



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 78 OF 2015

ALI MOHAMED.....CLAIMANT

VS

AWAL TRANSPORTERS LTD.....RESPONDENT

RULING

Introduction

1. The court entered judgment in favour of the claimant on 25.9.2015 in the sum of Kshs. 59,400 plus costs. The respondent however, exercise her right of appeal by filing a Notice of Appeal on 8.10.2015.

2. On 23.10.2015, the respondent brought the Motion dated 16.10.2015, which is now before the court for determination, under Order 42 Rule 6 (1) of the Civil Procedure Rules (CPRs). The motion seeks for an order of stay of execution of the impugned judgment pending the hearing and determination of the intended appeal. The grounds upon which the motion stands are that:-

- a. **The applicant intends to Lodge an appeal and she has already filed her Notice of Appeal.**
- b. **Unless stay is granted the appeal will be rendered nugatory.**
- c. **The applicant is ready to abide by any conditions for the stay that the court may impose.**

3. The Motion is supported by the affidavit sworn by the counsel for the applicant Mr. Ratemo Enock. The supporting affidavit merely raises the same grounds outlined on the body of the motion and only adds that it is in the greater interest of justice that the stay order be issued.

4. The claimant has opposed the motion by his Replying affidavit sworn on 11.11.2015. He depones that the applicant has not demonstrated how the intended appeal will be rendered nugatory. He further contends that the decreed sum is a very small amount that cannot cripple the applicant's operations. That granting the stay would be prejudicial to him because it would delay the enjoyment of his judgment. That the applicant's willingness to give security if ordered is not a guarantee to granting of stay order. Finally the claimant prays for the dismissal of the motion because it is incurably and fatally defective.

5. The motion was disposed of by written submissions.

Analysis and Determination

6. I have carefully perused and considered the motion, supporting affidavit, Replying affidavit and the rival submissions filed. The issues for determination are:-

- a. **Whether the Motion is fatally defective.**
- b. **Whether the Motion meets the threshold for the grant of stay pending appeal.**

Defective Motion

7. Although the claimant deponed that the motion is incurably and fatally defective, he has not submitted on that defect. I have perused the motion carefully and found no defect as alleged by the claimant. Consequently the answer to the first issue for determination is in the negative.

Threshold for stay pending Appeal

8. The order of stay is a discretionary relief. The discretion is however fettered by Order 42 Rule 6 (2) of the Civil Procedure Rules in the following terms:

“(2) No order for stay of execution shall be made under sub rule (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.”**

9. The threshold for grant of stay at this level as per the foregoing provision is therefore that the applicant must:

- a. **Satisfy the court that he stands to suffer substantial loss if the stay order is withheld.**
- b. **Satisfy the court that the application has been made without unreasonable delay.**
- c. **Offer security for the performance of the decree if the appeal fails.**

Substantial loss

10. The claimant contends that the decreed sum is too little to impact negatively on the operation of the respondent. He further contends that the applicant has not demonstrated how her appeal will be rendered nugatory if stay is denied. The applicant has not sworn any affidavit to prove that her intended appeal will be rendered nugatory. She has also not demonstrated how withholding of the stay order will occasion on her substantial loss. All what we have in support of the motion is affidavit of her counsel which makes generalized and broad statements. The affidavit alludes that the counsel is competent to swear but does not state the source of the information he has generally deponed on.

11. After considering the material presented before me by the applicant, I am not satisfied the applicant will suffer substantial loss if stay is declined. She has not demonstrated in evidence that if the decree is executed and later her appeal succeeds the claimant will not be able to repay her the decreed sum without undue delay. Substantial loss in my view does not refer to the magnitude of the loss but sufficiency of the value. That burden of proof lies with the applicant and her counsel cannot discharge it by the submissions from the bar. Consequently, the application fails on this ground alone. The reason for the foregoing view is that the prompt filing and offer of security are irrelevant if the applicant fails to prove substantial loss.

Inordinate delay

12. The impugned judgment was entered on 25.9.2015 and the application was heard on 23.10.2015, one

month after the judgment. In my view, that cannot be described as an inordinate delay considering all the circumstances of this case.

Offer of security

13. There is no doubt that the claimant has offered to abide by any terms of the stay order that the court may impose. This however is not a guarantee to getting the stay order.

Disposition

14. For the reasons stated above that the applicant has not proved substantial loss, the Notice of Motion dated 16.10.2015 is dismissed with costs.

Signed, dated and delivered this 7th October 2016.

ONESMUS MAKAU

JUDGE