



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 960 OF 2012

KENYA SHOE & LEATHER WORKERS UNION.....CLAIMANT

VERSUS

HR STRATEGIC PARTNERS LIMITED.....RESPONDENT

RULING

Judgment was entered in favour of the Claimant against the Respondent in this case on 6th December 2012. By an application dated 11th January 2013 filed by way of notice of motion under certificate of urgency, the Respondent applied for stay of execution pending appeal. I granted their prayer subject to the deposit of the decretal sum in court, which the Respondent complied with. To date no appeal has been filed.

By an application dated 8th July 2013 and filed in court under certificate of urgency on 8th July 2013, the Claimant Union seeks the following orders:-

1. That this Honourable Court certifies this Application as urgent.
2. That the service of this Application on the Respondent be dispensed within the first instance and the application be heard ex-parte.
3. That the Honourable court be pleased to set aside the orders granted to the Respondent on 5th February 2013 to proceed to the Honourable court of Appeal as sixty days (60) has elapsed as required by order 40 of the civil procedure Rule 2010.
4. That order 40 of the civil procedure Rules (2010) sub-order 7 states that: any order for an injunction may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied by such order.
5. That the Applicant is dissatisfied with the continuous reluctance by the Respondent to proceed with this matter to the Court of Appeal as was sought out by them and delaying justice system.
6. That this Honourable court be pleased to set aside an order of stay/to proceed to the court of Appeal granted on the 5th February 2013 because the time has elapsed as provided in order 40(4) 1,2, 3 & Honourable court be pleased to set aside an order of stay/to proceed to the court of Appeal granted on the 5th February 2013 because the time has elapsed as provided in order 40(4) 1, 2, 3 & 4 of the Civil Procedure Rules 2010.
7. That this Honourable court to order the release of the decretal sum of Kshs. 298,686/- deposited in court as security plus accrued interest to the Applicant for disposal as it is now clear the Respondent does not intend to proceed with their Application as sought and orders.
8. That the Respondent has deliberately failed to proceed with this matter to the court of Appeal sixty days (60) from the date the court orders to proceed to the court of Appeal was granted and more than ninety (90) days from the date the said court award was delivered.
9. That the Honourable court be pleased to order the Respondent to bare the costs of this suit.

The application is supported by the affidavit of Isaiah Odhiambo Omollo and on the following grounds:-

- a. That the claim herein was head inter-parte and an award delivered on 6th December 2012.
- b. That the Respondent being dissatisfied with the award of the court notified this court vide there notice of Appeal filed on 14th December 2012 and there application, which was later head on 28th Janauray 2013 and judgment delivered on 5th February 2013.
- c. That the Respondent was directed to deposit the Decretal sum amount of Kshs .298,686/- in court (which was done) and proceed with the matter to the court of Appeal.
- d. That the matter has since taken more than sixty (60) days indicating that the Respondent has no intention to proceed with this matter and contrary to order 40(4) 1,2,3,4 of the civil procedure rules 2010.
- e. That the Application and orders thereto has since been thrown into the dustbin by the Respondent and forgotten and therefore there is need for the court to order release of the monies deposited in court as security to the Applicant.
- f. That the only viable order the Honourable court should grant is to set aside the orders granted to the Respondent on 5th February 2013 and direct the registrar to release the Decretal sum amount of Kshs 298,686/- plus the accrued interest to the Applicant.
- g. That the inability/in default to proceed to the court of Appeal by the Respondent within the specified period required by Law and continuous reluctance by the Respondent to proceed in time to the court of Appeal as they requested is a pure indication of delay of justice and justice delayed is justice denied.
- h. That the Honourable court can only bring justice to the grievant if only the contents of the award delivered on 6th December 2012 is upheld and orders of 5th February 2013 is rested within its infancy and the grievants paid what was dully due to them before long through the Applicant.
- i. That the Respondent will suffer no loss if the said orders granted to them on 5th February 2013 are set aside as the amount awarded to the grievants was deposited long time ago with this Honourable court, and if award of 6th December 2012 are up held.
- j. That the costs of this application be borne by the Respondent.
- k. That it is just and equitable to grant the orders sought.

The Respondent filed a replying affidavit of Purity Makori, Advocate in which she depones that the application is bad in law and an abuse of court process, that the Respondent filed a notice of appeal and applied for certified copies proceedings. That certified copies of proceedings had not been supplied to enable the Respondent prepare the record of appeal. She further deponed that the prayers by the applicant are incapable of being granted as stay was granted pending hearing and determination of appeal and that Section 40 of the Civil Procedure Act does not apply to proceedings in the Industrial Court. That the application is incompetent and a gross abuse if the process of this court.

At the hearing of the application Mr. Maina who represented the applicant trade Union that since the Respondent was granted stay of execution on 5th February 2013 the Respondent has been reluctant to file the appeal. He urged the court to release the monies deposited in court as the delay in filing appeal is denying justice to the Claimant, that the Respondent does not seem ready to move to the court of appeal.

Ms. Kagai who appeared for the Respondent submitted that there no reluctance on the part of the Respondent to file appeal. That there had been follow ups at the court registry in an edevour to obtain proceedings. That the Respondent still intends to go ahead with the appeal. She urged the court to find the application not meritorious and dismiss it with costs.

Rule 81 of the Court of Appeal Rules provide that appeals must be lodged within 60 days of the date when the notice of appeal was lodged. The proviso to Rule 81(1) provides that where an application for a copy of the proceedings has been made the computation of time within which the appeal is to be instituted shall exclude the time required for the preparation and delivery of a copy of the proceedings.

In the present case the Respondent applied for proceedings by its letter dated 11th December 2012. There is a copy of proceedings in the court

file. It was certified by the Registrar on 30th May 2013. This means that the period between 13th December 2012 when the Respondent filed the notice of appeal and 30th May 2013 when the proceedings were certified would be excluded in the computation of the date within which appeal is to be lodged. Sixty days from 30th May 2013 expired on 30th July 2013. This means that the latest date within which the appeal should have been lodged was 30th July 2013. Yet on 17th September when this application was argued, the Respondents counsel stated that the Respondent was still waiting for proceedings. Counsel also stated they had been following up the proceedings at the registry yet did not attach any evidence of such follow up. I have perused the court file and apart from the letter dated 11th December 2012 there is only one letter dated 22nd April 2013 on follow up of proceedings.

It is now too late to file appeal.

Rule 82 of the court of Appeal Rules provides that where a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, he shall be deemed to have withdrawn the appeal. I find that the notice of appeal filed by the Respondent has been withdrawn by operation of law under Rule 82 of the Court of Appeal Rules following the Respondents failure to lodge appeal within the prescribed period.

For the foregoing reasons I order as follows:-

1. The sum of Kshs . 298,686.00 be released to the Claimant forthwith.
2. The Respondent pays the Claimant Shs. 10,000/- as costs of this application.
3. That the Claimant pays interest on decretal sum from the date of judgment to the date of this ruling.

Orders accordingly.

Dated at Nairobi this 5th day of June 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent