



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. 1844 OF 2011

REBECCA NDUTA NGURE.....CLAIMANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED..... RESPONDENT

Mr Kingara for Applicants/Respondent

Mr Waiganjo for the Claimant/Respondent

RULING

1. The Respondent/Applicant seeks stay of execution of the judgment of the Court delivered on 2nd October, 2014 and all consequential orders pending the hearing and determination of intended appeal.
2. The application is opposed by the Replying affidavit of the Claimant/Respondent sworn on 18th February, 2015.

Facts of the Case

3. The suit was filed in the year 2011 upon lifting of a *moratorium* issued by the High Court on all proceedings against the Applicant/Respondent until 2010. This suit had therefore to await the lifting of the moratorium.
4. The Claimant/Respondent was awarded terminal benefits which include, unpaid salary in the sum of Kshs 450,000 payment in lieu of leave in the sum of Kshs 279,552; unremitted pension deductions in the sum of Kshs 322,808 unpaid airtime allowance in the sum of Kshs 220,000, unpaid mileage allowance in the sum of Kshs 1,858,000, Sacco contributions in the sum of Kshs 34,000, unreimbursed medical expenses in the sum of Kshs 99,000, and compensation of Kshs 900,000.
5. It is common cause that the cause of action arose as a result of inability by the Applicant/Respondent to pay remuneration due to reasons of insolvency and being placed under statutory management.
6. The court specifically found that the Claimant/Applicant was simply told to go home and await the situation of the Respondent/Applicant to improve and that she will be recalled when that happened. That, this did not happen hence the suit.
7. The Claimant/Respondent has waited for many years since February, 2008 to get her terminal dues.

8. Issues for determination

- (i) Has the Applicant demonstrated that it has an arguable appeal?
 - (ii) Has the Applicant shown that the intended appeal will be rendered nugatory if the stay of execution of the judgment of this court is not granted.
 - (iii) Has the Application been brought without undue delay.
 - (iv) Where does the balance of convenience lie in this matter?
9. The Notice of Appeal was filed on 15th April, 2013 shortly after the judgment of the court was delivered on 10th April, 2013.
 10. This Application is dated 10th December, 2014 but was filed on 3rd February, 2015.
 11. it is important to note that this was a test suit and its outcome is applicable to the extent the findings of fact and law are similar to forty two (42) other suits listed on the face of the Notice of Motion.
 12. The Application therefore does not only seek to stay the judgment of the court in respect of this suit, but also the stay of execution and any further proceedings to apply to all the forty two (42) cases pending hearing and determination.
 13. These suits were filed between 2011 and 2012 upon lifting of the moratorium by this High court in 2010.
 14. The main objection to the judgment of the court as set out by the Applicant is that;
 - (i) The Learned Judge erred in law when he failed to find that the suit was statute barred pursuant to Section 90 of the Employment Act.
 - (ii) That the Learned Judge erred in law when he failed to find that the respondent was automatically terminated by operation of law following the appointment of statutory manager by the Commissioner of Insurance on February 2008, and therefore could not claim that they were dismissed unfairly.
 15. Without delving on the merits on these key grounds of Appeal which will in due time be canvassed by the Court of Appeal, the court notes that the two issues were raised by the Applicant at the onset by way of a preliminary objection filed on 20th April, 2012.
 17. The preliminary objections raised were considered and dismissed in a written ruling of the court delivered on 10th April, 2013.
 18. A Notice of Appeal was filed against the ruling of the court on 15th April, 2013.
 19. It is now submitted that these will be canvassed in the intended Appeal which was noted more than two years ago.
 20. A further Notice of Appeal was filed on 7th October, 2014 against the judgment of the court delivered on 2nd October 2014.
 21. The Notice of Appeal is not attached to this Application.
 22. The Application does not raise new grounds of Appeal arising from the judgment of this court and reiterates the grounds of Appeal raised against the ruling of the court delivered on 15th April, 2013.
 23. It is the court's findings that the Appeal noted on 10th April, 2013 is arguable on the two grounds of

Appeal appearing on the face of the Application.

24. There is no indication from the Applicant what steps have been taken to prosecute the Appeal more than two years later. It is the court's considered view that the Appeal has not been prosecuted expeditiously.

25. It is also the court's finding that no new grounds have been raised against the final judgment.

26. In her replying affidavit, the Claimant Rebecca Nduta Ngunde deposes that this Application was filed on 3rd February, 2015, three months after the delivery of the judgment.

27. The Applicant has not demonstrated what loss they stand to incur if they pay the decretal amount since they are a large profit making company.

28. That substantial portion of the award comprises of unpaid salary and allowances duly earned by the Claimant for work done and was unpaid for no fault of her own but due to the insolvency of the Applicant.

29. That the balance of convenience is in favour of allowing the Claimant to enjoy the fruits of the judgment while the Applicant prosecutes the Appeal, especially because no steps have been taken to prosecute the same more than two (2) years down the line.

30. The Applicant has offered to deposit 30% of the decretal amount in court pending the hearing and determination of the Appeal.

31. The court notes that the Claimant/Respondent has waited for a long time to get her remuneration for work done for no cause of her own making. She was not dismissed from employment. She offered here Labour for many months even when the Applicant was unable to pay her wages. When the applicant became financially viable, it has since recalled many of ex-employees and as per oral submissions by counsel for the Applicant settled many claims presented by its ex-employees in similar circumstances as the claimant.

32. To this end the court finds that it is equitable and in the interest of justice for the Respondent to:

- (i) Pay 50% of the decretal amount to the Claimant/Respondent forthwith;
- (ii) Deposit with the court 50% of the decretal sum pending the hearing and determination of the Appeal.

33. Accordingly, the court orders:

- (i) The Respondent to pay the Claimant 50% of the decretal sum within 30 days from the date of this ruling; and
- (ii) Deposit the remaining 50% with the court within 30 days pending the hearing and determination of the intended Appeal.
- (iii) Court makes no orders in regard to the 42 pending cases and same to take their normal course.

34. In the event orders (i) and (ii) above are not complied with, execution of the judgment and all consequential orders to follow.

Dated and Delivered at Nairobi this 29th Day of May 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE