



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 451 of 2012

(Consolidated with Cause No. 448 of 2012, 449 OF 2011 & 450 OF 2012)

(Before Hon. Justice Hellen S. Wasilwa on 11th February, 2016)

WILSON ALIVISA MULUANDA1ST CLAIMANT

GERALD KIMEMIA2ND CLAIMANT

PATRICK MBIHANE.....3RD CLAIMANT

CAROLINE IJALUHA MALENGE4TH CLAIMANT

VERSUS

ELAMS PRODUCTS LIMITEDRESPONDENT

RULING

1. The Application before Court is one dated 27.11.2015, where the Applicant seeks the following Orders:

1. *The matter be certified as urgent and heard ex parte in the first instance;*
2. *That there be an interim stay of execution of the judgment delivered herein on 29.10.2015 pending interpartes hearing of this application.*
3. *That there be stay of execution of the judgment herein pending hearing and final determination of this application.*
4. *That this Court be pleased to extend the time within which the Respondent should have issued and filed Notice of Intention to Appeal from the Judgment herein from 12th November, 2015, to the date of hearing and determination of this application and the Respondent be granted leave to file Notice of intention to appeal out of time.*
5. *That costs of this application be in the cause.*

2. The application is supported by the grounds on the face of the application to wit:

- a. *The Respondent is desirous of appealing the judgment delivered herein.*

- b. ***The Respondent's Chief Executive Officer was absent when advise of judgment was received at the Respondent's offices. A decision to appeal could not be made within the period set.***
- c. ***The Respondent's Chief Executive Officer resumed duty on 19th November, 2015, upon when a decision to appeal was made and subsequently communicated to the Advocates on record. By then however, the period for lodging the Notice of Appeal had lapsed.***
- d. ***The delay in lodging this application and intended Notice of Appeal is not inordinate.***
- e. ***The Respondent believes it has good grounds of appeal and should be granted an opportunity to ventilate the same in Court.***
3. The Application is supported by the supporting Affidavit of Srinivas Karra sworn on 27.11.2015 and a further affidavit of Nayan Kumar Patel sworn on 18.1.2016.
4. The Application is opposed and the Claimants have filed a Replying Affidavit sworn by Wilson Alivisa Muluanda with the authority of his co-Claimants.
5. The Applicant submits in respect to appeal out of time, the Respondent's Managing Director was not on duty from 19.10.2015-18.11.2015 and was on leave. The matter was last in Court on 25.11.2014, when Justice Onyango directed that judgment would be delivered on notice. The notice came in October, 2015.
6. The Applicant's policy is that only the Managing Director can authorize an appeal and so when the financial controller received the advise of judgment 23-11-2015, he could not give the Advocates on record instructions to appeal. The Advocates received instructions to appeal when the fourteen (14) days had lapsed. The applicant urges the Court to exercise its discretion and allow the Appellant an opportunity to file the appeal out of time.
7. The Applicant avers that the Application has been lodged timeously and the Respondent's interest can be protected by way of costs and money could be secured pending that appeal. The Applicant prays that the application of 27.11.2015, be allowed.
8. The Respondent in opposition to the application for stay pending appeal filed a Replying affidavit on 6.1.2016 and states that the prayer for stay of execution is premature as execution has not commenced. No Decree has been extracted and neither have costs been taxed.
9. On the prayer for extension of time to file appeal the Respondent submits that the grounds set out by the applicant in support do not warrant the exercise of Court's discretion as the Applicant has not produced documentation to prove that its Managing Director was on leave and could not give instructions to appeal. Further that the Managing Director did not have to be physically present to give instructions to appeal.
10. The Applicants also state that the instant application is an afterthought and should not be allowed since the Respondents were terminated in 2011 and the matter is still pending in Court.
11. The Applicant in response to the Respondent's submissions states that the Application is not premature as the stay sought is pending hearing and determination of the Application and they did not have to wait for a Decree before applying for stay of execution. The Applicant also states that the Managing Director of the Applicant has sworn an affidavit stating that he was not on duty at the time of advise of judgment and this fact is undisputed.
12. The Applicant prays that the Application be allowed.
13. Order 42 Rule 6(2) states as follows:

"No order for stay of execution shall be made under subrule (1) unless:

- a. *The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay and*
- b. *Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”*

14. The key conditions are set above and it is incumbent upon the Applicant to show substantial loss may result unless the order sought is granted.

15. I have looked at the affidavit of the Applicant and they have not shown that substantial loss may occur unless the orders sought are granted. They have also not proposed any security that they are willing to deposit in Court. No decree has also been executed in this case that is due for extracted. I will therefore find that this application is not warranted. I deny application for stay.

16. On issue of extension of time within which to file the appeal, the same is allowed and I grant the Applicants 30 days to file their intended appeal in default execution to proceed.

Read in open Court this 11th day of February, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Juma for Claimant Respondent – Present

Kamau holding brief for Mege for Applicant – Present