



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.105 OF 2015

EDWARD ISEDIA MUKASIA.....CLAIMANT

VERSUS

ELDO SUPERMARKET LIMITED.....RESPONDENT

(Before D. K. N. Marete)

RULING

This is an application by way of Notice of Motion dated 18th January, 2016 and brought to court vide a certificate of urgency of even date. It seeks the following orders of court:

- a) This application be certified as urgent.*
- b) There be stay of proceedings herein pending the hearing of this application interparties and pending the hearing and determination of the appeal filed herein.*
- c) There be a stay of execution of the decree herein pending the hearing and determination of this application inter parties.*
- d) There be a stay of execution of the decree herein pending the hearing and determination of the appeal filed herein.*

and is grounded on;

- a) The respondent is aggrieved by the judgment of this Honourable Court.*
- b) The respondent has accordingly filed an appeal against the said judgment.*
- c) One of the grounds of appeal is that the court erred in referring this matter to a third party to calculated dues.*
- d) It is therefore fair and in the interest of justice that there be a stay of proceedings herein pending the hearing and determination of the appeal.*

e) *This Honourable Court has already made an award in favour of the claimant.*

f) *The claimant is likely to execute the decree.*

g) *This appeal shall be rendered nugatory unless the orders sought are granted.*

In a Replying Affidavit sworn by Edward Isedia Mukasia, the claimant/respondent opposes the application and prays that the application be dismissed with costs.

The respondent/applicant in the Supporting Affidavits avers that she, being aggrieved by the said judgment, has filed a notice of appeal. She also avers that one of the intended grounds of appeal is that this court ought not to have referred the matter to a third party being seized of the matter in the first place and that the labour officer has made some outrageous calculations on this subject. He posits that since that is one of the grounds, it is necessary that these proceedings be stayed pending the hearing and determination of the appeal.

It is further the respondent/applicants averment that there is now a likelihood of execution of the decree by the claimant and in the absence of stay of proceedings, the appeal shall be rendered nugatory. She prays for these orders on further grounds that the appeal raises triable issues with a high probability of success. She also offers to raise and provide a bank guarantee for the award made.

The claimant/respondent opposes the application for being defective and bad in law and abuse of the process of court. He deems the same as an after thought and intended to deny him the fruits of judgment and decree of court. It is also the claimants averment that this application is unmerited, comprises of half truths, lies and blatant concealment of the facts of the case and intended to perpetrate injustice through endless legal trickery and maneuver.

It is the claimant's contention and submission that no appeal has been filed or even leave to appeal sought as is mandatory for appeals made out of time. Further, the claimant/respondent contends and submits that a notice of appeal is only but an expression of intention to appeal and not an appeal in itself. This should have been actualized by the filing of the actual appeal within thirty days from the date of judgment in line with the Court of Appeal Rules.

It is further the claimant/respondent's case that appeals from this court should be purely on matters of law and not facts as exhibited by the Respondent/Applicant's draft of intended appeal filed with this application. Therefore, its chances are nil, if at all.

It is the claimants further averment that the respondent/applicant does not meet the four legal criterion for stay of execution as follows;

16 "That I am informed by my advocates on record which advise I verily believe as true that there are four principles that a person seeking stay of execution of the judgments of the honourable court pending appeal must satisfy, prove and/or comply. The same are that, that substantial loss may result to the applicant unless orders are made, that they have an arguable case on appeal to warrant stay of execution, that the application has been made without unreasonable delay and that the applicant has furnished court with sufficient security as ordered by court for due performance of the decree and judgment of the court as may ultimately be binding on the applicant has been given by the applicant. That I have read the contents of the application and the supporting affidavit of Ajay R. Patel and I wish to state for a fact that the same does not meet the requirements as enumerated herein above."

In the instance case, the respondent/applicant only seems to suggest a compliance with the requirements of an offer of security in her submissions.

Lastly, the claimant/respondent submits that he is likely to suffer irreparable damage and loss if this application is allowed. Moreover, the application is brought in bad faith and with outstanding delay as

judgment herein was delivered way back on 30th June, 2015 well over seven months down the line.

When the application came for hearing on 2nd February, 2016 the applicant reiterated the application and sought to rely on her pleadings as set with a prayer that the application be allowed.

The claimant/respondent however, opposed the application vehemently. He reiterated his position at the Replying Affidavit and rubbished the application as being rudderless. It is his position that no appeal exists and further a notice of appeal is merely an intent at appeal. It is also the claimant's submission that there is indeed no demonstration of loss in the event of the success of the intended appeal.

In the circumstances, I agree with the position of the claimant/respondent that this application is not sustainable. From the onset, the delay in filing the application is inexplicable. The application is dated 18th January, 2016 and filed on 19th instant whereas judgement was made on 30th June, 2015. This is enormous and undue delay and the same remains unaccounted for. The applicant also does not meet or satiate the other criterion for sustainable applications for stay of execution or even stay of proceedings. Like is submitted by the claimant/respondent, this appears an afterthought and intended to defeat the ends of justice. It is not therefore sustainable in the circumstances. I am therefore inclined to dismiss the application with costs to the claimant/applicant.

Delivered, dated and signed this 17th day of February 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Nyamwega instructed by Kitiwa & Company Advocates for the respondent/applicant.
2. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant/respondent.