



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CIVIL APPEAL NO. 4 OF 2015
(Originally Naivasha High Court Civil Appeal No. 11 of 2015)

VAN DEN BERG (K) LIMITED

APPELLANT

v

CHARLES OSEWE OSODO

RESPONDENT

RULING

1. The Principal Magistrate, Naivasha delivered judgment on 4 February 2015 in Naivasha Principal Magistrates Court Civil Case No. 844 of 2012, *Charles Osewe Osodo v Van Den Berg (K) Ltd*. The Court awarded the Respondent Kshs 1,500,000/- as damages for injuries sustained in the workplace.
2. The Appellant was dissatisfied and it lodged a Memorandum of Appeal before the High Court in Naivasha on 6 February 2015.
3. On 13 April 2015, the Appellant filed a motion under certificate of urgency seeking stay of execution of the decree in Naivasha Principal Magistrates Court Civil Case No. 844 of 2014, pending the hearing of the appeal.
4. When the file was placed before Meoli J on 15 April 2015, she directed that the matter be transferred to this Court because it revolved around an injury in the workplace and it is this Court which has the requisite jurisdiction.
5. For ruling therefore is the motion seeking stay of execution pending appeal.
6. The Respondent filed a replying affidavit to the motion on 20 April 2015 and the motion was taken on 5 May 2015.
7. It is not in dispute that the Principal Magistrate had granted a conditional stay of execution on condition that the Appellant pays Kshs 1,000,000/- to the Respondent and that the balance be deposited into a joint interest earning account.
8. According to the Appellant, the award of Kshs 1,500,000/- was excessive and it stood to suffer irreparable harm and damage if the decretal sum was released to the Respondent.

9. It was submitted that the Respondent would not be in a position to refund the decretal sum were the appeal to succeed.

10. Lastly, the Appellant submitted that it approached this Court not on appeal from the ruling by the Senior Resident Magistrate, but as of right.

11. The Appellant offered that it was ready to have the decretal sum deposited into a joint interest earning account in the name of the party's advocates.

12. The Respondent opposed the motion. The main line of opposition was that the motion was *res judicata* on the basis that the Appellant had made a similar motion before the lower Court on 9 February 2015. The Respondent annexed to his replying affidavit the proceedings before the lower Court.

13. Applications for stay of execution can be made to the Court whose decision is being challenged. But the fact that such an application has been considered by the Court whose decision is appealed from is not a bar to a party seeking stay of execution from the Court appealed to. That is my understanding of Order 42 rule (6)(1) of the Civil Procedure Rules.

14. The question of *res judicata* is therefore unfounded.

15. What the Court should consider are whether the Appellant has demonstrated that it will suffer substantial loss, the application has been made without unreasonable delay and tender of security for the due performance of the decree has been made.

16. I have carefully perused the supporting affidavit sworn by Isaac M. Wamaasa and I have not been able to decipher what substantial loss the Appellant would suffer if stay were not grant.

17. The closest contention is that the Respondent is a man of straw who has not demonstrated that he could refund the decretal sum.

18. The position as urged by the Appellant on this point cannot be correct. It is not a burden placed upon decree holders to prove that they can refund the decretal sum. It is the appellant who alleges that the decree holder is a man of straw to demonstrate that fact.

19. The review of the legal principles applicable to stay of execution applications by the Senior Resident Magistrate after considering the authorities cited to her was sound. The Appellant has failed to demonstrate what substantial loss it would suffer before this Court.

20. The motion was brought in time and the Appellant cannot be faulted.

21. As to the tender of security, the Appellant has made a proposal to have the decretal sum deposited into a joint interest earning account in the name of the Advocates on record.

22. The Senior Resident Magistrate had granted a conditional stay. Considering that the Appellant has failed to prove substantial loss it stands to suffer, the Court would maintain a stay in terms similar to that granted by the lower Court.

Conclusion and Orders

23. From the foregoing, the Court orders that stay of execution in terms similar to that granted on 2 April 2015, to the effect that the Appellant pays to the Respondent the sum of Kshs 1,000,000/- and balance be deposited into a interest earning joint account in the advocates on record names.

24. Costs in the cause.

Delivered, dated and signed in Nakuru on this 12th day of June 2015.

Radido Stephen

Judge

Appearances

For Appellant Mr. Nyamwange instructed by Wamaasa & Co. Advocates

For Respondent Mr. Amboko instructed by Wanga Amboko & Co. Advocates

Court Assistant Janet