



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 60 OF 2013

HESBON NGARUIYA WAIGI CLAIMANT

VERSUS

EQUITORIAL COMMERCIAL BANK LIMITED..... RESPONDENT

RULING

1. There are two applications herein that have been placed together for determination. One dated 7th November 2013 and submitted by the claimant [referred to as the ‘first application’] and the other dated 26th November 2013 and submitted by the respondent [referred to as ‘the second application’].
2. The claimant through the Notice of Motion dated 7th November 2013 filed under the provisions of section 3A of the Civil Procedure Act, Rule 42, 45, 75 and Rule 84 of the Court of Appeal Rules for orders that the respondent be restrained from filing an Appeal from the judgement of the Court delivered on 16th September 2013 and the Notice of Appeal dated 14th October 2013 be struck out. The application is supported by the annexed affidavit of the claimant. The respondent filed their Preliminary Objections to the claimant’s application and dated 6th October 2013 noting that the Court has no jurisdiction to determine the application as the same is presented under the provisions of the Court of Appeal Rules.
3. The application dated 26th November 2013 filed by the respondent as Notice of Motion under order 42 Rule 6 and order 51 Rules 1 and 2 of the Civil Procedure Rules Rule 16 of the Industrial Court Procedure Rules and section 3A of the Civil procedure Act seeking for stay of execution of judgement delivered on 16th September 2013 pending hearing and determination of the intended appeal. This application is supported by the annexed affidavit of Jacqueline Mumbi Hinga. To this application, the claimant filed the Replying Affidavit sworn by the claimant and dated 28th November 2013.
4. The first application is based on the grounds that judgement was entered in favour of the claimant on 16th September 2013 in the presence of the respondent, no notice of appeal was filed within 14 days until the 29th day on 14th October 2013 and that this Notice of Appeal was not served upon the claimant. further grounds are that the Notice of Appeal was irregular and illegal as it was served out of time and without leave of court and should be struck out as this was a breach of law meant to derail an delay and also deny the claimant the fruits of his judgement.
5. These ground are reiterated in the supporting affidavit of the claimant noting that once the judgement was delivered by the court on 16th September 2013, there was no Notice of Appeal within 14 days are by law required, the same was only filed after 29 days which was irregular and in breach of the law. No leave was obtained before the Notice of Appeal was filed out of time. That this is meant to prolong the trial for no just cause and the Notice of Appeal filed should be struck out.

6. The second application is based on the grounds that the judgement herein was entered for the gross sum of Kshs.460, 000.00 with costs and the respondent filed a Notice of Appeal against the judgement and the intended appeal has arguable issues with great chances of success and unless a stay is granted the same will be rendered nugatory. That the respondent is willing to deposit the security for due performance of such decree as may be ultimately binding upon it.

7. In supporting Affidavit is sworn by Brian Asin, against what is stated in the application, Jacqueline Mumbi Hinga. In the affidavit of Brian Asin this deponent states that as the legal officer of the respondent he is authorised to make the affidavit with regard to the judgement of this court delivered on 16th September 2013. That the court granted Kshs.460, 000.00 to the claimant together with costs and the respondent being aggrieved by the judgement of the court wishes to proceed on appeal which has arguable issues and has high chances of success. That if stay is not granted the intended appeal will be rendered nugatory as the claimant is not in a position to refund the judgement amount if this is released to him as he has been out of employment since 2011. The respondent being a reputable bank undertake to provide security under terms given by the court.

8. To the two applications, both parties filed their written submissions. The claimant submission is filed on 19th February 2014 and the respondent submissions were filed on 24th February 2014.

9. The claimant submitted that the Notice of Appeal filed by the respondent dated 14th October 2013 was irregular as the same was done after 29 days thus beyond the time allowed in law which should be within 14 days after the judgement delivered on 16th September 2013. This was contrary to the provisions of Rule 75 of the Appellate Jurisdiction Rules. Once the Notice of Appeal was filed, it was not served upon the claimant within 7 days contrary to the law where leave of the court was to be sought before such service out of time.

10. With regard to the respondent application, the claimant submitted that the application for stay of the court judgement should be dismissed with costs since any party wishing to lodge an appeal against the judgement of the court should follow the law and laid down procedure. On 16th September 2013 the respondent orally applied for stay which was granted and the application dated 26th October 2013 is thus a duplication of process meant to delay the enjoyment of the judgement as made in favour of the claimant. The respondent has not used the time granted well and thus should not be made to benefit from more time with stay.

