



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 156 OF 2015

JACKSON KIVILU.....CLAIMANT

VERSUS

ALBA PETROLEUM LIMITED.....RESPONDENT

RULING

Introduction

1. On 19. 2. 2016, I dismissed the application for stay of execution pending appeal brought by the respondent in the suit. The respondent was dissatisfied by the said decision (impugned ruling) and preferred an appeal against the same by filing a Notice of Appeal on 24. 2. 2016. Additionally she also applied for certified copy of typed proceedings and the impugned ruling on the same day.

2. On 9. 3. 2016, the respondent (herein after called its applicant) filed the Notice of Motion (first motion) for leave to appeal against the impugned ruling on grounds that I made error in law and fact by overstepping my jurisdiction, and finding that there was no appeal pending.

3. On 1. 4. 2016, the applicant filed a second Notice of Motion dated 24. 3. 2016 seeking enlargement of time within which to make an application for leave to appeal. The ground upon which the second motion is brought is basically that she was prevented from filing the application for leave within the statutory time by the unavailability of the court file at the Court Registry.

4. The claimant has opposed the two motions by his Replying affidavit sworn on 3. 5. 2016. The gist of the Replying affidavit is that the two motions by the applicant have been brought in bad faith to delay settlement of the judgment debt and taxation of his costs. That the applicant has not proved that the court file was not available for filing of his first motion on time. According to the claimant the file was available and had indeed been scheduled for taxation on 11. 3. 2016. That the motions have been brought after inordinate delay and without any justification. Additionally the claimant is of the view that this court has become functus officio and therefore disqualified from granting the orders sought.

5. The two motions were disposed of by written submissions by Counsel for the two parties.

Analysis and Determination

6. I have carefully perused and considered the motions, rival affidavits, and written submissions and framed the following issues for determination:-

a. Whether this court is *functus officio vis-à-vis* the orders sought.

b. Whether the two motions have merits

Functus Officio

7. The first motion is brought under order 43 Rule 1 (2) & (3) of the Civil Procedure Rules (CPR) Sub Rule (2) requires that an appeal from a decision made under order 42 rule 6 can only be made with the leave of the court. Sub rule (3) on the other hand provides an application for these leave to appeal under section 75 of the Civil Procedure Act (CPA) shall in the first instance be made in the court which made the impugned decision. Consequently I find that this court is competent to entertain the two motions. It is not therefore *functus officio* as submitted by the claimant because they all deal with the same issue of the leave to appeal against a decision of this court made under order 42 rule 6.

Merits

8. The basis upon which the leave to appeal is sought is that the court made a finding that the applicant has no appeal pending, that such finding was made in error both of law and fact because this court has no jurisdiction to determine whether or not there exists any appeal before the court of Appeal as that is the sole province of the said Appellate court. With due respect to the applicant, the two motions are misconceived and unnecessary.

9. The reason for the foregoing view is that I never made any final decision on whether or not the application had an appeal pending before the court of appeal. All what I did through the impugned ruling was to make a personal opinion based on the observation I made from the court record and the rules of the appellate court. Having carefully perused and considered both the court record and the said rules of procedure I was entitled to my personal opinion as a basis for exercising my discretion whether to grant stay of execution pending appeal or not.

10. The finding that there was appeal pending was therefore the reason for declining stay of execution. I did not exceed my jurisdiction but only exercised my discretion carefully and judiciously based on very minimal legal research. It is quite elementary in my view to deduce from the court record and the appellate court procedure rules that the appellant had no appeal on record. In such a clear case, was I to ignore the facts that there was no appeal on record and proceed to grant stay of execution pending a non-existent appeal? In my view no.

11. This court is not barred from considering any law, including the court of Appeal procedure Rules whenever called to decide on any matter.

12. The requirements for granting stay of execution under order 42 rule 6 are but the minimum requirements. There is no legal bar for the trial court to consider other basis requirements provided by other sources of law.

13. In addition to the foregoing, the leave to appeal against the denial of the stay of execution was unnecessary because under order 42 rule 6 (1) the applicant has the legal right to make a fresh application for stay of execution before the appellate court and not to appeal against the denial of stay. Even where the stay is granted any party aggrieved by the order has the legal right to apply to the appellate court to have the order set aside. Order 42 rule 6 (1) provides that

***“--- Whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court appealed from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*”**

14. In view of the foregoing, I find that the application for leave to appeal against denial of stay of

execution is misconceived berefit of merits and unnecessary. Likewise the second motion for the enlargement of time to apply for the leave to appeal is unnecessary and frivolous.

Disposition

15. For the reasons stated above the Notice of motion dated 2. 3. 2016 and 24. 3. 2012 are dismissed with costs.

Signed, Dated and Delivered this 9th day of September, 2016

ONESMUS MAKAU

JUDGE