



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 156 OF 2015

JACKSON KIVILU.....CLAIMANT

VS

ALBA PETROLEUM LTD.....RESPONDENT

RULING

Introduction

1. The application before the Court is the respondent's Notice of Motion dated 13.10.2015. It is brought under Order 42 Rule 6 of the Civil Procedure Rules (CPRs), Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It seeks basically for stay of execution of this court's judgment passed on 14.9.2015 whereby the applicant was ordered to pay the claimant kshs.1,618,152/= as compensation for unfair termination of his employment contract.

2. The Motion is supported by the affidavit sworn on 13.10.2015 by the Respondent's HR Manager Ms. Beatrice O. Ooko. The grounds upon which the Motion stands are that:

- a. The applicant has an appeal on record which is evidenced by lodging a Notice of Appeal.
- b. The Appeal is arguable because the Court erred both in holding that the claimant was unfairly terminated and in awarding him damages.
- c. If stay is withheld, the applicant's appeal will be rendered nugatory and she will suffer substantial loss.
- d. The applicant is ready to deposit security as the Court may order for the due performance of the impugned decree.

3. The claimant has opposed the Motion by his Replying affidavit sworn on 21.10.2015 by which he prays for the Motion to be dismissed for lack of merits. He denies the allegation that the court erred in its judgment and contended that court considered all the facts and the law carefully while entering the said judgment. He denies that the applicant will suffer an substantial loss if stay is denied because he is able to refund the decreed sum if the appeal succeeds. That the allegation that he is a man no means because he is 60 years and employed, is baseless. That granting the stay order will prejudice him because it will delay his enjoyment of the fruit of his judgment.

4. The Motion was disposed of by way of written submissions filed by counsel for both parties.

Analysis and determination

5. There is no dispute that the applicant has exercised his right of appeal against this Court's judgment delivered on 14.9.2015 by filing a Notice of Appeal on 24.9.2015. There is also no dispute that on 16.9.2015 the applicant wrote an application for certified copy of Court proceedings and ruling delivered on 14.9.2015. The issue for determination is whether the Motion now before the Court meets the threshold for the grant of stay of execution pending appeal before the Court of Appeal.

Threshold for stay pending Appeal

6. Order 42 rule 6 (2) of the Civil Procedure Rules (CPRs) bars the trial Court from ordering stay of execution of its judgment pending appeal before unless:

- a. The Court is satisfied that a substantial loss may result to the applicant if the order is denied.
- b. The application has been made without unreasonable delay.
- c. The applicant is offering to be bound by such security for the due performance of the decree as the Court may order.

7. The foregoing conditions precedent to granting stay pending appeal are only relevant for consideration once it is proved that the applicant has an appeal pending before the appellate court. It is now trite law that the lodging of a Notice of Appeal under Rule 75 of the Court of Appeal Rules (CARs) prima facie constitutes an appeal for purposes of granting stay of execution. The question that begs for an answer is whether the applicant has any appeal pending before the Court of Appeal.

8. This Court delivered the impugned judgment on 14.9.2015 and the applicant filed her Notice of Appeal on 24.9.2015. The said Notice was filed 10 days after the judgment and as such it was in compliance with Rule 75 of the Court of Appeal Rules (CARs) which provided that such notice shall be lodged with the Registrar of the Superior Court within 14 days of the date of the decision against which it is desired to appeal.

9. Under Rule 82 (1) of the Court of Appeal Rules (CARs), the applicant had 60 days after 24.9.2014 to lodge his appeal at the Court of Appeal. In this case, no such appeal was lodged within 60 days from 24.9.2014 when the window for lodging the appeal was closed. Rule 83 of the Court of Appeal Rules provides that if a party who has lodged a Notice of Appeal fails to lodge his appeal within the appointed time, he shall be deemed to have withdrawn his Notice of Appeal. However the proviso to Rule 82 (1) of the Court of Appeal Rules (CARs) provides that:

“Where an application for a copy of proceedings in the Superior Court has been made in accordance with sub rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the Superior Court as having been required for the preparation and delivery to the appellant of such copy”.

10. In this case the applicant drew his application for certified copy of proceedings on 16.9.2012 but kept it until 5.11.2015 when she filed the application in Court according to the receiving stamp on the copy of the Court file. The effective date of her application for the copy of proceedings was therefore 5.11.2015 which was almost 2 months after the date of the impugned judgment and outside the 30 days stated above. There is also no evidence of service of the said letter on the claimant. Consequently the applicant is not availed the benefit provided under the provision to sub rule (1) above. Sub rule (2) of Rule 82 of the Court of Appeal Rules provides that:

“An appellant shall not be entitled to rely on the proviso to sub rule (1) unless his application for such copy was in writing and a copy of it was served upon the Respondent”.

11. For the reasons stated above, the Court regrets to find and hold that there is no appeal pending against the judgment of this Court dated 14.9.2015. The Court will therefore not proceed to consider whether or not the Motion meets the threshold set by Order 42 Rule 6 (2) of the Court of Appeal Rules (CPRs).

Disposition

12. The Notice of Motion dated 13.9.2015 is dismissed with costs.

Signed, dated and delivered at Mombasa this 19th February, 2016.

ONESMUS MAKAU

J U D G E