



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA

AT MOMBASA

CAUSE 199 OF 2013

KENNEDY O. OKINYI CLAIMANT

VERSUS

GRAIN BULK HANDLERS LTD..... RESPONDENT

RULING

Introduction

1. The Notice of Motion before the court is dated 13.1.2015 and it is brought by the respondent in the main suit, hereinafter called the “applicant”. The motion basically seeks stay of execution of this court’s judgment/ decree entered on 5.12.2014, pending appeal before the Court of Appeal. The motion is supported by the Affidavits sworn by Joseph Mwella on 13.1.2015 and 11.2.2015. The motion is however opposed by the claimant vide his Replying affidavit sworn on 29.1.2015.

Background

2. On 5.12.2014, this court entered judgment in favour of the claimant declaring his dismissal from employment unfair and unjustified and awarding him Kshs.1,170,000, plus costs and interests. The applicant being aggrieved by the said judgment filed a Notice Appeal on 11.12.2014 and served the claimant’s counsel by registered mail on 16.12.2014. The Deputy Registrar of this court issued a decree on 24.12.2014 but costs are yet to be taxed. When the motion was brought under Certificate of Urgency and the Vacation Rules on 13.1.2015, the court granted a conditional stay order pending *inter partes* hearing of the motion. The condition for the interim stay order was complied with by the depositing of the whole Decretal sum in court by the applicant. When the motion came up for hearing the parties agreed to dispose it off by filing written submissions.

Applicant’s case

3. The motion is founded on Rule 31(2) of the Industrial Court (procedure) Rules (ICPRs), order 42 rule 6, order 51 rule 1 of the civil Procedure Rules (CPRs). Rule 31(2) of the ICPRs basically applies the CPRs to this court after entry of judgment. On the other hand Order 42 rule 6 of the CPRs restricts the trial court from granting stay of execution of its judgment except where it is satisfied that: (a) substantial loss may result to the applicant if stay is denied; (b) the application has been made without unreasonable delay; and (c) the applicant furnishes security.

4. The applicant has contended that her application was made without inordinate delay after the judgment. According to her filing the motion in approximately one month after judgment cannot be said to have been after an unreasonable delay. As regards security, the applicant has submitted that she has already deposited entire decretal sum in court which can continue operating as security pending the determination of the appeal. Lastly the applicant contended that unless stay is ordered she stands to suffer substantial loss because the claimant has no gainful employment which makes recovery of decretal sum nigh impossible should the appeal succeed. According to her, the foregoing position has been corroborated by the fact the claimant has failed to file an affidavit of means to prove the sources of income and capacity to pay back the decretal sum should the appeal succeed.

Claimant's reply

5. The claimant has submitted that the applicant's motion lacks merits and prayed that the same be dismissed with costs. He has contended that he is capable of repaying the judgment debt should the appeal succeed and submitted that the burden of proving his inability to repay lies on the applicant as per the Court of Appeal decision in *Nai. C.A No. 344 of 1999 Caneland Ltd and Others vs Delphis Bank Ltd*. According to the claimant the unsubstantiated allegation that he is incapable of refunding the debt is only a presumption.

6. On the other hand, the claimant has contended that the applicant has not proved that her appeal has good chances of success and as such he has submitted that the application before the court is only a delaying tactic. He has therefore prayed that the judgment debt deposited in court as a condition for the interim stay order be released to him.

Analysis and determination

7. After careful consideration of the Application, affidavits and submissions, it is clear that the applicant has preferred an appeal against the judgment of this court delivered on 5.12.2014. The proof of the said appeal is the Notice of Appeal filed on 11.12.2014. The issue for determination herein is whether the application has met the threshold for the grant of stay of execution by the trial court pending appeal.

Threshold for grant of stay pending appeal

8. As correctly submitted by the applicant, Order 42 rule 6 of the CPRs restricts this court from granting stay of execution of its judgment pending appeal except when it is satisfied that: (a) substantial loss may result to the applicant if stay is denied; (b) the application has been made without unreasonable delay; and (c) the applicant furnishes security. Of the foregoing three criteria, only substantive loss has attracted a contest between the parties herein. The court there finds and holds that the application has satisfied the uncontested two criteria. The court therefore finds that it is not inordinate delay to file the application for stay pending appeal one month after the impugned judgment and especially where there is no immediate danger of any execution. Likewise the court is satisfied that a deposit of the entire decretal sum in court by the applicant as security is good enough to protect the decree holder should the appeal fail. In this case the entire judgment debt of KShs.1, 170,000 has already been deposited in court pending this ruling and the applicant is desirous to have the same continue being held as security pending the determination of the appeal.

9. The court however is not satisfied with the applicant's contention that the claimant will not be able to repay the judgment debt should the appeal succeed because he is not in any gainful employment and the fact that he has not sworn any affidavit of means to prove his sources of income. In other words, the applicant seems to shift the burden of proof to the claimant to prove his ability to repay the judgment debt should the appeal succeed. Respectfully, the court disagrees with the applicant on that wrong submission and echoes the Court of Appeal decision in the *Caneland ltd case, supra*, that the onus of proving that the decree holder's inability to repay the judgment debt should the appeal succeed lies on the applicant. In addition, lack of a gainful employment does not *per se* mean that he is incapable of repaying the decretal sum should the appeal succeed. Consequently the court is not satisfied that the applicant will suffer substantial loss if stay is not granted and that her appeal will be rendered nugatory if it succeeds.

On that basis therefore, the court finds and holds that the applicant's motion has not met the threshold for granting stay of execution pending appeal as set out by Order 42 rule 6 of the CPRs and it is dismissed.

10. Although not within its mandate at this level, the court has considered whether or not there is any appeal on record. There is no doubt that a Notice of Appeal on record is the evidence of appeal for purposes of granting stay of execution. However such notice of appeal may lapse if the rules of the Appellate court are not strictly adhered to. For example service of the notice of appeal and the Written Request for the typed proceedings and judgment are crucial in determining whether or not time for filing the record of appeal has stopped running. In this case there is no evidence on record that the appellant filed a written request for typed proceedings and judgment and served the same on the claimant within the time prescribed by the said rule of procedure for the Court of Appeal. The foregoing observation points to the possibility that the Notice of Appeal has since lapsed but as indicated above that is a duty for another court.

Disposition

For the reasons stated above, the applicants motion dated 13.1.2015 is dismissed with costs.

Signed, dated and delivered at Mombasa on 27th day of April 2015.

ONESMUS N.MAKAU

JUDGE