



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 128 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th July 2016)

CHARLES MUTURI MWANGI.....CLAIMANT/RESPONDENT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT/APPLICANT

RULING

1. Before the Court is an Application dated 25th April 2016 brought under Section 12(1), (5) of Labour Institutions Act, Section 17 of the Industrial Court Act No. 20 of 2011, rule 16(1), (2), (15) of the Industrial Court Procedure Rules 2010, Sections 1 (A), 1(B), 3(A) of the Civil Procedure Act, Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law on Application for orders:

- 1. That this application be certified urgent for the reasons recorded herein and be heard ex parte in the first instance.*
- 2. That this Honorable Court be pleased to grant stay of execution of judgment of the Employment and Labour Relations Court delivered in the matter herein on the 15th of March 2016 by the Honorable Lady Justice Wasilwa pending inter-parties hearing and determination of this application.*
- 3. That this Honorable Court be pleased to grant stay of execution of the judgment of the Employment and Labour Relations Court delivered in the matter herein on the 15th March 2016 by the Honorable Lady Justice Wasilwa pending inter – parties hearing and determination of the intended Appeal.*
- 4. That costs of this application be provided.*

2. The Application is premised on the following grounds and on the supporting affidavit of Rosemary Okumbe.

- 1. By judgment delivered by this Court on the 15th March 2016, the Court awarded the Claimant Kshs.6,780,000 as monies owing to him plus interest.*
- 2. That being dissatisfied with the aforementioned, the Applicant has preferred an appeal against*

it by lodging a notice of appeal dated and filed on the 24th of March 2016 and applying of typed proceedings.

3. That the Applicant herein also proceeded to prepare a Draft Memorandum of Appeal which is annexed to the supporting affidavit.

4. However, before the Applicant herein could process and serve the Notice of Appeal and copy of letter applying for typed proceedings, the Respondent herein proceeded to file and serve the above mentioned documents upon the Applicant herein.

5. That the Respondent filed and served their documents before the Applicant herein and as such the Applicant shall cross-appeal upon being served with the Record of Appeal.

6. That the Respondent only wishes to partially appeal against the Court's decision. As such while the appeal is intended, the Applicant herein is apprehensive that the Respondent could move at any time and commence execution of the decree of the Court thereby rendering the intended cross-appeal nugatory and a mere academic exercise.

7. That the genesis of the instant matter is a Memorandum of Claim filed by the Respondent herein against the instant Applicant whereby he claimed to have been unlawfully terminated amongst other grounds and/or prayers in his claim.

8. That at the time of his employment, the Appellant was placed under Statutory Management thereby rendering the Respondent's employment as a Marketing Manager as being immediately frustrated.

9. That the Appellant did not voluntarily terminate the Respondent's employment but unfortunately, the same was terminated by operation of the law, a matter out of the Appellant's control.

10. That the Respondent is indigent having remained unemployed after ceasing being an employee of the Appellant, through his own failure in not securing another job with view to mitigate his loss.

11. That this application has been brought without undue delay.

12. That the Respondent does not stand to suffer loss if the orders sought herein are granted.

13. That in any event, the Applicant is willing and ready to furnish a reasonable security subject to directions of this Honorable Court.

14. That is it in the interest of justice that orders sought be granted as no prejudice will be occasioned upon the Respondent/Decree holder.

3. The Claimant/Respondent has filed a Replying Affidavit dated 3rd June 2016 deponed to by one Charles Muturi Mwangi.

4. The Claimant/Respondent states that a copy of the Notice of Appeal which has been deponed to has never to date been served and hence it is fatally defective and irrelevant not being served within the prescribed time.

5. They state that the dispute has been protracted by a number of objections and adjournments occasioned by the Respondent who have been oppressive and incapacitating and have had the effect of a substantial drain on his physical strength and have wasted him and his family interests.

6. They state that the judgment of this Honorable Trial Court has awarded the salaries for sixteen 16

months and twenty one (21) days and leave allowance of Kenya Shillings One Hundred Thousand (Kshs.100,000/=) for the year 2009 less statutory deductions and costs of the suit and interest and that there were other reliefs prayed for that were not awarded and others not referred to in the Judgment, in addition to being lower in terms of unpaid salaries, allowances and clearance certificates.

7. They state that this new application is an abuse of the Respondent's dominant position and is intended on the face of this Honorable Court to extend undue economic duress, it is a cross appeal as the Claimant has also filed a Notice of Appeal over parts of the claim that were not awarded.

8. They state that the Respondent had presented evidence through witness stating that the claim would have been paid had it been under ten million, and as the Court awarded a figure less than the intended claim then this application is inconsistent with their own evidence.

9. The Respondent/Applicant's Deputy Company Secretary whose affidavit supported this application was not employed at the time the Claimant/Respondent was in their employment and is therefore unfamiliar with the true facts of the case.

10. They further state that the application for stay is premature as the Claimants'/Respondent Advocates party and party bill of costs has yet to be taxed or costs agreed.

