



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 13 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 14th December, 2015)

DEVKI STEEL MILLS LIMITEDAPPELLANT

VERSUS

MBAI MOKIRESPONDENT

RULING

1. The Applicants filed this application on 21.9.2015 under Certificate of Urgency through the firm of Nduati & Company Advocates. They sought among other orders an order for stay of execution of the Judgment entered in the underlying suit and the resulting decree pending the hearing and determination of this application interparties.
2. Stay orders were granted at the exparte stage and the Applicants ordered to serve the application on the Respondents.
3. The Respondents have however raised a preliminary order which is the subject of this ruling.
4. The preliminary objection raised by the Respondents is based on the following grounds:-

1. The appeal herein is against a decision rendered on 21st January 2015 and no leave having been obtained to file an appeal out of time, the appeal herein is fatally and incurably defective having been filed outside the 30 days prescribed by law.

2. An application predicated upon an incompetent appeal is itself incompetent and for striking out with costs and additionally Order 42 Rule 6 and generally Civil Procedure Rules do not apply in Employment and Labour Relations matters.

3. The letter dated 9th September 2015 (Exhibit GM2) indicating that on 18th September 2015 the Appellant wrote to the Deputy Registrar to withdraw civil appeal No. 94 of 2015 Nairobi is a nullity in law as a suit can only be withdrawn by way of a Notice of withdrawal or discontinuance of suit and not by a letter to Court. The Notice of withdrawal or discontinuance of suit must be served on all the necessary parties in the suit. Even if the letter addressed to the Deputy Registrar were a valid Notice, it is reasonably not practical that on the same day, the Deputy Registrar could act upon the letter paving the way for the Appellant to file the present appeal before this Court.

4. It can be reasonably concluded that this appeal was filed while there was still a subsisting

appeal in the High Court an act the Respondent contends is an abuse of the Court process.

5. The depositions in support of the application dated 18th September 2015 by George N. Muriu are legally untenable. A party's Counsel cannot descend into the arena of disputes and depose to contested matters of facts. The supporting affidavit is consequently incompetent.

6. The Appellant has failed to avail the ruling of the lower Court to assist this Court address its mind on how the lower Court determined the matter. The failure is thus an abuse of the Court process on account of material non –disclosure.

5. In reply to this preliminary objection the Respondents filed their submissions before this Court on 29.10.2015. It is their submission that there was no delay in filing this appeal as the judgment in the lower Court was delivered on 21.1.2015. They then filed an appeal in the High Court on 11.3.2015 and an application in the lower Court on 12th March 2015 seeking stay of execution pending the hearing and determination of the pending appeal.

6. On 4th September 2015, the lower Court delivered its ruling in which they rejected the stay of execution citing Francis Mutunga Musau vs. Devki Steel Mills Limited Misc. Application No. 91 of 2015 that the appeal was filed in the wrong Court and so stay could not be granted. That this decision of High Court was delivered on 10th July 2015 four months after the Applicants appeal was filed.

7. On applicability of Order 42 Rule 6 they apply to this Court in light of the provision of Article 159(2) (d) Section 20 of Employment and Labour Relations Act and Rule 36 of the Industrial Court (Procedure) Rules.

The law

8. Under Rule 8 of the industrial Court (Procedure Rules:

(1) Where any written law provides for an appeal to the court, an aggrieved person shall file a Memorandum of Appeal with the Court within the time specified for that appeal under the written law.

(2) Where no period of appeal is specified in the written law an appeal shall be filed within thirty days from the date the decision that is the subject of appeal was delivered -----“

9. Order 42 Rule 6(1) of the Civil Procedure Rule on the other hand provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty on application being made to consider such application and make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside”.

10. A careful consideration of Order 42 shows that the Civil Procedure Rule do not set the exact time within which an appeal shall be preferred though the rule states as soon as possible. The Defendant have submitted that his Order 42 does apply in the Employment and Labour Relations Court in light of the provisions of Article 159 (2) (d) Section 20 of Employment and Labour Relations Act and Rule 36 of the Industrial Court (Procedure) Rules.

11. Considering the submissions and the law it is apparent that the Applicants herein filed their appeal before the wrong Court and thereafter apparently withdrew it through a letter to the Deputy Registrar

dated 9.9.2015 Appendix GM 2. The Respondents aver that the letter was not sufficient to have the appeal withdraw and there is no Order from the High Court showing that appeal No. 94 of 2015 has been since withdrawn.

12. Secondly, the Appellants filed this appeal on 21.9.2015 whereas Judgment was delivered on the lower Court on 21.1.2015. Under rule 8 of the Industrial Court (Procedure) Rules, this appeal was supposed to have been filed within 30 days from the day the decision was made i.e. 21.1.2015.

13. The Appellants did not file this appeal by 21.2.2015 but in September 2015 and without seeking leave to file the same and also without taking steps to withdraw the appeal pending in the High Court. The ruling of the lower Court is also not attached.

14. They have submitted that under Article 159 of the Constitution, this Court should not dwell on technicalities. It is my view that filing an appeal out of time and without seeking time to file it out of time is not a mere technicality. Filing 2 appeals in two different Courts is also an abuse of the Court process.

15. I find that this preliminary objection has merit and I allow it and strike out the appeal filed with costs to the Respondents.

Dated and delivered in open Court this 14th day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njoroge for Appellant - Present

No appearance Respondents