



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 401 OF 2013

DAVID WANYONYI.....CLAIMANT

v

ATTORNEY GENERAL.....1st RESPONDENT

CHIEF OF DEFENCES FORCES..... 2nd RESPONDENT

ARMY COMMANDER KENYA ARMY..... 3rd RESPONDENT

RULING

1. Ongaya J delivered judgment on 17 October 2014 and he entered judgment for the Claimant against the Respondents for

a) *The respondents to pay the claimant for the 17 days worked and not paid for.*

b) *The respondents to re-engage the claimant in the service of the Kenya Defence Forces at the rank of Sergeant and the due prevailing pay and other benefits and to assign the claimant duties with effect from 1.11.2014; and the period between the date of dismissal 17.05.2013 to the date of re-engagement 1.11.2014 be treated as leave without pay for the purpose of pension so that there shall be no break in the claimant's service.*

c) *in alternative to (b) above, the claimant is retired from the service of the Kenya Defence Forces with effect from the date of the dismissal with full pension benefits payable by 1.12.2014 in default interest at court rates to be payable thereon from 17.05.2013 till full payment.*

d) *The respondent to pay costs of the suit.*

2. A decree was issued on 11 November 2014.

3. The decree was not complied with and on 3 December 2014, the Claimant filed a motion under urgency seeking that

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2. *THAT this Honourable court be pleased to summon to court the Chief Legal Officer of the Kenya Defence Forces to show cause as to why the Respondents have failed to comply with the decree dated 17th October 2014.*

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4. The motion was certified urgent on the same day and the Court directed that it be served for *inter partes* hearing on 19 January 2015. It could not proceed on 19 January 2015 because the Respondents sought for more time to respond. Hearing of the motion was thus adjourned to 10 February 2015.
5. On 10 February 2015, the parties informed the Court that they were negotiating and the Court stood over the motion generally.
6. On 24 February 2015, the Respondents filed a motion under urgency seeking

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2. THAT this Honourable Court do order a stay of execution of the Judgment and Order made by the Honourable Justice Byram Ongaya on 17th October 2014 pending the *inter partes* hearing of this Application.

3. THAT this Honourable Court do order a stay of execution of the Judgment and Order made by the Honourable Justice Byram Ongaya on 17th October 2014 pending the hearing and determination of the Respondent/Applicants' Appeal.

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7. The Court certified this latter motion urgent and directed that it be served for *inter partes* hearing on 27 February 2015. The Claimant filed a replying affidavit to the motion on 26 February 2015 and the motion was heard as scheduled.
8. The substantive prayer begging for determination is prayer 3 of the motion seeking stay of execution pending hearing and determination of the Respondents' appeal in the Court of Appeal.
9. The legal principles applicable in applications such as this one are now legion.
10. Among the several grounds set out by the Respondent on the face of the motion, the ones which are relevant and material are, that, the Claimant would not be in a position to refund the decretal sum if paid directly to him, and that the application has been made timeously.
11. The supporting affidavit of Mr. Kiprotich Kirui also deposes that the Respondents stand to suffer irreparable loss if a stay of execution is not granted.
12. In submissions in support of the motion, Mr. Kirui submitted that a Notice of Appeal was filed on 6 November 2014 and that the Claimant would suffer no prejudice if a stay order were granted.
13. Mr. Simiyu took the Claimant's case in opposing the motion. He relied on the Claimant's replying affidavit. The Claimant deposed that it had taken the Respondents 4 months to seek stay and Mr. Simiyu submitted the same was not timeous.
14. It was further deposed that there was no appeal which had been preferred against the judgment and that in any case the Respondents had not offered any security.
15. In a brief rejoinder, Mr. Kirui submitted that the Government was exempted from furnishing security in cases like the instant one by virtue of Order 42 rule 8 of the Civil Procedure Rules.

Evaluation

16. It is correct as submitted by Mr. Kirui that the government is exempted from the requirement to furnish security where a stay of execution pending appeal is sought.
17. But the furnishing of security is only one of the conditions to be met for a stay order pending appeal to be granted. The Respondent must still satisfy the other conditions by demonstrating that it will suffer substantial loss and that an application is made without unreasonable delay.
18. The main order made by Ongaya J was the re-engagement of the Claimant in the service of the Kenya Defence Forces. The alternative order was retirement from the Kenya Defence Forces with full pension.
19. The Respondents have not demonstrated or satisfied the Court that re-engagement of the Claimant

would cause them any substantial loss or any loss. Equally the Respondents have not shown the substantial loss they would suffer were the alternative order to retire the Claimant with full pension be complied with.

20. In my view, the Respondents have failed to satisfy one of the two conditions it ought to satisfy to get a stay of execution at this forum or level of the judicial hierarchy.
21. Whether the Respondents have an arguable or an appeal with huge chances of success are not factors this Court ought to consider. Those factors would be applicable in application for stay of execution at the Court of Appeal.
22. On the filing of the application for stay of execution, the Court is of the view that the delay was not so unreasonable in the circumstances of this instant case.

Conclusion and Orders

23. From the foregoing, the Court finds and holds that the motion filed in Court on 24 February 2014 is unmerited and the Court dismisses it with no order as to costs.

Delivered, dated and signed in Nakuru on this 17th day of April 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Simiyu instructed by Simiyu & Co. Advocates

For Respondents Mr. Kirui, Litigation Counsel, Office of the Attorney General

Nixon Court Assistant