11. For the aforesaid reasons, they pray that the application be dismissed.

12. The Applicant filed written submissions dated 27th June 2016 in support of their application.

13. They submit that at the preliminary stage the Claimant made an application to amend his claim which application although was opposed by the Applicant was found to have merit, and had factual points that were intertwined with points of law that the Court could not at that stage entertain. Those issues were not dealt with and the Applicant urges the Court to find that its decision may be varied or reversed on appeal and should grant the application.

14. They rely on the case of **Erinford Properties Ltd vs Chesire CC**

“Judges must decide cases even if they are hesitant in their conclusions; at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal”.

15. They further rely on the case of **King'orani Investments Limited –vs- Kenya Commercial Bank & Another** where in granting a limited injunction, her ladyship Justice Lesiit held:

“No doubt in my ruling in which I refused an application for interlocutory injunction, I express firm belief that the Applicant's request was not wanted. However, I also do accept that this is a complex matter and that it may be that in its appeal, the applicant is relying upon other issue than those argued before me. It is also possible that I was wrong in my ruling”.

16. The Applicant submits that they would suffer substantial irreparable loss should the application not be granted. They refer to the case of **Apar Industries Limited vs. Joe Freighters Limited [2015] eKLR** where the Honourable Justice Gikonyo also made reference to Bungoma High Court **Misc. Application No 42 of 2011; James Wangalwa & Another vs. Agnes Naliaka Chese** where the Court determined that in proving substantial loss:

“The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the

successful party in the appeal. This is what substantial loss would entail....”

17. The Applicant submits that they are at risk of execution of the colossal sum which amount would cause substantive loss to the Respondent before it gets an opportunity to ventilate the appeal. They further submit that the Claimant submitted that they are not in gainful employment and would therefore be unable to refund the decretal amounts if the cross – appeal succeeds thus rendering it nugatory.

18. The Applicant submits that the proposed cross appeal raises issues of interpretation as to when a contract is frustrated and terminated through operation of law, which issue if successfully argued at appeal would mean that the trial Court lacked jurisdiction to entertain the matter in the first instance. They submit that asking them to do what the judgment requires means that it will become a pious explorer in an academic exercise of judicial process at appeal.

19. The Respondent also submits that the judgment herein was entered on the 15th of March 2016 and the Applicant was not in Court due to some mix up in their diary. They submit that they moved to make this application as soon as they learnt of it but was unable to as the file was in chambers with the judge making corrections to the judgment. They ask the Court not to penalize them for the delay, in the pursuit of justice.

20. They submit that they are willing to provide any security that the Court deems fit to order and conclude with a prayer that their application for stay of execution is granted.

Claimant/Respondents submissions

21. The Claimant Respondent filed their submissions in Court dated 30th June 2016. In them they submit that this application is premised on the basis that there is an intended appeal under Order 42 Rule 6 of the Civil Procedure Rules.

22. They submit that they have opposed the Respondents application as the judgment they have received is purely a monetary decree one of about one sixth of the Claimants claim and by law an appeal cannot be rendered nugatory by the mere fact of having paid the decretal amount as it is recoverable to the extent of any success on appeal. To this end they rely on the case of **Kenya Shell Limited vs Kiburu & Another [1986] KLR 419** where the court of appeal dismissed an application for money decree.

23. They further reiterate no notice of appeal whether valid or invalid has been served to date by the Respondent, they submit that the Respondent has not explained reasons as to why they did not comply with this and ask the Court to take Judicial Notice of this non-compliance.

24. The Claimant/Respondent submits that they will suffer great economic duress should the stay be granted. The Applicant Company is suffering liquidity problems and is being placed under management of a statutory manager and this stay may affect their ability to pay should it be granted.

25. They further submit that labour rights and income thereof are now constitutional rights and a delay in the same when already earned would be a violation of this right.

26. They pray that the Court dismisses the application for stay of execution with costs.

27. Having considered the submissions of both parties, I refer to Order 42 Rule 6(2) of the Civil Procedure Rules which states as follows:

“(2) 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.

28. The only considerations this Court needs to make is granting or not granting the orders sought are as above.

29. In considering (a) above, the Applicants came to this Court on 25/4/2016 after judgment had been delivered on 15/3/2016. This was more than 1 month after the delivery of judgment. Whereas I considered this, a delay, it is not very inordinate as not to make the Applicants locked out of this application.

30. The other issue to consider is whether substantial loss will be occasioned to the Applicant if the prayers sought are not granted.

31. In determining this, I note that the Applicants filed their Notice of Appeal on 24.3.2016. They have raised issues they want Court of Appeal to determine. So that the appeal is not rendered nugatory, it is in the interest of justice to grant the orders sought in the application.

32. I will allow application on condition that the Applicants deposit ½ the decretal sum in an interest earning account held in joint names of Counsel on record and the other ½ be released to the Claimant Respondent within 30 days. In default execution to issue.

33. Costs in the course.

Read in open Court this 14th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wachira holding brief for Kihara for Claimant – Present

Murigori holding brief for Respondent – Present