



**REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT**

AT NAIROBI

CAUSE NO. 1727 OF 2011

RULING

PATRICK ONGUSO NASIBI

VERSUS

NATIONAL WATER CONSERVATION

AND

PIPELINE CORPORATION

DELIVERED BY

HON. LADY JUSTICE MAUREEN ONYANGO

REPUBLIC OF KENYA

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PATRICK ONGUSO NASIBI.....CLAIMANT

VERSUS

NATIONAL WATER CONSERVATION

AND

PIPELINE CORPORATION.....RESPONDENT

RULING

The application before me for determination is the Respondent's Notice of Motion dated 15th May, 2014 and filed in court under Certificate of Urgency on 16th May, 2014. The application is made under Section

17 of the Industrial Court Act, 2011, Rule 16(2), 27(4) and 31(2) of the Industrial Court (Procedure) Rules, 2010, Order 51 Rule 1, Order 42, Rule 6(1), (2) and (6) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The Respondent seeks the following orders:-

1. **THAT** this application be certified as urgent and be heard exparte in the first instance.
2. **THAT** this honourable court pleased to issue an order of stay execution of the decree herein pending the hearing and determination of the application herein and/or further orders of this honourable court.
3. That pending the hearing and determination of the Respondent's **Nairobi Civil Application No. NAI 57 of 2013 (National Water Conservation & Pipeline Corporation vs. Patrick Onguso Nasibi)** and/or further orders, this honourable court be pleased to issue an order of stay of execution of the decree herein.
4. **THAT** costs of this application be provided for.

The application is supported by the Affidavit of Evans Ngibuini, the Acting Managing Director of the Respondent and on the grounds that Judgment was entered against the Respondent on 16th January, 2013 in the sum of Kshs.2,906,278.85 plus costs, that costs were assessed on 28th March 2014 at Kshs.187,070, that the Respondent, being dissatisfied by the Judgment filed an application in the Court of Appeal (Nairobi Civil Application No. 57 of 2013) seeking leave to file Notice of Appeal out of time, which application is still pending before the Court of Appeal.

The Respondent further states in the grounds in support of the application and in the supporting affidavit that on 12th May, 2014 the Claimant instructed Ms. Recovery Concepts Auctioneers to execute the decree in this case hence this application for stay of execution.

The Respondents plead that should the intended appeal succeed it would be rendered nugatory if this application is not granted, that the Respondent is willing to comply with any conditions as to security for the performance of the decree as may be imposed by the court and further that the Claimant will not suffer any prejudice should the orders be granted.

The Respondent relied on the following authorities:-

1. **The Industrial Court Act and Industrial Court (Procedure) Rules 2010.**
2. **Kenya Kazi Security Services Limited vs Kenya National Private Security Workers Union – Civil appeal No. NAI.108 of 2013 (UR 71/2013).**
3. **Transport Workers Union Kenya vs African Safari Diani Adventure HCCC No. 2225 of 1992 – Mombasa Industrial Cause No. 21 of 2013.**
4. **Josephine Seraphine Wadegu vs Kenya Power & Lighting company Limited – Kisumu Industrial Cause No. 3'A'/2013.**
5. **Ramadhan Mohamed Ali vs Hasim Salim Ghaim – Mombasa HCCA No.32 of 2013.**

