



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 808(N) OF 2009

ANNE WAITHERA KIMANI.....CLAIMANT

VS

STEPHEN NDUNGU NJENGA.....RESPONDENT

RULING

Introduction

1. On 5th March 2014, I delivered an award in favour of the Claimant in the sum of Kshs.476,850.00 being house allowance for 187 months. I released the court file back to the Registry on the same day that I delivered the award. From the record, the Respondent filed a notice of appeal on 15th March 2014 and an application for stay of execution of my award more than a year later on 26th May 2015.

Application for Stay of Execution

2. The Respondent's application seeks orders for stay of execution pending appeal. The application which is supported by an affidavit sworn by the Respondent, Stephen Ndungu Njenga, on 29th April 2014 is based on the following grounds:

- a. That the Respondent filed a notice of appeal on 15th March 2014;
- b. That the Respondent has an arguable appeal;
- c. That the Claimant has by letter dated 19th March 2014, informed the Respondent of her intention to institute execution proceedings;
- d. That the Respondent stands to suffer substantial loss if the orders sought are not granted;
- e. That if a stay pending the hearing and determination of the appeal is not granted, the appeal will be rendered nugatory;
- f. That the Respondent is ready and willing to comply with any reasonable conditions as the Court may order.

3. Mr. Nyabena for the Respondent submitted that the application for stay of execution was filed late because after delivery of the award, the court file went missing.

The Claimant's Reply

4. In a replying affidavit sworn by the Claimant, Anne Waitthera Kimani on 16th June 2015, she depones that the Respondent's application is fatally defective on two grounds; first it was served on her Advocates on 7th April 2014 which was past the deadline set in the Court of Appeal Rules. Second, there was

inordinate delay in filing the application for stay of execution.

5. Ms. Amboko for the Claimant submitted that the Respondent had not met the conditions for stay as provided under Order 42 Rule 6(2) of the Civil Procedure Rules. In particular, the Respondent had not shown the substantial loss he would suffer if the application is not granted. In addition, he had not offered any security and the application had been filed after a period of one year and three months following delivery of the award.

6. Counsel further submitted that the Respondent had failed to comply with the time limit provided under Rule 77(1) of the Court of Appeal Rules since the notice of appeal which was filed on 19th March 2014, was served on the Claimant on 7th April 2014.

Ruling by the Court

7. Order 42 Rule 6(2) of the Civil Procedure Rules gives the conditions upon which an order for stay of execution may be granted as follows:

- a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;
- b) That the the application has been made without unreasonable delay;
- c) That the applicant has given adequate security for the due performance of such order as may be binding on him.

8. Under case law, there is the additional condition that the applicant has an arguable appeal which would be rendered nugatory if the order sought is not granted (see *Reliance Bank Limited Vs Noriaka Investments Limited [2002] 1EA 227 (CAK)227 Case No. 937 of 2002*) and *Abel Okoth Okello Vs Kenya Medical Research Institute (Kemri) [2014] eKLR*).

9. It is not in contest that the Respondent's application was filed late. Counsel for the Respondent told the Court that soon after delivery of the award, the court file went missing, hence the delay. When a party pleads delay occasioned by a missing court record, the Court will examine the efforts made by that party towards tracing the record or reconstruction thereof.

10. On 14th March 2014, the Respondent's Advocates wrote to the Deputy Registrar of this Court asking for certified copies of the proceedings together with the award. Then on 24th March 2014, they wrote to the Claimant's Advocates asking for a draft decree. On 13th May 2014, the Respondent's Advocates wrote to the Deputy Registrar again stating that they had been trying to trace the court file for purposes of filing an application for stay of execution since 29th April 2014, but the file was missing at the Registry.

11. The next time the Respondent's Advocates wrote to the Deputy Registrar was on 30th April 2015 when they asked for a certificate of delay. From the foregoing correspondence, it seems to me that the Respondent did not make adequate efforts towards either tracing the court file or pursuing the reconstruction option.

12. Further, the Respondent did not serve the notice of appeal on the Respondent within the required time frame. The Court of Appeal Rules provide definite time lines for processing of appeals from the superior lower courts. Rule 75 of the Rules requires a party wishing to appeal against a decision of a lower superior court to lodge a notice of appeal in that court within fourteen days.

13. Rule 77(1) requires the intended appellant to serve the notice of appeal on all persons directly affected by the appeal within seven days after lodging the notice of appeal. The Respondent filed the notice of appeal on 19th March 2014 which was within the fourteen days window provided under Rule 75 of the Court of Appeal Rules. However, the notice of appeal was served on the Claimant on 7th April 2014,

outside the seven days time limit set under Rule 77(1) and the Respondent did not offer any explanation for this lapse.

14. The importance of the time lines set in the Court of Appeal Rules cannot be gainsaid. A party holding an award in their favour cannot be left waiting indefinitely. An aggrieved party who wishes to appeal must activate the appeal process without delay. In my view, the Respondent failed this test by serving the notice of appeal late and then filing the current application very late in the day.

15. For this reason alone, the Court finds the Respondent's application to be without merit and proceeds to dismiss it with costs to the Claimant. The interim orders granted on 27th May 2015 are hereby vacated.

16. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF JULY 2015

LINNET NDOLO

JUDGE

Appearance:

Ms. Amboko for the Claimant

Mr. Nyabena for the Respondent