



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 431 OF 2010

KENNETH NJIRU NYORANICLAIMANT

VERSUS

DODHIA PACKAGING LIMITED RESPONDENT

RULING

Mbabu Advocate, for the Claimant

Guserwa Advocate, for the Respondent

On 8th July 2013, the respondent filed their application through Notice of Motion under Order 42, Rule 6 and 7 of the Civil procedure Rules seeking for stay of execution of the judgement/decree herein pending the hearing and determination of the intended Appeal by the respondent herein. This application is supported by the annexed affidavit of Dipak Shah, a director of the respondent. The claimant in response to this application filed the Replying Affidavit sworn by the claimant and dated 30th August 2013 opposing the application on the basis that there will be no loss occasioned on the respondent, there was inordinate delay in filing the application which was only done when the claimant filed their bill of costs and thus should be dismissed.

The application by the respondent is based on the grounds that judgement was delivered herein on 5th October 2012 which aggrieved the respondent. On 23rd November 2010 the court directed parties that judgement would be delivered on notice but this was never served upon the respondent advocate and when the judgement was delivered on 5th October 2012, the respondent and the advocate were not aware. That the respondent only became aware of this judgement on 25th November 2012. The respondent wishes to file an appeal against the judgement and if the same is not granted, it will be rendered nugatory.

In support of this application, the respondent advocate submitted that they need the stay of execution to prosecute their appeal and they are willing to deposit the judgement amount as security in a joint account with the claimant's advocate or abide with any orders of court. There will be no prejudice suffered by the claimant.

In reply, the claimant in his affidavit states that the respondent has not honoured the decree herein and by bringing this application is meant to frustrate and keep him from enjoying his judgement after he was wrongly terminated. That the application has not raised enough reasons to warrant the orders sought there

will be no substantial loss to the respondent if the appeal is not allowed, when the respondent became aware of the judgement they did not file this application immediately and thus not filed in good faith. The orders sought are discretionary and noting the delay in filing this application, the same should not be granted and the same should be dismissed with costs.

The claimant's advocate further submitted that upon the discovery of the judgement by the respondent on 25th October 2012 no application for stay was filed until 8th July 2013, a nine (9) months delay from the date of the judgment which delay is not explained and thus the application is filed to keep the claimant away from enjoying the fruits of his judgement. No appeal or notice of appeal has been served upon the claimant or attached to the application and thus no arguable appeal which should form the basis of an application for stay of execution pending appeal. This is a monetary decree which should be released to the claimant.

I note that under Section 17 of the Industrial Court Act, a party that is dissatisfied with any judgement, award, order or decree issued by this Court has an inherent right of appeal to the Court of Appeal in accordance with Article 164(3) of the Constitution. The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal. The granting of stay of execution pending appeal is at the discretion of the court when sufficient cause has been established by the Applicant that:

- (a) Substantial loss may result to the Applicant unless the order is made;
- (b) The application has been made without unreasonable delay and
- (c) Such security as the court orders for the due performance of the decree has been given by the Applicant.

To this application there is no notice of appeal as submitted by Counsel for the respondent nor is there an appeal or draft memoranda attached to give an indication of what grounds or basis that the same if not allowed to be heard first will be rendered nugatory if stay herein is not granted. There is no indication as to why these key documents are not attached to the application herein. Despite the offer to deposit the judgement amount in a joint interest earning account pending the hearing of the appeal, this remains an intention that cannot be actualised by securing an interest that does not exist through an intended appeal. As of now, there is no notice of the appeal or the appeal itself that would sway the court to grant a stay of execution in favour of the respondent.

To therefore grant the application in its current form would be an injustice to a party who already has a judgement of this court. There are simply no good grounds outlined to warrant this court to grant as prayed by the respondent in the application dated 2nd July 2013.

I therefore dismiss the application dated 2nd July 2013. Costs to the claimant.

Dated and delivered at Nairobi this 10th February 2014

M. Mbaru

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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