



REPUBLIC OF KENYA

IN THE IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA AT MOMBASA

CAUSE 46 OF 2014

WISELEY PATRICK SIMASI & 8 OTHERS..... CLAIMANT

VERSUS

LAMANTHE HYGIENE FOOD.....RESPONDENT

RULING

Introduction

1. The Notice of Motion before the court is dated 14.5.2015 and it is brought by the respondent in the main suit, hereinafter called the “applicant”. The motion basically seeks for stay of execution of this court’s judgment/ decree entered on 13.2.2015, pending appeal before the Court of Appeal. The motion is supported by the Affidavits sworn by Solomon Muriuki Johnson on 14.5.2015. The motion is however opposed by the claimants vide the Replying affidavit sworn on 29.1.2015 by Mr Hezron Onwang’a on behalf of the claimants.

Background

2. On 13.2.2015, this court entered judgment in favour of the claimants declaring their dismissal from employment unfair and awarding them an aggregate sum of kshs.2, 020,519, plus costs and interests. The applicant was aggrieved by the said judgment and filed a Notice Appeal on 23.2.2015 and served the claimants through their union on the same day. The Deputy Registrar of this court issued a decree on 16.4.2015 but the respondent never requested for certified copy of typed proceedings and judgment. In the meanwhile, on 7.5.2015 the claimants applied for and obtained warrants of attachment of the applicant property in execution of the impugned decree. Costs of the suit are however not yet taxed.

3. On the 11.5.2015 the Deputy registrar of this completed preparing typed proceedings and the applicant obtained certified copy of the same on 12.5.2015. Thereafter the applicant brought the present motion on 3.6.2015 and the court granted stay of execution pending hearing of the motion *inter-partes*. When the motion came up for hearing on 23.6.2015 the parties agreed to dispose it of by filing written submissions.

Applicant’s case

4. The motion is brought under Order 42 of the civil Procedure Rules (CPRs) and section 3A and 95 of the Civil Procedure Act (CPA). The grounds upon which the motion is brought are that the applicant has an arguable appeal; that the appeal will be rendered nugatory if stay is ordered; that the applicant is apprehensive that the claimants may not be able to refund the judgment debt should the appeal succeed after execution because they have not sworn any affidavit to confirm their ability; that the application has been brought without inordinate delay and; that the applicant is willing to comply with any order for

security or costs.

Claimant's reply

5. The claimants have opposed the motion and prayed for the same to be dismissed with costs for lack of merits. According to them the applicant has failed to prove that she has any arguable appeal with probability of success and, or, that she will suffer any substantial loss if stay is not granted. That without filing any draft appeal the applicant has not demonstrated that she has any appeal on points of law as required under section 17(2) Industrial Court Act (ICA) and Article 164(3) of the Constitution. They have contended that the application has been brought after inordinate delay from 13.2.2015 when the judgment was delivered. They relied on ***ELRCC 851 of 2014 Josphat Musumba & another -vs -Yegpro (k) limited.***

Analysis and determination

6. After careful consideration of the Application, affidavits and submissions, it is clear that the applicant has preferred an appeal against the judgment of this court delivered on 13.2.2015. The proof of the said appeal is the Notice of Appeal filed on 23.2.2015. The issue for determination herein is whether the application herein has met the threshold for the grant of stay of execution by the trial court pending appeal.

Threshold for grant of stay pending appeal

7. There is no dispute that, Order 42 rule 6 of the CPRs bars this court from granting stay of execution of its judgment pending appeal except when it is satisfied:

(a) that substantial loss may result to the applicant if stay is denied; (b) that the application has been made without unreasonable delay; and (c) that the applicant is able and willing to furnish security to guarantee payment of the judgment debt in the event the appeal fails. This court is satisfied that the applicant is willing to comply with any conditions for stay which the court may order. The court is also satisfied that the application has not been brought after inordinate delay because it was filed within 3 months after the impugned judgment and before taxation of costs.

8. The court is however not satisfied with the applicant's contention that the claimants will not be able to repay the judgment debt should the appeal succeed because they did swear any affidavit to prove that they will be able to refund the same. The said contention by the applicant is an attempt to shift the burden of proof to the claimant to prove their ability to repay the judgment debt should the appeal succeed. Respectfully, the court disagrees with the applicant on that wrong submission and echoes the Court of Appeal decision in the ***Nai. C.A No. 344 of 1999 Caneland Ltd and Others vs Delphis Bank Ltd***, that the onus of proving the Decree holder's inability to repay the judgment debt should the appeal succeed rests with the applicant.

9. Consequently the court is not satisfied that the applicant will suffer substantial loss if stay is not granted nor will her appeal will be rendered nugatory if it succeeds. On that basis therefore, the court finds and holds that the applicant's motion has not met the threshold for granting stay of execution pending appeal as set out by Order 42 rule 6 of the CPRs and it is dismissed. The foregoing should however not be mistaken to mean that the execution commenced by the claimant is to proceed. The reason for the foregoing view is that the execution is premature for want of leave of the court to execute before the costs of the suit awarded are taxed.

10. As a parting shot the court wishes to echo the observations it made in ***ELRCC No. 199 of 2013 Kennedy O. Okinyi versus Grain Bulk Handlers Ltd*** which involved similar facts, thus:

“Although not within its mandate at this level, the court has considered whether or not there is any appeal on record. There is no doubt that a Notice of Appeal on record is the evidence of appeal for purposes of granting stay of execution. However such notice of appeal lapses if the rules of the

Appellate court are not strictly adhered to. For example service of the notice of appeal and the Written Request for certified copy of typed proceedings and the judgment are crucial in determining whether or not the time for filing the record of appeal has stopped running. In this case there is no evidence on record that the appellant filed a written request for typed proceedings and judgment and served the same on the claimant within the time prescribed by the said rules of procedure for the Court of Appeal. The foregoing observation points to the possibility that the Notice of Appeal has since lapsed but as indicated above that is a duty for another court.”

Disposition

11. For the reasons stated above, the applicants motion dated 14.5.2015 is dismissed with costs. The on-going execution is however declared illegal and invalid for want of the leave of the court.

Signed, dated and delivered at Mombasa on 14th day of September 2015.

ONESIMUS N.MAKAU

JUDGE