



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 401 OF 2013

DAVID WANYONYICLAIMANT

v

HON. ATTORNEY GENERAL.....1ST RESPONDENT

CHIEF OF DEFENCE FORCES.....2ND RESPONDENT

ARMY COMMANDER KENYA ARMY.....3RD RESPONDENT

RULING NO. 2

1. In a judgment delivered by Ongaya J on 17 October 2014, the Court found for the Claimant and ordered the Respondents to re-engage him and or in the alternative to pay him certain entitlements including pension.
2. The Respondents did not comply and the failure compelled the Claimant to file an application dated 2 December 2014 seeking that the Chief Legal Officer of the 2nd Respondent be summoned to Court to show cause why the Respondents had failed to comply with the judgment.
3. Before the application could be determined, the parties informed the Court that they were negotiating and the application was stood over generally.
4. But a few weeks later (24 February 2015), the Respondents filed a motion seeking

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2. THAT this Honourable Court do order stay of execution of the Judgment and Order made by the Honourable Justice Byram Ongaya on 17 October 2014 pending the *inter-partes* hearing of this Application.

3. THAT this Honourable Court do order a stay of execution of the Judgment and Order made by the Honourable Byram Ongaya on 17 October 2014 pending the hearing and determination of the Respondent/Applicants Appeal.

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5. In a ruling delivered on 17 April 2015, this Court found the stay of execution pending appeal application unmerited and dismissed it.

6. Not to be deterred, the Respondents filed another motion on 17 June 2015 seeking

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2. THAT this Honourable Court do set aside the Judgment and Order made by the Honourable Justice Ongaya on 17 October 2014 pending the *inter-partes* hearing of this application.

3. THAT this Honourable Court do review the Judgment and Order made by the Honourable Justice Ongaya on 17 October 2014.

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7. The Claimant was served with the new motion and he filed Grounds of Opposition on 22 June 2015 and a Replying Affidavit on 29 June 2015.

Respondents' submissions

8. In submissions in support of the instant motion, the Respondents asserted that the judgment delivered on 17 October 2014 was anchored on section 5(2) of the Employment Act, 2007 which was not applicable by virtue of section 3 thereof.

9. In this regard, it was contended that there was an error/mistake apparent on the face of the record.

10. The Respondents also urged that the application was brought timeously.

11. The Respondents cited several authorities, which are on record and the Court has looked at them.

Claimant's response

12. The Claimant submitted that the Respondents had come to Court with unclean hands because they had waited for over 8 months before seeking review and in any case they had not complied with the terms of the judgment.

13. The Claimant also urged that the Respondents were abusing the Court process because they had preferred an appeal before the Court of Appeal which should have been withdrawn first before filing an application seeking review.

14. The Claimant consequently submitted that a letter dated 22 June 2015 purporting to withdraw the appeal was not valid.

15. In further submissions, the Claimant urged that the motion was *res judicata*, the issues having been dealt with in the earlier application for stay of execution, and a ruling delivered.

Respondents' rejoinder

16. In a rejoinder, the Respondents contended that the appeal before the Court of Appeal had been withdrawn and that Article 24 of the Constitution restricted the enjoyment of certain rights by members of the military, and the Court had ignored that legal aspect in its judgment.

Evaluation

17. Public policy and judicious use of the Court's time require a party to place all of his case arising out of the same circumstances at once before Court for determination. The Respondents filed an application for stay of execution pending appeal on 24 February 2015.

18. The Respondent must or ought to have been aware of the grounds it advanced in the review application and the law at the time they made the initial application for stay of execution.

19. In this regard, the Respondent should have laid out its full case and urged the same together with that review challenge to the judgment (see *Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd* (1975) AC 581- in a case dealing with *res judicata* but whose principle I believe goes beyond *res*

judicata).

20. In the view of the Court, the Respondents in urging the present application were seeking to achieve what they failed to achieve when the stay of execution application was dismissed. The instant motion was therefore an afterthought.
21. Further, the record bears that a Notice of Appeal was filed on 6 November 2014 after which the stay application was launched but declined.
22. In seeking stay of execution pending appeal, the Respondents were perfectly right in exercising a constitutional and statutory right. That attempt however did not succeed and the Respondents still had a right to approach the Court of Appeal to seek a stay. No mention was made whether that option was taken.
23. Instead, the Respondents moved the Court on 15 June 2015 to seek a review/setting aside. On 22 June 2015, they wrote to the Registrar of this Court purporting to withdraw a Memorandum of Appeal dated 5 November 2014 (this should have been a Notice of Appeal and not Memorandum of Appeal).
24. As a fact, it stands that by the time the instant motion was being filed, there was an appeal pending before the Court of Appeal.
25. The question therefore becomes whether it was open to the Respondents to pursue the two different processes (appeal to a higher Court and review before the Court whose decision was being appealed).
26. There are conflicting holdings by the Court of Appeal on the question. In *Yani Haryanto v E .D. & F Man. (Sugar) Limited*, Civil Appeal No. 122 of 1992, it was held that

despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review.... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in....

27. On the other hand, in *Orero v Seko* (1984) KLR 238 where the Court held that the review remedy is only available to a party who is not appealing. A similar position was reached in *Kisya v Attorney General* (1986) eKLR where the Court held that a party who has filed a notice of appeal cannot apply for review but if the application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending.
28. In the present case the application for review was filed on 17 June 2015 while the notice of appeal had been lodged in Court on 5 November 2014.
29. On the merits, the Respondents contend that the Court premised its findings and holdings on section 5(2) of the Employment Act, 2007 which deals with discrimination in employment whilst section 3 of the Act expressly ousted the application of the Employment Act, 2007 to members of the military.
30. Whether the discrimination ought or ought not to have been a consideration considering our constitutional framework and not just applying the Employment Act is a matter best resolved on appeal.
31. In my view, despite the conflicting positions advanced by the Court of Appeal, the Respondents herein have not made out a case for review and the grounds they have advanced properly belong to the realm of appeal.

Conclusion and Orders

32. The upshot of the foregoing is that the Respondents application filed in Court on 17 June 2015 is unmerited and it dismissed with costs to the Claimant.

Delivered, dated and signed in Nakuru on this 6th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Simiyu instructed by Simiyu & Co. Advocates

For Respondents Mr. Kirui, Litigation Counsel, Office of the Attorney General

Court Assistant Nixon