The Claimant opposes the application and on 29th May, 2014 filed a Replying Affidavit sworn on 26th May, 2014. In the Replying Affidavit the Claimant states that the Respondent sought a 30 day stay of execution which was granted by the court on the date of delivery of Judgment, the Respondent did not file Notice of Appeal and only filed its application seeking leave to appeal out of time two (2) months after the judgment. The Claimant further states in the Replying Affidavit that no Notice of Appeal was filed within 14 days as required by law, that there is no appeal and therefore no stay can be granted pending a non-existent appeal, and further that the Respondent has not demonstrated that it would suffer substantial loss. The Claimant states in the Affidavit that he is the owner of property known as Ngong/Ngong/26992 which has a residential house whose current market value is Kshs.8,000,000/=. He annexed a copy of the title and valuation report to his affidavit. He further states that he has a green-house within the same property from which he carries out horticulture farming and earns an income of Kshs.150,000/= per month. That he is also a Director in Plan B Holding, a Bar and Restaurant Franchise with a gross monthly turnover of Kshs.6,000,000/= from which he earns income in excess of Kshs.200,000/= per month. He states that he would be in a position to repay the decretal sum should the Respondent's intended appeal succeed. He prays that the application be disallowed for want of merit.

The Claimant relied on the following authorities:

1. **Redlands Enterprises Limited V. Premier Savings & Finance Limited (2002) 2 KLR**
2. **Joseph Makarios V Benardicato Esalambo & another {2014} eKLR**

The application was first heard ex-parte on 16th May 2014 by my brother Justice Nduma Nderi who granted stay of execution pending inter parties hearing of the application. When the application came up for hearing before me on 12th June 2014 the parties agreed to proceed by way of written submissions.

I have considered the grounds in support of the application and the averments in the supporting affidavit of Evans Ngubuini as well as replying affidavit of the Claimant. I have also read the submissions filed by both parties and the authorities that the parties have relied on.

In my opinion the first issue I should consider is whether I have jurisdiction to hear and determine the Respondent's application taking into account the fact that the Respondent has already moved to the Court of Appeal to seek extension of time for filing appeal.

Rule 41 of the Court of Appeal Rules 2010 provides as follows:

“The court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for doing of any act authorized or required by these rules, notwithstanding the fact that no application has been made in the first instance to the superior court.”

Section 7 of the Appellate Jurisdiction Act empowers the High Court to extend time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal even after the time for giving such notice or making such appeal has already lapsed.

From the foregoing, both this Court and the Court of Appeal have jurisdiction to grant the orders sought by the applicant. The applicant has not explained why the application for stay of execution was not made at the same time as the application for extension of time to file and serve notice of Appeal. As the Claimant's Counsel has pointed out, an appeal does not operate as a stay of execution. Both parties have correctly observed that stay of execution pending appeal is granted on the grounds that the applicant has an arguable appeal and the appeal would be rendered nugatory should stay not be granted.

In the instant case, there is no appeal that has been filed. The applicant has only sought leave to file notice of appeal out of time. That application is not in this court but in the Court of appeal. The application could have been made in this court but the applicant chose to go to the court of appeal, which has concurrent jurisdiction.

The court can only grant the orders on the understanding that the application filed in the court of Appeal will be successful. Such understanding can only be confirmed by the court of Appeal. To do otherwise would be granting speculative orders which this court cannot do.

It is also my understanding that once the court of Appeal is seized of a matter, this court ceases to have jurisdiction. It becomes functus officio. The jurisdiction in the matter can only revert to this court if the court of Appeal remits the matter back to this court.

It is my opinion that this matter should be filed in the Court Appeal as the court is already seized of the matter.

The foregoing notwithstanding, the court record shows that on the date of judgment, Ms. Njui who was holding brief for Mr. Kamwendwa for the Respondent sought stay of execution for 30 days to process

payment which application was granted for that purpose in spite of the fact that stay was opposed by the Claimant.

I have further confirmed from the court record that the Respondent/Applicant has to date not applied for certified copies of proceedings and judgment which would be necessary for this court to issue a certificate of delay for purposes of filing appeal out of time.

The application filed in the court of Appeal which is annexed to the applicants application herein does not include leave to apply for copies of proceedings and judgment out of time. Further, the grounds of the intended appeal include matters of both law and fact without distinction.

The Industrial Court Act is explicit that appeals from decisions of this court would be on issues of law only.

I am convinced from the foregoing that the application is not merited and dismiss it with costs.

Read in open Court this 16th day of September, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE