

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 13 OF 2012

JOHN OTIENO

PONTUS KATAMACLAIMANTS

VERSUS

ERICA KULUMBA T/A RISE & SHINE ACADEMY.....RESPONDENT

R U L I N G

INTRODUCTION

1. The defendant herein (applicant) has filed the Notice of Motion dated 8/10/2014 under a certificate of urgency. The Motion is supported by the affidavit sworn by Erica Kulumba on 8/10/2014. The Motion seeks for an order of stay pending hearing and determination of an application for review of the judgment delivered on 24/9/2013 and consequential orders thereto. The gist of the Motion is that the applicant has filed an application for review of the said judgment delivered on 24/9/2013 and annexed a copy of the review application as exhibit App1. In her view the application for review has high chances of success and the application was not made after inordinate delay and as such the stay order sought should issue.

2. The Motion has been opposed by the claimant vide the replying affidavit sworn on 15/10/2014. The gist of the grounds of opposition is that the application is fatally defective, has been brought after inordinate delay and lacks merit and the application has no chances of success.

3. On 9/10/2014 when Motion was first mentioned under the certificate of urgency and the applicant was given a conditional stay of execution in which she was directed to deposit the whole decretal sum in court within 4 days and the application was fixed for interpartes hearing on 22/10/2014. When the case was mentioned on 22/10/2014, the parties were directed to file written submission to dispose of the Motion and mention the matter on 7/11/2014. However, when the matter was mentioned on 7/11/2014 the parties recorded a consent order for the release of ksh.220,666 to the claimant out of the money deposited in court as a condition for stay order.

ANALYSIS AND DETERMINATION

4. After considering the Motion and the submissions filed, there is no dispute that this court entered judgment in favour of the claimants on 20/9/2013 which was never challenged by any appeal. There is also no dispute that costs of the suit were taxed by the Deputy Registrar of this court on 19/9/2014 and no appeal was preferred against the said taxation. There is also no dispute that the applicant never sought any stay or review of the judgment until execution was done one year after the entry of the judgment. The issue for determination is whether the application has merits.

5. The court has carefully considered the submissions by the applicant as well as the claimant and formed the opinion that the Motion is bereft of merits. The reasons for the foregoing finding is that there is no basis for the stay order to issue because there is no competent application for review on record. In this courts view, application for review is provided for under rule 32 of the Industrial Court Procedure Rules. The application is supposed to be in form 6 of the First Schedule accompanied by a memorandum. In the alternative, the application can be brought by way of Notice of Motion supported by the affidavit under

Order 45 of the Civil Procedure Rules which is the procedure for application for review in the superior courts of law. None of the foregoing alternative procedures were adopted. Consequently the Motion must fail for lack of merits. Even if the annexed copy of the application marked App1 was to be treated as a competent application for review, which is not the case herein, the same would still fail for being short of identifying and proving the ground upon which the review is sought. In addition a delay of one year before making such application is inordinate and Motion must fail.

DISPOSITION

For the reasons stated above, the Notice of Motion dated 8/10/2014 is dismissed with costs.

Dated, signed and delivered this 6th February 2015

O. N. Makau

Judge