



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 336 OF 2013

CATHERINE MONTHE NZILA.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion dated 23rd December, 2014, the applicant seeks an order of stay of execution pending appeal.
2. When the motion came for argument inter partes before me on 19th January, 2015 Mr. Ouma for the applicant informed me that the application has interim orders and all he needed was their confirmation pending appeal.
3. Mr. Ouma contended that the respondent has already filed a Notice of Appeal yet the applicant is pursuing the execution of the judgment. This was evidenced by the fact that the counsel for the applicant had demanded payment of the decretal sum and further that he had written to the applicant seeking the reinstatement of the respondent. Mr. Ouma submitted that the applicant had justifiable reason for dismissing the claimant and that if the sums ordered were paid to the respondent it would amount to unjust enrichment. According to Mr. Ouma the claimant was not in employment and the sum ordered to be paid by the Court was about Kshs.3.7 million hence there would be challenge in recovery if the appeal was successful. In support of the application counsel relied on the case of **Reliance Bank Ltd v. Nolake Investments.**
4. Mr. Kubai opposed the application stating that chances of success was not a ground for stay. It was his submission that section 7 (2) of the Industrial Court Act provided that right of appeal was only on a point of law and the intended appeal was full of facts. There was no finding that the applicant was justified in dismissing the respondent.
5. According to Mr. Kubai the Court adequately considered the issue of reinstatement. He complained that the respondent would be out of employment as long as the Appeal was pending and the respondent was more likely to face hardship than the applicant.
6. Order 42 rule 6 of the Civil Procedure Rules provides in paraphrase that:-

(a) 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.

7. In the case of **David Wanjau Muhoro v. Ol Pajeta Ranching Limited cause No. 1813 of 2011** this Court observed as follows:-

“whereas the rules do not define substantial loss, it would seem that prior to granting stay, the Court has to be satisfied that substantial loss may result and the applicant for stay has furnished suitable security... in other words a stay order will not be made merely because the applicant has demonstrated that substantial loss will result ...the use of conjunctive “and” after the word delay yields the foregoing interpretation making the issue of security a conditional element prior to grant of stay of execution. What this means is that the issue of arguability of an appeal or its being rendered nugatory are considerations for the Court of Appeal and not this Court.

8. Whilst it is a matter of local notoriety that the applicant is a reputable commercial bank presumably with vast assets and very capable of settling the decretal sum if the appeal does not succeed, the rules of the Court and Civil Procedure just like other provisions of the statute and law generally ought to apply equally to all. It would be discriminating to assume that just because one applicant has the capacity to meet the decretal sum if the appeal becomes unsuccessful the rules of procedure should be waived in that respect without an express provision in that regard. To this extent alone this application is incompetent; however there is also the issue of an unsuccessful party making an application to the Judge who decided against such party to stay his own order. An application for stay or review of the trial Judge’s order closely borders on asking such Judge to reconsider his own decision and reach a different view then cast doubt on his original decision and say may be I was wrong so I should review or stay my decision pending Appeal.

9. The power of review can be understandable since it is not uncommon that new facts or documents which reasonably were not within the possession or knowledge of a party after exercising due diligence, can be found after determination by a Court of law, besides the law may change leading to a Judge deciding a matter per incuriam.

10. However it becomes uncomfortable to ask a Judge to hold his her decision simply because a Court of a higher hierarchy might reach a different finding. It is my humble view that a time has come when save for the power of review, the Rules Committee should make the power to stay an order or judgment of a trial Court a preserve of the appellate Court.

11. My sentiments expressed above find refuge in the words of Kuloba J as he then was in the case of **East Africa Breweries Limited v. Castle Brewing Kenya Limited HCCC NO. 848 of 1998**. The learned Judge observed:-

“with regard to the viability, prospects and chances or otherwise, of the appeal succeeding, it is really not for a trial Court, or the court appealed from to reconsider its own decision to find out whether it was probably wrong, and to assess the chances of the appeal against the decision succeeding. It is invidious, if not odious, for a judge of the Court from which an appeal emanates, whether he is the one who rendered the decision to be challenged on appeal, or some other judge of the same jurisdictional hierarchy, after a decision in his Court, to embark upon a reconsideration of the merits and demerits of the same case or application so as to change his mind and reach a different position and hold that he realizes that with hindsight, the decision rendered by his Court was wrong or doubtful and that there are reasonable or high prospects of the appeal succeeding.”

12. I heard both the Claimant and the respondent in this suit. I reviewed and analysed evidence and vis-à-vis the law as well as the facts of the case and rendered myself the way I did. I may not have been

perfect but in my own opinion the decision I arrived at is where the scales of justice led me. In the circumstances, I see no reason to stay my decision and leave it to the appellate Court to do so if it deems it fit in the circumstances.

13, This application therefore stands dismissed with costs.

14. It is so ordered.

Dated at Nairobi this 20th day of February 2015

Abuodha J. N.

Judge

Delivered this 20th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge