



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO 1159 OF 2012**

**MAUREEN HOMEM ..... CLAIMANT**

*VERSUS*

**BOG ARYA VEDIC SCHOOL & ANOTHER ..... RESPONDENT**

K. Mwangi for respondent/applicant

J. N. Mbugua for claimant/respondent

**RULING**

1. The respondent/applicant vide notice of motion dated 9<sup>th</sup> October 2015 and 13<sup>th</sup> October 2015 seeks a stay of execution of the decree in this case pending the hearing and determination of Civil Appeal No. 2539 2015 which is pending before the court of Appeal in Nairobi.
2. The two applications seek the same relief and are consolidated. The two are supported by grounds set out on the face of the notice of motion and supporting affidavit of James Karanja Mwangi to wit;

The applicant is dissatisfied with the judgment delivered by Nderi Nduma J. on 24<sup>th</sup> April 2015 on the grounds that it was not delivered by the trial judge inspite of agreement by the parties that the file be forwarded to Mombasa for the judgment to be made by Rika J. who had conducted the matter before he was transferred.

3. That the applicant is ready to provide security for the due performance of the decree by depositing the entire decretal sum and costs in court or in an interest earning account in the joint names of the parties counsel pending the hearing and determination of the said appeal.
4. That on 1<sup>st</sup> October 2014, the case was mentioned before Nderi Nduma and Mr. Ouma held brief for Mr. Mbugua for claimant while Mr. Mwangi appeared for the respondent. At the time the respondent had filed its submissions and the claimant was given seven (7) days to file her submissions. The court ordered that the file be forwarded to Rika J. to write the judgment after a mention on 10<sup>th</sup> October 2014 to confirm filing of submissions.
5. The applicant submits that the judgment be set aside and file be sent to the trial judge to make the judgment.

6. That the motion was brought without unreasonable delay and the appeal has been filed.
7. That the applicants would suffer substantial loss if the stay of execution is not granted.
8. The decretal sum is Kshs.2,795,426.00 and the claimant is seventy one (71) years old and sickly as it appears from the affidavits on record. The claimant is unlikely to be able to refund the decretal sum if the appeal is successful.
9. The applicant prays it be granted the relief sought.

### **Response**

10. The claimant filed a replying affidavit sworn on 19<sup>th</sup> November 2015 in reply to the applications dated 9<sup>th</sup> and 13<sup>th</sup> October 2015.

The claimant states that the supporting affidavits are incurably defective and same be struck out with costs.

11. That there was no consent recorded regarding the matter in issue as exhibit “MH 1” will show. The attached order of the court dated 1<sup>st</sup> October 2014 reads; Claimant is granted seven (7) days to respond to respondent’s submissions. Mention on 10<sup>th</sup> January 2014 so as to send the file to the trial judge.

12. That the applications were brought after inordinate delay and the same do not disclose good reasons for staying execution of the decree of the court.

13. That the claimant is a lady of sound mind living in her own house along Ngong road Nairobi, enjoying substantial rental income from tenants with her flats along Ngong Road and therefore has adequate financial ability to pay back to the respondent the decretal sum should the appeal succeed.

14. That the appeal is frivolous and is not arguable and has no chance of success since there was no consent as alleged or at all.

### **Determination**

15. The court has considered the competing arguments in this case and in particular;

- i. whether or not the application has been brought without undue delay;
- ii. whether or not the applicant has an arguable appeal;
- iii. whether or not the appeal will be rendered nugatory if the stay is not granted.

### **Issue i**

16. Judgment was delivered on 23<sup>rd</sup> April 2015 and the application for stay was filed on 9<sup>th</sup> October 2015 six months down the line and only after the claimant had commenced execution of the decree.

17. No explanation has been offered for the delay. The court finds six months delay to be inordinate and prejudicial to the claimant who has legitimate expectation to enjoy the fruits of her judgment.

### **Issue ii**

18. The sole reason given in the application as to why the applicant is dissatisfied with the judgment of the court is that the judgment was not made by the trial judge.

19. It is common cause that the matter was partly heard when Rika J. the trial judge was transferred to Mombasa. From the record, on 11<sup>th</sup> October 2014, when the matter was first mentioned before Nduma J, Mr. Ouma who held brief for Mr. Mbugua, who was in conduct of the suit had indicated to the court that the purpose of the mention was to confirm filing of submissions and thereafter the file be transferred to Mombasa, for Rika J. to do the judgment. The claimant was granted seven (7) days to respond to the submissions filed by the respondent.
20. However on 10<sup>th</sup> October 2014, Mr. Wathome appeared for Mr. Mbugua for the claimant and the respondent was absent. The claimant requested for judgment date and same was granted for 15<sup>th</sup> December 2014. The issue of transfer was not raised at all.
21. The judgment was subsequently delivered on 24<sup>th</sup> April 2015 in the presence of Mr. Njoroge for the claimant and J. K. Mwangi for the claimant. No objection was raised by either party.
22. The issue raised by the applicant is that, the judgment was made and issued in error by Nduma J. and the file ought to have been transferred to Rika J. This to my mind is a matter for setting aside or review under rule 32 of the Employment and Labour Relations (procedure) Rules 2010 but not one for appeal. The court considers that the applicant has not established that it has an arguable appeal especially, because the court did not award compensation damages for alleged wrongful termination of employment but only awarded terminal benefits which it found to have been proved on a balance of probability by the claimant taking into account the admissions made by the applicant in the pleadings and the testimony by the parties.

### **Issue iii**

23. As to whether or not the appeal would be rendered nugatory by the failure to grant stay orders, the court finds that the claimant has demonstrated that she has means to refund the decretal amount if the appeal was successful.
24. The court therefore on the balance of convenience is of the view that the claimant ought to be allowed to enjoy the fruits of her judgment this application having been brought after inordinate delay.

**Dated and delivered at Nairobi this 17<sup>th</sup> June, 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**