



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 335 OF 2013

VINCENT OMOLLO OBUOM

CLAIMANT

v

CATHOLIC DIOCESE OF NAKURU

RESPONDENT

RULING

1. In a judgment delivered on 20 November 2015, the Court found and held that the Claimant had been constructively dismissed and awarded him a total of Kshs 635,230/-. The award included entitlements flowing from the employment relationship and compensation.
2. The decision aggrieved the Respondent and on 3 December 2015, it lodged a motion under certificate of urgency seeking stay of execution of the judgment and decree.
3. The motion was certified urgent and interim stay was granted pending the hearing of the application *inter partes* on 16 December 2015.
4. Mr. Orege who urged the motion on behalf of the Respondent submitted that the application was brought without inordinate delay, that if the order sought were not granted, the Respondent would not be able to recover the decretal sum if paid, and that the Respondent was ready to provide security.
5. Counsel further urged that the Respondent stood to suffer substantial loss if stay pending appeal was not granted.
6. He further submitted that the motion was not opposed because the Claimant had failed to file any response thereto.
7. The Claimant who acted in person even during the trial of the Cause was allowed by the Court to respond to the motion.
8. He submitted that the application was a tactic meant to delay/frustrate him and that the Respondent had not demonstrated that the intended appeal had overwhelming chances of success.
9. He further submitted that on top of the decretal sum, the auctioneers had billed their charges as Kshs 94,000/- and that the date in the warrants (24 November 2015 instead of 20 November 2015) was a typographical error.
10. Order 42 rule (6)(2) of the Civil Procedure Rules has outlined the conditions upon which stay of execution pending appeal may be granted. Briefly, these are that the applicant should satisfy the Court that substantial loss may be occasioned; that the application should be made without unreasonable delay and lastly, provision of such sufficient security by the applicant.
11. Court's have on various occasions discussed and distilled the principles arising out of Order 42 rule 6 of the Civil Procedure Rules. Such cases are *Mukuma v Abuoga* (1988) KLR 645, *Jotham Simiyu Wasike & another v Jackson Ongeri & 4 others* (2013) eKLR, *Tabro Transporters Ltd v Absalom Dova Lumba* (2012) eKLR and *Anthony Kiberenge Kamau v Kibuchi Wamunyi & 3 others* (2010) eKLR.
12. The Court will look at each of the elements to see whether the Respondent has met the threshold.

Substantial loss

13. In *Cosmas Kipkoech Sigei v Madrugada Ltd & Ar* (2010) eKLR Emukule J held that

a stay will not be made on the ground that the decree holder is a pauper, and will therefore be unable to refund the decretal sum if paid to him....

14. In *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, Odunga J observed that,

the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit...it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

15. The Court has perused keenly the supporting affidavit sworn by Fr. Benard Ngaruiya, but is unable to decipher where it has been demonstrated that the Claimant would be unable to repay the decretal sum, or the substantial loss that would be occasioned were a stay to be declined at this level of the judicial chain.

16. As regards the limb of approaching Court without unreasonable delay, the Court is satisfied that, the application being brought about 2 weeks after the judgment was brought without delay.

17. In my view, the Respondent has failed to meet the test for grant of stay of execution pending appeal despite it offering to provide security and the application is for dismissal.

18. However, the Respondent in the supporting affidavit raised other pertinent issues and the Court will deal with only one.

19. This was that a draft decree was not served upon it before a proper decree was sealed and execution commenced. This assertion was not controverted by the Claimant.

20. It appears the Claimant was in a rush to short circuit the process and this practice must be deprecated.

21. The Deputy Registrar ought not to have sealed and issued the decree without being satisfied that a draft had been submitted to the Respondent and 7 days had lapsed without response. There is nothing on file to suggest that this requirement was complied with.

22. The parties did not address the Court on the legal effect or consequences of the failure.

23. On this account, the Court would deny the Claimant element of auctioneer's charges. He should meet those charges himself for short-circuiting the procedures.

24. The motion is thus dismissed, save for the order in the preceding paragraph on auctioneer's charges.

25. Each party to bear own costs of the application.

Delivered, dated and signed in Nakuru on this 12th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant in person

For Respondent Mr. Orege instructed by Rodi, Orege & Co. Advocates

Court Assistant S. Mwangi