applicant filed this application. I therefore order that the Deputy Registrar ensures that proceedings are supplied to the Respondent within 30 days from the date of ruling and that the appeal be filed within 60 days failing which the decretal sum deposited in Court may be released to the Claimant.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2017

MAUREEN ONYANGO

JUDGE