



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.63 OF 2014

PERIS NYAMBURA KIMANI CLAIMANT

VERSUS

DELBIT PETROLIUM LIMITED RESPONDENT

RULING

1. The ruling herein relate to two applications dated 27th July 2015 and 6th August 2015. The two shall be addressed together. Both parties agreed to file their written submissions with regard to both applications and also address the issue of pension due to the petitioner.

2. In the application dated 27th July 2015 filed by the respondent, Delbit Petroleum Limited, they seek for orders of stay of execution of the award of the Court and all consequential orders made on 9th July 2015 pending hearing of the application and pending the Respondent filing their intended appeal to the Court of Appeal. the Respondent also seek to be allowed to deposit the decretal amount of Kshs.3,840,000.00 in an interest earning account to be held in the joint names of the advocates on record pending hearing of the intended appeal.

3.The application is supported by the affidavit of Kimeu Kimeu and on the grounds that the Respondent is apprehensive that the petitioner shall execute the judgement of the Court any time whereas they have filed a Notice of Appeal on 15th July 2015. The Respondent has an arguable appeal that challenges the findings of this Court that the Respondent violated the petitioner's right to privacy, confidentiality and dignity and therefore is entitled to a compensation of 3.6 million Kenya shillings. The Respondent is ready and willing to deposit the decretal sum in a joint deposit account to be held by both advocates for the parties.

4. In the affidavit of Kimeu Kimeu, he avers that as the head of Human Resource of the Respondent company they are aggrieved by the award of the Court of 9th July 2015 and intend to file an appeal to the Court of Appeal. The respondents are particularly aggrieved by the finding that there was an infringement of the petitioner's right to privacy, a claim not pleaded in the petition and there was no evidence in this regard.

In reply the petitioner filed the Replying Affidavit on 6th August 2015 and avers that upon judgement of the Court on 9th July 2015, the Court granted stay of 60 days for parties to agree on the pension due to the petitioner and thus the judgement is not complete as the issue of pension due is pending. The issue of stay of the judgement pending appeal cannot thus be addressed at this point. There is no threat of execution as the petitioner cannot proceed in that regard without the question of pension due being addressed. The Respondent has also moved another Court [judge] for stay orders and this cannot be addressed in this regard as the trial was before another Court [judge]. This will clog issues and proceedings and could lead to conflicting decisions.

5. The petitioner also avers that the prayer that the decretal amount be deposited in a joint account should only be determined after the total amounts due have been settled and not as proposed by the respondent.

6. The second application if filed by the petitioner and dated 6th august 2015 seeking for orders that there exists serious need to set aside the orders made on 31st July 2015 as these orders were issued to the Respondent without material disclosure of full facts and or suppression of material facts; pursuant to judgement of 9th July 2015 the Respondent has moved the Court on an application that substantially is for review before another Judge other than the trial judge as the trail judge had directed parties to agree on the pension due to the petitioner within 60 days and thus if the application for stay by the Respondent is heard and determined, it will lead to conflicting orders.

7. In the affidavit in support of the application of the petitioner, Peris Nyambura Kimani it is averred that the judgement of the Court that the Respondent is seeking to stay is incomplete as the question of pension due is not computed and agreed upon as directed in the judgement. That when the Respondent moved the Court in their application dated 27th July 2015 they failed to disclose to the Court of material facts in this matter and thus the directions and orders made are in conflict or will end up in conflicting decisions of the court. Order 3 in the judgement dated 9th July 2015 is of the nature that the parties have 60 days to agree on the pension due and this should have been addressed before the Respondent could move the Court with the substantive order for stay pending appeal.

Submissions

8. The Respondent herein submitted that upon judgement of the Court delivered on 9th July 2015, they are aggrieved by the findings of the Court that the petitioner's right to privacy was violated and then awarded the sum of kshs.3, 840,000.00. The Respondent has thus applied to stay this decision to enable them proceed to the Court of Appeal and have attached a draft memorandum of appeal with an outline of the issues they wish to address. As held in **Collins Osoro Lukhale versus AAA Growers Ltd [2015] eKLR** the Court held that in an application such as this one an applicant must establish substantial loss will occur; there is no delay and that security for due performances of the decree is given. The Respondent has an arguable appeal and if the petitioner is paid the decretal sum she will not be able to refund.

