



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 576 OF 2014

JULIUS ORARE ISAAC.....CLAIMANT

VS

BAKE “N” BITE COMPANY LIMITED.....RESPONDENT

RULING

Introduction

1. The application before the court is the respondent’s Notice of Motion dated 10.8.2015. It seeks stay of proceedings in this suit pending the hearing and determination of appeal against the ruling of this court dated 27.4.2015. The motion is supported by the affidavit sworn by Mr. Seif Muhammed Seif on 10.8.2015. The gist of the application is that the applicant lodged a Notice of Appeal on 30.4.2015 and sought and obtained certified copies of the typed proceedings and the impugned ruling. That she has an arguable appeal with good prospects of success, which will be rendered nugatory if the stay order is denied. That application for the stay has been made without undue delay. That if stay is denied the applicant will suffer irreparable loss and damage because the issue of union membership will not be determined.
2. The claimant has opposed the Motion by his replying affidavit sworn on 21.9.2015. In his view the Motion was filed after inordinate delay of 4 months after the delivery of the impugned ruling. That the Motion is brought in abuse of the court process and it is meant to delay trial of the suit.
3. The Motion was disposed of by way of written submission.

Applicant’s submissions

4. The issue for determination is whether the application has met the threshold for the grant of stay by the trial court pending appeal before the Court of Appeal. It is trite that the principles for granting stay pending appeal at this level is a bit different from the requirements at the Court of Appeal. At this level the threshold for granting appeal is provided for under Order 42 rule 6 (2) of the Civil Procedure Rules (CPRs). The said provision bars the Court from making stay of execution unless:-
 - a. The Court is satisfied that substantial loss may result to the applicant unless the order is made,
 - b. The application has been made without unreasonable delay and

c. The applicant has given security for the due performance of the impugned decree or order.

5. In view of the foresaid provisions of the Civil Procedure Rules, the court is of the considered opinion that it does not need to consider whether or not the applicant has an arguable appeal with probability of success. If it does so, the court would be sitting on appeal over its own decision. What this court is required to ascertain in that respect under sub rule (4) of rule 6 above is satisfy itself that the applicant has at least given a Notice of appeal under the Court of Appeal Rules. Once it is satisfied that an Appeal has been lodged as required under sub rule (4) above, the court is then supposed to consider whether the requirements provided under sub rule (2) above have been proved by the applicant. In this case the court is satisfied that the applicant filed a Notice of appeal in this court on 30.4.2015 which was within the 14 days period allowed by Rule 75 (2) of the Court of Appeal Rules.

Substantial loss

6. The applicant has deposed in Paragraph 10 of his supporting affidavit that

“...If the stay of proceedings is not granted then the appeal if successful will be rendered nugatory and the respondent shall suffer substantial loss and damage since the pertinent question touching on the claimant being a member of a trade union as clearly admitted in his memorandum of claim will not have been determined.”

7. In addition her counsel has submitted in paragraph 11 of his written submissions that:-

11. However, the said mandatory application of CBAs to non members does not however extend to representation by trade union in dispute resolution. If a non member falls into disputes with the employer he has all the right to access this court for justice without involving the union even if he has paid Agency fees to the union. Consequently the court does not see any substantial loss to be occasioned to the applicant if stay is denied and trial done because it is the lawful thing to do. The issue of membership to a trade union was raised by the applicant and did not file any evidence to support the said allegation. Consequently the court agrees with the claimant's submission that the facts of this case are distinguishable from those in the *Bike "N" Bite vs Nugare case*. In the said case, the claimant's were members of the union and in fact the trade union participated in the suit because the claimant's were her members.

Unreasonable delay

12. There is no dispute that the application herein was made 4 months after the impugned ruling. By that time 2 months had lapsed after the certified copies of typed proceedings and ruling had been availed to the applicant. One wonders whether indeed the applicant had filed a record of appeal and why she never sought the stay order before the appellate court. In this court's view, a delay of 4 months before making the application for stay pending appeal is inordinate delay. No good cause has been shown to justify that delay.

Security

13. As regards the issue of security for performance, the court is of the view that the circumstances of this suit does not require security to be ordered. It is obvious that if the appeal fails the suit will be heard to its logical conclusion. Consequently even if the stay of proceedings was to be ordered, the court would not order any security.

Disposition

14. In view of the finding above that no substantial loss will be suffered by the applicant and the fact that the application was brought after an inordinate delay, the Notice of Motion dated 10.8.2015 is dismissed with costs.

Signed, dated and delivered this 19th February 2016

ONESMUS MAKAU

JUDGE