



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1325 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 5th October, 2016)

CATHERINE WAMBUI KARUNO.....CLAIMANT

VERSUS

TROCAIRE.....RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application under Section 12(3)(1) of the Employment and Labour Relations Act and all other enabling provisions of law, dated 8th August 2016 where the Respondent Applicant seeks orders:

- 1. That this Honourable Court be pleased to certify this application as urgent and the same be heard during this Honourable Courts Vacation.***
- 2. That this Honourable Court be pleased to stay further proceedings including the taxation of the Claimants' bill of Costs pending the hearing and determination of this application.***
- 3. That this Honourable Court be pleased to order stay of execution of the decree resulting from judgment delivered on the 6th of July 2016 pending the hearing and determination of the intended appeal.***
- 4. That costs of this application be provided for.***

2. The application is based on the following grounds:

- a) By judgment delivered on the 6th of July 2016 this Honourable Court awarded the Respondent a sum of Kshs. 3,896,711.00 on account of unfair and unlawful redundancy.***
- b) Being aggrieved by the said award, the Applicant intends to appeal and has filed a Notice of Appeal against the said judgment.***
- c) Following the orders in the judgment, the Respondent has moved this court by filing a party to party Bill of Costs dated 20th July 2016 which is coming up for taxation on 15th August 2016.***
- d) As the Applicant will be challenging the entire award including the award/quantum of costs, it***

is imperative that further proceedings be stayed while the appeal is pending.

e) The Applicant is apprehensive that if the application herein is not heard forthwith, and an interim stay is granted, the respondent will commence steps to execute the decree and defeat the application herein.

f) The Applicant has a good appeal with overwhelming chances of success which raise arguable point that should be canvassed and determined by the Court of Appeal. The Applicant proposes to raise the following grounds among others as appearing in the draft Memorandum of Appeal:

(i) The Honourable Court erred in law and in fact in finding that an estoppel arose from the discussion between the parties prior to the lapse of the contract which were not intended to bind the parties as the same did not give rise to a further/new contract.

(ii) The Honourable Court erred in law and in fact by inferring a redundancy in the circumstance of this case notwithstanding the fact that the Respondent had a fixed contract that came to an end.

(iii) The honourable Court erred in law and in fact by awarding the Respondent compensation for unlawful redundancy in a clear case where the Respondent's contract automatically terminated by effluxion of time and as such no issue of redundancy arose.

(iv) The Honourable Court erred in law and in fact in awarding the Respondent the maximum award of twelve (12) months' salary compensation without justification for exercise of the discretion when all facts considered, the termination was fair test as it was on the basis of the terms of contract.

(v) The Honourable Court erred law in arriving at conclusions detrimental to the Applicant without the benefit of credible evidence.

g) Unless the orders sought herein are granted, the Respondent will proceed to execute the decree resulting from the judgment delivered on the 6th July 2016 and thereby jeopardize the Applicants' Appeal and render nugatory.

h) That at the trial, the Respondent testified that she is currently unemployed. Unless the orders sought herein granted, and the decretal sum is paid to the Respondent, the Applicant is likely to suffer substantial loss as the Respondent may be incapable of reimbursing the same to the Applicant in the event the appeal succeeds.

i) The Applicant is prepared to deposit in a joint interest earning account the amount ordered to secure the Respondent's interest in any event.

j) The Applicant stands to suffer irreparably if the execution of the decree/order arising from the judgment delivered on the 6th of July 2016 is not stayed and if further proceedings are not stayed.

k) The application has been brought without any delay.

l) No prejudice will be occasioned to the Respondent in the event this Application allowed.

m) It is in the wider interest of justice that the application be allowed as prayed.

3. The Claimant/Respondent has filed a Replying Affidavit dated 19th August 2016 where they aver that the application before the Court is unmerited, frivolous, and not deserving of the exercise of the Courts' discretion. That the Respondent has not shown their compliance with the conditions necessary for grant of the orders of stay of execution and as such do not deserve the same.

4. That they had approached the Claimant's Advocates to agree on terms which they would be granted orders of stay of execution pending appeal, and the proposal the Claimant gave that she be paid of 50% decretal sum together with the costs of the suit and the balance being 50% be deposited in a joint interest earning account operated by both counsel is yet to receive a response.

5. They aver that the Respondent is a foreign non-governmental organization with its head office in the United Kingdom and there is no guarantee that they will be still be in operation in Kenya by the time the appeal is heard.

6. They further state that justice in this matter favours the payment of the decretal sum rather than ordering the stay of execution.

7. The parties made oral submissions in Court.

8. The Applicants relied on their pleadings and stated that they will suffer substantial loss. They reiterate that there is no other known source of income for the Claimant/Respondent, and if the appeal succeeds she may not be able to reimburse.

9. They are willing to deposit the entire sum in an interest earning account and oppose the Claimant's suggestion of depositing 50% with her and the other 50% in an interest earning account as she may not be able to refund it. The Applicant is an agent of the Catholic Church present in over 20 Countries and will not be likely to flee.

10. The Claimant/Respondent states that there is a valid judgment and the Claimant should not be denied the fruits of such judgment unless there is good cause. They state that the Applicants have not demonstrated that the Claimant would be unable to pay the money should the appeal succeed. They rely on Civil Application No. 201 of 2013, at paragraph 27 to 30.

11. In response the Applicant stated that to distinguish the cases cited, it is noted that it is the obligation of the Claimant/Respondent to prove the ability to pay and the Applicant who has done so.

12. The provisions of the law for grant of orders of stay pending appeal is found in Order 42 rule 6(2) of Civil Procedure Rules which state as follows:

"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".

13. The Applicant filed this application on 8.8.2016 after judgment delivered on 6.7.2016. I may say this was with some delay as this was one month after judgment was delivered. I will however not consider the delay inordinate in the circumstances.

14. On the issue of substantial loss the Applicant and Respondent all submit substantial loss with Applicant stating that the Respondent is a foreigner and the Respondent also stating that the Applicant is also a foreign company.

15. In order to balance the interest of both parties, and so that no party suffers unduly, I will allow stay but on condition that ½ the decretal sum is released to the Claimant and the other half deposited in an interest earning account held in the joint names of Counsels on record within 30 days from today. In default execution to issue.

16. Costs in the cause.

Read in open Court this 5th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA
JUDGE

In the presence of:

Juma for Claimant – Present

Otieno holding brief for Munyu for Respondent – Present