9. The Respondent also submits that the application is submitted without delay since the reading of the Court award and they are willing to deposit the decretal amount in a joint account of the parties herein.

10. The petitioner on their part submit that the onus to prove that the petitioner is unable to repay the judgment award once paid to her and the appeal is successful is upon the Respondent and not on her as the successful litigant. There are no sufficient grounds to grant stay herein as held in **Freight In Time Limited versus Rosebell Wambui Muthee [2014] eKLR**. To satisfy that the application is submitted without delay is not sufficient as the principles governing stay of judgement cannot be separated. The Court must also weigh competing interest of both parties and each case be determined on its own facts. In this case the Respondent has made unsubstantiated claims of bias against the petitioner. There is no good reason for the Court to give the orders sought by the Respondent as this is a money decree and should only be stayed in special circumstances that have not been outlined. The loss to be incurred is not stated and an appeal should not be used to delay the course of justice.

11. The petitioner has relied on the cases of **Titus Otieno Koceyo & Another versus Mathew Ouma Oseko t/a Oseko & Company Advocates [2009] eKLR**; **Peria Wanja & 4 others versus Hannah Njeri Muthumbi [2011] eKLR**; **Kenya national Private Security Workers union versus Kenya kazi Security Services Limited [2013] eKLR**.

Determination

12. The first application by the Respondent is seeking stay of judgement herein pending their filing the intended appeal to the Court of Appeal. In the interim the Court granted interim orders of stay pending hearing of the respondent's application. the second application is by the petitioner and seeking that the

interim orders issued on stay of the judgement be vacated, varies and be set aside as the Respondent obtained such interim orders without disclosing material facts.

13. Indeed as submitted by the petitioner, the judgement of the Court of the Court on 9th July 2015 made orders and directions part of which relate to the Respondent was to compute gratuity and pension within 60 days and the matter to be mentioned in 60 days to confirm compliance. Without such confirmation, the decretal amount cannot be computed by the Respondent at Kshs.3, 600,000.00 and on this basis have the entire judgement put on hold for the Respondent to exercise their right of appeal.

14. Even where the Respondent has such a right to appeal, the petitioner holds a valid judgement of this Court that should not be frustrated in terms of compliance and computation of any legal dues that the petitioner has had confirmed. To offer security as proposed by the Respondent at Kshs.3, 600,000.00 does not cure and or conform to the orders and directions of the Court at paragraph (c) of the Court orders as follows;

Where gratuity and pension are due, I direct the Respondent to ensure that the same is calculated and paid within 60 days from the date hereof. Parties shall take a mention date to confirm compliance.

15. The decretal amount, even where the Respondent is keen to offer the same as security pending an intended appeal, must be computed before the Court can address any application seeking to stay the judgement herein. An intended appeal remains an intention and a Notice of Appeal serves the purpose of an indication of such an intention and the preservation of the right to appeal but in itself is not the Appeal to the Court of Appeal. The requisite process of enforcing a valid judgement of the Court can therefore not be stopped, frustrated or stopped on the mere fact and face of an intended appeal or a Notice of Appeal. To construe such a notice - the Notice of Appeal to be the Appeal and on its basis seek stay would be to go contrary to the principles that guide Court in addressing the subject of stay of execution pending hearing and determination of any Appeal of the orders of the Court to the Court of Appeal.

16. The Respondent has not outlined as to how far they have addressed the direction made at paragraph (c) of the judgement and the orders made therein. It is imperative and in the interests of justice that the judgement be seen in its whole and not just go at the point that the Respondent wish to challenge before any other court.

17. To stay the entire judgement of the Court without the parties following through the directions therein that affect the total decretal amount awarded to the petitioner would be to circumvent the course of justice. This is not the objective of the court.

To avoid conflicting directions herein, in the interests of justice and for good order application for stay pending the respondent's intended appeal and dated 27th July 2015 shall be put in abeyance pending the parties herein addressing orders and directions of the judgement of the Court dated 9th July 2015.

Interim orders made on 31st July 2015 are hereby set aside.

It is so ordered.

Ruling delivered in open court on the 21st September 2015.

M. Mbaru

JUDGE

In the presence of

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