



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 26 OF 2013**

**DONALD ORICHO.....CLAIMANT**

**VERSUS**

**THE NATIONAL VISION PARTY.....1<sup>ST</sup> RESPONDENT**

**NICHOLAS K. BIWOTT.....2<sup>ND</sup> RESPONDENT**

**BENTER AKINYI OPANDE.....3<sup>RD</sup> RESPONDENT**

Mr Wachira for Applicants/Respondent

Mr Oduor for Claimant/Respondent

**RULING**

1. This Claim was heard and determined by Linnet Ndolo J vide a judgement dated 17<sup>th</sup> June 2014. The Claim was awarded Kshs 178,000. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed an application seeking *interalia*;
  - i. That the Honourable Court order a stay of execution of the judgement and order made by the Honourable Court on the 17<sup>th</sup> June 2014 pending the hearing and final determination of the Applicant's intended appeal.
2. The Application is supported by grounds set out on the face of the application and in the supporting affidavit of Mr Allan Juma Masika the Applicants' Chairman in charge of Nairobi county.
3. The Applicant submits that it has an arguable appeal with a high probability of success and if the stay of execution is not granted the appeal would be rendered nugatory.
4. That the Applicants are ready and willing to deposit such sum of money as this Honourable Court may order in a joint escrow account to the order of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants Advocates of the first part and the Claimant's/Respondents Advocates of the Second part.
5. The Claimant filed a replying affidavit sworn on 3<sup>rd</sup> November 2014 opposing the Application. The Claimant states that the applicants have not shown that, the Claimant is a man of straw and would be unable to refund the decretal amount.
6. That the Applicants have therefore not demonstrated that payment of the decretal amount would render the appeal nugatory. That the applicants have not shown they have taken any steps to file the appeal and no draft memorandum of appeal has been filed to persuade the court that the intended appeal is arguable. The Claimant prays that the Application be dismissed with costs.
7. The matter was brought before me to hear and determine the Application whilst Justice Ndolo was attending to non-judicial functions and was therefore not available to hear and determine the

- matter. The parties agreed to proceed with the matter by way of written submissions. The Court was of the mistaken believe that Justice Ndolo had not rendered a judgment in the matter and proceeded to write and deliver a judgement on 21st August 2015.
8. This judgement was written and delivered in error and the same is wholly set aside because the matter was *res judicata* by fact of the Judgement by Ndolo J delivered on 17<sup>th</sup> June, 2014.

### **Determination of Application**

9. A careful look at the judgement of Ndolo J shows that though the 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny existence of an employment relationship between the Claimant and the 1<sup>st</sup> Respondent, the 3<sup>rd</sup> Respondent in her capacity as interim Chairman for Nairobi County Branch of the 1<sup>st</sup> Respondent recruited the Claimant on 23<sup>rd</sup> January, 2013.
10. The 3<sup>rd</sup> Respondent agrees with the Claimant's particulars of claim that save for the Kshs 20,000 paid to the Claimant by the 2<sup>nd</sup> Respondent, no further payment was made. In the 3<sup>rd</sup> Respondent's memorandum of defence, she states that her attempt to have the claim settled was to no avail.
11. From the foregoing and given that no averments have been made in the Application demonstrating that the appeal is arguable and since no memorandum of appeal has been filed todate, the applicants have failed to show on a balance of probability that they have an arguable appeal.
12. The award of Kshs 178,000 represents a salary for work done without pay and it is in the interest of justice and indeed the balance of convenience is in favour of allowing the claimant to enjoy the fruits of his judgement. The Applicants have not demonstrated that the Claimant is a man of straw and would be unable to repay the decretal sum if the appeal is successful in the longrun. Failure to allow this application would not render the appeal nugatory in the court's view.
13. Accordingly, the Application is dismissed with costs to the Claimant/Respondent.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**