



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 698 OF 2010

JAMES KIBATHI CERE.....CLAIMANT/RESPONDENT

versus

WILHAM (K) LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant seeks through the Application dated 6th February 2014 to stay of execution and leave to lodge an appeal against the Judgment of this Court given on 14th June 2013. The advocates now on record M/s Wekesa & Simiyu aver that the firm of Omwoyo Momanyi Gichuki & Co. Advocates previously on record did not inform the Respondent/Applicant of the Judgment of this Court. Mr. Owesi urged the Notice of Motion Application by the Respondent/Applicant. He submitted that the Respondent/Applicant was desirous of filing an appeal out of time against the judgment passed in June last year but the Respondent was not made aware of the same due to the negligence of the then advocates on record and only learnt of it when the noose of execution was being tightened. He referred the Court to the draft memorandum and grounds of appeal as well as the authorities in support. He urged the Court not to occasion hardship on the Respondent/Applicant due to the advocates error. He submitted that there was no delay since the firm now on record was instructed. He submitted that there was readiness to provide security if the Court granted the leave on condition that security be furnished.
2. The Claimant/Respondent was opposed to this Application and filed Grounds in Opposition and a Replying Affidavit sworn by the Claimant. Mr. Kiche for the Claimant/Respondent urged the Court not to accede to the Application. He submitted that the reason advanced for not filing a notice of appeal was the failure to be notified of the judgment. He said it was curious that the Respondent/Applicant was informed of all steps and the hearing date except the date for judgment. He submitted that the Respondent/Applicant had not shown documents to the counsel then on record asking what the position was. He submitted that the noose of execution started to tighten in December 2013 when the Claimant's advocate letter of 19th December 2013 was delivered to the then advocates on record. The Application was made in February 2014 which is 2 months after the fact and thus there was inordinate delay. He submitted that they must prove they have an arguable appeal and that if orders are not granted the appeal would be rendered nugatory since the filing of grounds alone do not show an arguable appeal. There was no demonstration that there would be substantial loss and there was no offer of meaningful security. There was no basis to reverse the burden of proof as it is only where a party is impecunious that there must be a demonstration that the Claimant would be in position to refund.
3. In a brief reprise Mr. Owesi submitted that there was no delay as the letter of December 2013 was what prompted the Respondent/Applicant to move in January 2014 to retrieve the file and seek to

stop the execution now looming. He submitted that the draft memorandum of appeal is not frivolous or vexatious. He stated a sum of 940,000/- together with interest and costs is not little. Nugatory to him did not mean going under. He offered to have the funds placed as security so that no party goes at a loss.

4. The issue at hand is twofold. One, is the Respondent/Applicant guilty of laches? If not, is the Respondent/Applicant deserving of the exercise of the Court's discretion in granting leave to appeal? Two, what are the consequences of the grant or decline to exercise discretion in favour of the Respondent/Applicant?
5. It is not in dispute that a Judgment of this Court was given on 14th June 2013. It has been submitted that the failure to prefer an appeal was as a result of the negligence of the advocates then on record. The Respondent/Applicant has annexed a Draft Memorandum of Appeal which raises 8 grounds. The Grounds can be collapsed into 3. Firstly, that the Court failed to properly evaluate the law and evidence on record thereby arriving at an erroneous decision, secondly that the Court took into account matters it ought not have taken thereby arriving at a wrong conclusion or judgment and thirdly that the decision of the Court amounted to a travesty of justice. The Court, in decisions such as the one being sought must consider various principles before the orders can be granted. The following conditions must be satisfied before the court can grant a stay.
 - i. That the Application has been made without unreasonable delay.
 - ii. That substantial loss will result to the Applicant unless such order is made.
 - iii. Security for due performance of the decree has been given by the Applicant.
6. Any appeal or stay pending appeal that is preferred must be seen through the prism of statute and *stare decisis*. In the case of **Nairobi Metropolitan PSV SACCOS Union Limited & 24 others v County of Nairobi Government & 3 others [2014] eKLR** the decision of Lenaola J. in that case was that no order for stay of execution should be made unless the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and such security as the Court orders for the due performance of such decree or order as may be made has been given by the applicant. The Learned Judge cited the case of **Halai & Anor v. Thornton & Turpin (1963) Ltd [1990] KLR**. In **Halai v. Thornton & Turpin** the Court of Appeal held as follows:-

“The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

The question here therefore would be whether the applicant has established grounds for the grant of an order of stay of execution.

7. The Applicant has come to Court 8 months after the decision of the Court. The excuse given is that there was negligence on the part of the previous advocates. Whereas there is no definite period that the Court would set as the cut-off when determining whether a party is guilty of laches, any unexplained period beyond the time set for the doing of anything with a time limit could be deemed as laches. The delay would be inordinate if there is no reasonable cause for the delay. In the Supporting Affidavit of Duncan Okoth Oyuga sworn in support of the Application fails to annex any complaint preferred against the firm either by way of letter to the said advocates or a complaint to the Advocates Complaints Commission or the Law Society of Kenya. There is no correspondence annexed showing the Respondent followed up on the matter at all since the Respondent's witnesses testified in Court on 6th December 2012. There was an advocate who appeared diligently in the matter until the point of submissions. There is clearly unreasonable

delay in the matter. Why is it that everything worked like clockwork until the end of the case? I do not buy the argument advanced by the counsel now on record. I find that the applicant did not bring the application without undue delay. It is stated that the Respondent/Applicant would suffer substantial loss if stay is not granted but it has not been demonstrated what loss the Respondent would suffer. There is no proof advanced that the payment of Ksh. 940,000/- or thereabout will lead to substantial loss to the Respondent/Applicant. Indeed what is telling is that in response to the Claimant/Respondent's submission, counsel for the Respondent/Applicant suggested that the Respondent was not adverse to an order for security. There is no tender of security as such. The premise upon which the stay is granted takes into account the tender of security which is woefully lacking though adverted to. The authorities cited in support by the Respondent/Applicant are not on all fours with the case before me and thus are of no aid to the Respondent/Applicant's case.

8. The upshot of the foregoing is that the Respondent/Applicant has not laid sufficient foundation for the grant of the orders sought and I decline to exercise my discretion in favour of the Respondent/Applicant. The application is dismissed with costs to the Claimant/Respondent.

Orders accordingly.

Dated and delivered at Nairobi this **10th** day of **June** 2014

Nzioki wa Makau

JUDGE