



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 140 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

ERIC KAYESI NANDWA.....CLAIMANT

-Versus-

INSTEEL LIMITED.....DEFENDANT

RULING

The Motion before me for determination is dated 14th October, 2015. It was filed by the Respondent/Applicant seeking the following orders:-

1. *That service of the application be dispensed with in the first instance.*
2. *That this application be certified as urgent and be heard ex-parte in the first instance owing to the urgency disclosed in the certificate of urgency and in the affidavit in support of this application.*
3. *That there be an interim order of stay of execution of the Judgement dated 21/11/2014 in Kisumu Cause No.141 of 2013 herein, pending the hearing and determination of this application inter-partes.*
4. *That there be a declaration that the stay of execution pending appeal recorded on February 11, 2015 is still in force and further that the execution proceedings be declared to have been commenced prematurely and set aside unconditionally.*
5. *That the Honourable Court restore the terms of the Consent Stay of Execution Pending Appeal and have the respondents compelled to execute bank Account Opening Forms so as to comply with that Consent Order.*
6. *That the costs of this application be provided for.*

The application is supported by the grounds on the face thereof and an affidavit of **DAVE LUNG' AHO SIGANGA** counsel for the Respondent.

The Claimant opposed the application through the replying affidavit of **MARCELLA ONYANGO**, Counsel for the Claimant.

The application was fixed for inter partes hearing on 26th October, 2015 but on the hearing date parties

informed the court that they wished to attempt an out of court settlement. On 10th December, 2015 after several mentions for purposes of recording consent, the parties informed the court they were unable to agree and that they wished to canvass the application by way of written submissions. They later filed and exchanged written submissions.

The facts giving rise to this application are that the Claimant filed suit against the Respondent alleging that he was declared redundant illegally and prayed for reinstatement. In its judgement delivered on 21st November, 2014 the court ordered reinstatement of the claimant within 30 days and payment of Shs.660,000 less statutory deductions. The Respondent filed a notice of appeal on 8th December 2014, and wrote a letter seeking certified copies of proceedings and Judgement for purposes of filing appeal on 5th January, 2015. On 16th January, 2015 the Respondent filed an application for stay of execution which the Claimant opposed through grounds of opposition filed on 2nd February, 2015.

On 11th February, 2015 parties recorded a consent in the following terms:-

'BY CONSENT'

a) The application of January 16, 2015 be and is hereby allowed.

b) The applicant to deposit a sum of Kshs.380,000 in a joint interest earning account held by the law firms representing the claimant and the Respondent within 45 days hereof.

c) In default of (b) above parties be at liberty to apply.

The Claimant in the meantime filed his Bill of Costs on 4th December 2014. The bill was by consent taxed in the sum of 109,104 on 20th April, 2015. Parties also agreed on stay of execution of 30 days.

From correspondence annexed to the Respondent's affidavit in support of this application the Respondent's counsel wrote to the claimant's counsel on 26th March 2015 seeking a 10 day extension to comply with the consent order of 11th February, 2015. The letter sought the Claimant's assurance on whether there was need for a formal application for the extension and enclosed a consent order. On 27th March, 2015 the Respondent's counsel wrote to the Claimant's counsel informing them that they had received the deposit from their client and proposed that the joint account be opened at NIC Bank in Kisumu. On 5th May, 2015 the Respondent's counsel again wrote to Claimant's Counsel enclosing account opening forms and requested the Claimant's counsel to avail certain documents necessary for opening the account. Reminders were sent to claimant's advocates on 18th May, 9th June, 2015 and 3rd August, 2015. The Respondent also sent a reminder to the Deputy Registrar on 3rd August seeking certified copies of proceedings and judgement for purposes of appeal.

It would appear that none of these correspondence was responded to by the Claimant's counsel. On 5th September 2015 Victoria Blue Auctioneering Services proclaimed against the Respondents moveable property. This application was filed as a consequence of the proclamation.

In the written submissions filed on behalf of the Respondent counsel submits that order 42 Rule 6(1) and (2) of the Civil Procedure Act provides for application for stay pending appeal while section 1A, 1B and 3A of Civil Procedure Act gives the court unlimited power and preserves the court's inherent power to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court.

The Respondent submitted that it has satisfied the requirements for stay as set out in Rule 5(2) (b) of the Court of Appeal Rules and relied on several court decisions. It was submitted that the Respondent has an arguable appeal, that if stay is not granted, the intended appeal would be rendered nugatory should it be successful and that the claimant has no known means to refund the decretal sum thus the Respondent would suffer substantial loss. It was further argued that the application had been brought without unreasonable delay and the Respondent's counsel was in possession of the decretal sum which is sufficient security for due performance of decree or court orders. It was further submitted that the Claimant should not be allowed to benefit from his wrongdoing.