11. The respondent submitted that in response to the claimant's application dated 7th November 2013, the application as submitted under the provisions of the Court of Appeal Rules created under the Appellant Jurisdiction Act only apply to the Court of Appeal and not to the Industrial Court. That this is an error that cannot be cured by the invocation of the inherent powers of this court. The respondent relied on the case of *Githae versus Nairobi City Commission [1991] KLR 529* noting that where specific provisions exists to deal with a matter, the Court is bound to follow that provision. Thus Rule 84 of the Court of Appeal Rules that the claimant is seeking to apply does not apply to proceedings before the Industrial Court.

12. With regard to the respondent's application for stay pending their intended appeal, it was submitted that there is a sufficient cause that the respondent wishes to pursue before the Court of Appeal from the judgement of this court delivered on 16th September 2013. There is also sufficient cause that the claimant would not be able to refund the judgement amount if this is released to him before the appeal is heard and determined noting that he has been out of work since 2011 when he was terminated by the respondent due to redundancy. There has been no delay in submission of the application for stay and the respondent has attached the draft memorandum of appeal. That the provisions of Order 42 have been complied with and further the respondent is ready and willing to deposit security as directed by the court pending the determination of their intended appeal.

Several questions emerge for determination thus;

Are there set procedures and or rules for parties seeking to appeal Industrial Court decisions? If so, have they been followed in this case?

Should stay herein be granted to allow prosecution of an intended appeal?

13. Proceedings before The Industrial Court are governed by the application of the Industrial Court (Procedure) Rules (the Rules) and where these Rules do not address any particular provision, parties can rely on any other written laws or Rules of procedure as before any other High Court. Parties have largely adopted the use of the Civil Procedure Act and the Rules thereto on areas where the Rules applicable to the Industrial Court are found as not exhaustive. With regard to appeals arising from decisions of the industrial Court as under the Industrial Court Act, Rule 28(5) is applicable where parties can file an appeal against any decision of the Court. The Rule does not outline the timelines, process or method and in this regard other written laws applicable to the High Court apply as the Industrial Court is a Superior Court of Record.

14. In this case, the claimant has applied the provisions of the Appellate Jurisdiction Act and the Rules thereto in seeking that the Notice of Appeal filed by the respondent be struck out. In my reading of the Appellate Jurisdiction Act and the Rules thereto, this statute apply to proceedings as before the Court of Appeal and not to the High Court. To apply the Appellate Jurisdiction Act with regard to proceeding before the Industrial Court would be to pre-empt proceeding as before the Court of Appeal which proceedings have not commenced. The relevant procedure would be to seek the striking out of such a Notice of Appeal by the use of relevant legislative provisions or rules that govern proceeding as before a High Court. I therefore agree with the respondent that the claimant's application is pre-mature in the application of the Appellate Jurisdiction Act and the Rules applicable as before the Court of Appeal. The claimant's application will therefore be dismissed.

15. With regard to the second application, the respondent is seeking stay pending prosecution of their intended appeal. In the main application, the respondent states that they rely on the affidavit of Jacqueline Mumbi Hinga but upon perusal of the record the attached supporting affidavit is that of Brian Asin. Was this an error and or omission fatal to the application on record and can it be cured with the averments of this application being matters supported in the annexed affidavit? It is trite that all applications brought before this court should be supported by facts as stated in an affidavit, which affidavit relate to the orders sought and the grounds upon which the application is based upon. The substantive part of the application indicates that the same will be supported by the affidavit of Jacqueline Mumbi Hinga but this affidavit is not attached. This application was filed by the respondent and dated 29th November 2013 but there is no supporting affidavit from the person stated to be the deponent in support. The affidavit attached from Brian Asin does not outline which application it seeks to support whether the one filed by the respondent dated 29th November 2013 or as a further support to any averments made by Jacqueline Mumbi Hinga. Whether the averments made by Brian Asin talk to matters outlined in the respondent application is immaterial as the link between the substantive application made the by respondent and the document in support is lost. Technically therefore the respondent application lacks in a material way that cannot be said to be an error or mistake curable by this Court as the application lack a material provision, that of a supporting affidavit.

The respondent application is therefore bare and cannot stand on its own without the supporting facts. This application will therefore be struck out.

No orders as to costs.

Dated and delivered in open court this 10th Day of March, 2014.

M. Mbaru

Judge

In the presence of:

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