



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.464 OF 2012

THOMAS NYANGI MWITA.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

1. By application and Notice of Motion dated 7th November 2016, the respondent, Kenya Commercial Bank Limited, is seeking for orders that;

1. *Spent.*

2. ...

3. *That this court be pleased to issue an order of stay of execution pending the hearing and determination of the Appeal;*

4. *That this court do direct that the said disputed amount that is unpaid be deposited into a joint account as a security pending the hearing and determination of the Appeal*

5. *Costs of this application be in the cuase.*

2. The application is supported by the Annexed Affidavit of Grace Kanyiri and on the grounds that by judgement of the court on 17th December, 2015 the court directed the Respondent to pay the Claimant for loss of salary; compensation; notice pay; and costs of the suit. The Respondent being aggrieved filed Notice of Appeal and applied for typed proceedings so as to file a record of appeal. This position was communicated to the Claimant so as to stop execution and seek agreement to have the disputed amounts deposited into a joint account which was agreed but the Claimant has since moved with execution.

3. That the amounts involved are colossal at kshs.9, 597,708.00 and if paid to the claimant, he has no means to refund the same upon a successful appeal by the respondent. That the undisputed amounts have since been paid to the Claimant at Kshs.3, 999,060.00 as a show of good faith.

4. The Respondent is willing to put the disputed amounts into a joint account pending the hearing and determination of the appeal. Such will secure these funds and be available based on the outcome of the appeal.

5. In reply, the Claimant filed Replying Affidavit on 16th November 2016 and avers that upon delivery of judgement herein on 17th December, 2015 the Respondent has made partial payment. On the balance due,

the Respondent failed to have the funds deposited in a joint interest earning account within the agreed time which is over 5 months and the security being given is not adequate.

6. The application is filed with delay to deny the clamant the fruits of his judgement. There will be no prejudice suffered by the Respondent as had the funds been secured as offered, this would not have arisen.

7. No appeal has been lodged and despite efforts to have the due monies paid have not been honoured. The application is therefore made late and not in good faith.

8. Both parties made their oral submissions in court.

Determination

9. The substantive orders sought in the application by the Respondent is that?

That this court be pleased to issue an order of stay of execution pending the hearing and determination of the Appeal.

10. The orders sought to be stayed relate to judgment delivered on 17th December, 2015. The application was filed on 8th November 2016, a month short of a year since the judgement was delivered.

11. The stay sought is also premised on an Appeal that has been filed. I find no such evidence of any appeal on record or a draft memoranda to that effect. Is this by error or deliberate? As noted above, it has been 11 months since the judgement was delivered herein. Where the Notice of Appeal has been filed, that is with this court and not any other court. A Notice of Appeal is not *the Appeal* to the Court of Appeal as this only serves as an intention. Where such an intention is not put into action by filing the Appeal to the appropriate court, such intention remains as such. Such cannot be used to hold the other party back as there is no good cause to do so.

12. Where the Respondent was keen to secure the right to appeal or in any manner and to avoid execution, such right should have been immediately secured by an order of the court. To engage the Claimant outside the court process left the Respondent exposed.

13. The Claimant should not be denied the fruits of his judgement where the Respondent has taken no action save to file Notice of Motion and seek for written proceedings. There is a valid judgement of the court and nothing stops the Claimant from proceeding with execution of the judgement herein. As held in **Peter Kamwi versus Standard Group Limited, Cause No.176 of 2015**, the indigence of a party is not a sufficient ground to deny a party execution of a legitimate order of the court. To do so would be to cause serious injustice and further ensconce the rationale over which the order was granted.

14. I however find the claimant's Counsel has in submissions been noble and offered to have the subject funds deposited in a joint account in a bank other than the Respondent bank. Such I find to be a reasonable offer even where I would not have made such a provision noting the above analysis.

15. A conditional stay shall therefore be allowed.

16. As the delay and application herein is caused by the respondent, auctioneer costs shall be paid by the Respondent with the grant of the stay.

Stay of execution is hereby granted subject to the following Orders and directions;

(a) The Respondent shall within the next 14 calendar days cause to be deposited in an interest earning account held in the joint names of the advocates for the parties all the due amounts with interest to this day;

- (b) The account shall be held in a bank other than the Respondent;**
- (c) Where there is no Appeal filed within the next 45 calendar days, the order**
 - (a) shall lapse and amounts deposited become available to the Claimant;**
- (d) Auctioneer costs of kshs.776,956.00 shall be paid by the respondent;**
- (e) No costs.**

Orders accordingly.

Read in open court at Nairobi this 19th December, 2016

M. MBARU

JUDGE

In the presence of:

.....

.....