For the claimant it is stated in the Replying Affidavit and in the written submissions that the Respondent failed to deposit the decretal sum within 45 days as agreed in the consent order of 11th February, 2015 which lapsed on or about 18th March, 2015 and the orders were not extended by court or by consent of the parties. It was submitted that the Respondent also failed to comply with its letter dated 27th February, 2015 asking the Claimant to report to its compliance manager for reinstatement. It was submitted for the Claimant that the orders of 11th February, 2015 have not been set aside or varied, and that the Respondent cannot seek orders to compel the Claimant's advocates to sign account opening documents. It was submitted that the Respondent's application is an abuse of court process and the orders sought are not merited, that the application should be dismissed with costs.

Findings and Determination

This is not a normal application for stay of execution pending appeal and the authorities both statutory and decisions of the court relied upon by the parties may not be relevant in the determination of the application. This is because parties recorded a consent on the stay of execution on 11th February, 2015 pursuant to the Respondent's application dated 16th January, 2015. Among the conditions for stay according to the consent was the deposit of the entire sum of Shs.380,000 in an interest bearing account in the joint names of the advocates representing the parties within 14 days and in default execution to issue. There was a further consent that the Claimant reports to the Respondents headquarters for reinstatement.

On 26th March, 2015 the Respondent sought an extension of stay for 10 days as counsel for the Respondent had not yet received the decretal sum. The Claimant's counsel did not respond to the letter. On 27th April, 2015 the Respondent's counsel confirmed having received the decretal sum and sent the Claimant's counsel forms for opening account but there was no response to both letters.

On 20th April, 2015 when the Claimant's Bill of Costs came up for taxation parties again recorded a consent on the bill and a stay of execution of 30 days.

The Claimant's only ground for objecting to the application herein is that the Respondent is guilty of laches and that by the time the Claimant applied for execution in July 2015 the Respondent had not filed an application to extend the time within which to deposit the decretal sum into a joint interest earning account.

I find this to be an argument made in bad faith for several reasons. 1st, the Respondent had by its letter dated 26th March 2015 asked for an extension of 10 days. In the same letter the Respondent asked for the Claimant's confirmation if there was need for a formal application for the extension. The letter reads as follows:-

We refer to the above matter and write to request an extension of 10 days in order to comply with the orders issued by the Court on February 11,2015. This has been occasioned by the delay in getting the court order.

Kindly assure us that we need not make a formal application for this. We enclose a consent letter in terms for your execution.

Kindly, further withhold any precipitate steps to enable us get our client's compliance as they have asked for the order which we ought to obtain today.

Yours faithfully,

LUNG'AHO SIGANGA

The Claimant has not denied receiving this letter.

The letter was not responded to. What was the Respondent to make of the failure to respond?

Secondly on 20th April 2015, there was taxation by consent with a stay of 30 days. The Claimant cannot therefore go back on the stay of 11th February, 2015 after consenting to another stay of 30 days on 20th April.

Thirdly, the Respondent's counsel confirmed by letter dated 27th April, 2015 that they were in receipt of the money and forwarded forms for account opening. By this time it was only 7 days into the 30 day stay consent agreed upon on 20th April, 2015. The consent had not lapsed as the Claimant has argued.

The 4th reason is that even if the consent of 11th February, 2015 was to be deemed as having lapsed, there could be no execution before taxation and extraction of a decree. Having agreed to a 30 day stay during taxation, the Respondent was not in default as it sent the account opening forms on 27th April, 2015. It is therefore the claimant's counsel who frustrated the Respondent's pursuit to open the joint interest earning account by failing to execute the account opening forms.

For the foregoing reasons, I allow the application and order that the Claimant's counsel executes the account opening forms and facilitates all account opening formalities within 14 days from the date of Ruling failing which the Respondent is free to deposit the said sum into court.

I further confirm the stay of execution pending appeal as agreed by consent on 11th February 2015, subject to the decretal sum being deposited as stated in this ruling.

Each, party shall bear its costs of this application.

I make no orders on the issue of reinstatement of the Claimant the same having not been raised as an issue for determination by the court in this application.

As agreed by the parties, these orders shall apply to cause no.141 of 2013.

Dated, signed and delivered this 26th day of May, 2016

MAUREEN ONYANGO

JUDGE