



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2535 OF 2012

JAMES KIPCHIRCHIR SAMBU CLAIMANT

VERSUS

PATRIOTIC GUARDS LIMITEDRESPONDENT

RULING

1.By application and Notice of Motion dated 20th January 2016, the respondent, Patriotic Guards Limited is seeking for orders that;

1. ...

2. *Pending hearing and determination of the intended appeal an order of stay of execution of the judgment and decree of the High Court and any subsequent orders issued in its furtherance be stayed forthwith.*

3. *Temporary orders of stay of execution of the judgment dated 3rd November 2015 and ruling dated 21st December 2015 in terms of prayer (2) above be granted pending inter parties hearing of this application*

4. *The costs of this application be provided for.*

2.The application is supported by the affidavit of Titus Kigen and on the grounds that the respondent has preferred an appeal against the ruling and order of the court, the appeal is arguable with high chances of success and if the orders appeal against are not stayed the same will be rendered nugatory. That in dismissing the respondent's application the court misdirected itself and abused discretion by denying the subject a hearing on merit. And therefore there was a fundamental error of fact by denying the respondent a fair hearing because of the mistake of his advocate. Advocate mistakes should not be visited upon a party who is now exposed and without remedy sought. The court erred in awarding the claimant after termination in terms of section 44(4) (f) and (g) of the Employment Act as the claimant had committed a criminal offence to the substantial loss and detriment of the respondent and was subject for summary dismissal. That the ex parte judgement should be set aside to avoid injustice and hardship resulting thereon.

3.In reply the claimant has filed a Grounds of Opposition on 3rd February 2016. That the appeal lacks merits and is founded on clearly wrong principles and presumptions and there is no prove of substantial loss which is likely to be suffered is stay is not granted and further that there is no proof that the appeal will be rendered nugatory. That there is no proof of irreparable loss and damage has been demonstrated and the claimant is thus entitled to the fruits of his judgment or part thereof pending the appeal.

4.Both parties filed written submissions

5.The respondent submit that they have filed Civil Appeal No.20 of 2016 filed on 3rd February 2016 which has been served upon the claimant as respondent therein. There are triable issues in the appeal and seek stay of execution herein to enable the respondent ventilate the same on merit as to proceed herein would render the appeal academic. The appeal relate to the dismissed application of 6th November 2015 for the non-attendance to advocate while he was before Ochieng J and which was a mistake and or error that should not be visited upon the respondent. in **Richard Nicharpi Leiygu versus IEBC & Others, Civil Appeal No.18 of 2013**, the Court of Appeal held that mistake of counsel should not result in the doors of justice being closed against an innocent litigant.

6.The respondent also rely on the cases of **James Moyenga Nyakweba 7 Others versus Jairo Atinya Asitiba, HCCC 196 of 2012, John Peter Kiria & Another versus Pauline Kagwiria, Civil Appeal No.114 of 2009 (Meru)**.

7.The claimant on their part submit that Order 42 Rule 6(2) of the Civil procedure Rules 2010 sets out the principles for the grant of orders of stay of execution pending appeal. The appeal must have merit and that that is raises substantial issues of law; unless stay is granted there will be substantial loss and damage; application has been filed without delay and the party seeking stay is willing to deposit security. The appeal seeks to challenge the ruling and judgement of the court on the basis that the respondent failed to attend court and the client too. Based on the evidence available, the court proceeded to write judgement and such cannot be faulted as the respondent chose not to attend.

8.That there is no proof that if stay is not granted there will be substantial loss as held in **Kenya Shell Limited versus Kiburu [1986] KLR**. This was given emphasis in the case of **Machira t/a Machira & Co. Advocates versus East African Standard** where stay of judgement was refused as there was no proof of substantial loss. In this case the application lacks merit and should be dismissed.

Determination

9.Section 17 of the Employment and Labour Relations Court Act allow a party dissatisfied with a decision of this court to file an appeal. The Respondent conform having filed Civil Appeal No.20 of 2016 before the Court of Appeal. The merits of this appeal is not for the court to determine.

10.The application is seeking stay of execution of the judgement and ruling of the court pending the hearing of the intended appeal which has since been filed. As submitted by the claimant, the principles governing the grant of stay of execution application were summarised in the case of **Machira t/a Machira & Co. Advocates versus East African Standard, HCCC No.162 of 1996**. The court also went on to analyse the facts of the case giving rise to the application and observed that a successful judgement holder should be allowed to enjoy the fruits of their judgement.

11.An applicant must demonstrate that there will be substantial loss if stay is not granted. In this regard therefore, in **Kenya Shell Limited Versus Kiburu**, the court distinguished between what amounts to ‘substantial loss’ and ‘irreparable loss’ and held that;

... It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money. [Emphasis added].

12.The respondent does not address this aspect of what loss will be occasioned upon them if stay is not granted at all. Save for setting out matters with regard to being aggrieved with the judgment of the court and the ruling thereto where the court proceeded ex parte, nothing has been submitted on what impact that judgement and ruling shall have upon the respondent if the claimant were to proceed with the execution

process following the judgment of the court. The duty is upon an applicant to demonstrate what damages or loss is to be suffered if the order of stay is not granted. In **Socfinac Co. Ltd versus Nelphat Kimotho Muturi, Civil Appeal No.542 of 2012 (High Court)** it was held;

... by granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the one hand granting stay would be denying a successful litigant of the fruits of his judgement.

13. Without satisfying this ground, to go through the motion of whether there was delay or whether there should be deposit of security would be academic. However, this is a court of justice and the discretion to be applied should be done judicially. On the grounds that there is an Appeal already lodged a deposit of security shall suffice pending hearing of the same. The terms of such deposit shall be issued hereunder.

In conclusion therefore, in the interests of justice and noting Civil Appeal No.20 of 2016 before the Court of Appeal, the application dated 20th January 2016 by the respondent is hereby allowed in the following terms;

(a) There shall be a deposit of the entire decretal sum in a joint, interest earning account of both Advocates for the parties – Namada & Co. Advocates for the claimant and Wachakana & Co. Advocates for the respondent – within the next 14 days;

(b) Orders above (a) shall apply pending the hearing and determination of Civil Appeal No.20 of 2016 before the Court of Appeal.

(c) Where the Respondent fails to Move the Court as (b) above within 60 days, orders above shall automatically lapse.

(d) Costs herein to the claimant.

ORDERS ACCORDINGLY.

Delivered in open court at Nairobi this 13th day of October 2016.

M. MBARU

JUDGE

In the presence of:

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