



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 137 OF 2014

JENNY LUESBY CLAIMANT

VERSUS

STANDARD GROUP LIMITED RESPONDENT

RULING

Mrs C.A. Wetende Advocate for the Claimant

Mr Chacha Odera & Omondi Advocates for the Respondents

1. On 30th July 2014, the respondent herein, Standard Group Limited filed their application through Notice of Motion dated 30th July 2014 brought under the provisions of section 1A, 1B and 3A of the Civil procedure Act, order 42 rule 6 of the Civil procedure Rules 2010 and seeking for orders that judgement and award dated 16th July 2014 and any resultant decree be stayed until the hearing and determination of their intended appeal. The application is supported by the annexed affidavit of Ronald Luby. The claimant, Jenny Luesby replied to the application through a Replying Affidavit filed on 27th August 2014 opposing the application.

2. The respondent's application is based on the grounds that the judgement of the court delivered on 16th July 2014 awarded the claimant following a finding that there was summary dismissal and or unfair termination compensation, notice pay, general damages, payment of due salary and accrued leave days together with costs and interest. Immediately upon delivery of the judgement, the respondent was granted 14 days of stay pending filing a formal application. The respondent being dissatisfied with the judgement filed a notice of appeal and therefore seeks stay to enable them file the appeal to the Court of Appeal. Other reasons are that the sums awarded tot eh claimant are substantial, she is not a Kenyan national and has no known assets in Kenya that can be used to recover any amounts paid to her in the event that appeal is successful as her financial status is otherwise unknown.

3. In the affidavit of Ronald Luby, he states that as the respondent company secretary and having read the judgement of the court there are good grounds to file an appeal against the same. That there are conflicting decisions from the court on the award of general damages and this will form part of the grounds for the appeal.

4. In reply, the claimant stated that on 18th November 2013 opposed the application noting that she was summarily dismissed but the respondent retained the terminal dues that were paid on 9th June 2014 causing her serious financial and emotional strain which had a negative impact on her children and self and she had obligations that were not met. The claimant is currently working at her Kenyan company, African Laughter Ltd from where the respondent had head-hunted her to the job she lost with them.

There is a valid judgement of the court and the respondents had not paid the uncontested amounts or met the orders without a monetary obligation, the issuance of a Certificate of Service.

5. The claimant also states that the respondents have not met the threshold for the grant of the orders sought as there is no demonstration that there is an arguable appeal or that it will be rendered nugatory unless the orders are granted. The claimant has demonstrable assets in Kenya and businesses worth over 30 million Kenya shillings. The court has made a finding on matters now being raised in the affidavit of Ronald Lubyia and there being no appeal there is no good reason to allow the application.

6. In submissions, the respondents advocates stated that in law appeal is as of right and the respondents have filed a notice of appeal and to preserve it, the court should grant the stay sought. The respondent is ready to deposit security of the entire judgement amount or a portion of it as directed by the court. With the judgement amount being substantial, the claimant will not be able to repay it if the respondents are successful before the Court of appeal. The respondents relied on the case of **Kenya Airports Authority versus Mitu-Bell Welfare Society and Another [2014] eKLR** noting that there will be difficulty to recover the judgement amount from the claimant if this is paid before the respondent is heard by the Court of Appeal. The claimant has not demonstrated that she has assets that can be used to recover any amounts against her should the respondent succeed on appeal.

7. In submissions, the claimant advocate stated that the orders sought by the respondent are discretionary, the court has already given 14 days stay and the respondent failed to comply with any orders even the non-monetary ones and should therefore not enjoy such discretion. There are uncontested amounts which have not been released to the claimant. There is no loss that will be suffered by the respondent if stay is not granted as it is not sufficient to say the award is too high.

8. 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.

9. On the cited cases by the Respondents authorities in support of the application, in *Industrial Cause No. 1616 of 2012, Aviation & Allied Workers union versus Kenya Airways Ltd and Others* this case be distinguished with the current case as the applicants in seeking stay had already filed their appeal which was pending hearing before the Court of Appeal. In *Tobias Ong'any Auma and Others versus Kenya Airways Co-operation [2001] eKLR* the matter related to redundancy and the question of payment of general damages with regard to the provisions of the repealed Employment Act, Cap 226 which is not the case here. In *Feisal Amin Janmohammed T/A Dunyia Forwarders versus Shami Trading Co. Ltd [2014] eKLR* the court went into great details to analyse why a party seeking stay should establish that *substantial loss* will arise hence the basis for the court to issue such stay.

10. The granting of stay of execution pending appeal is also governed by Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the Applicant. See the Halsbury's Law of England, vol.17, paragraph 14:

Incidence of the legal burden in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.

11. Other grounds that must be established by an applicant are;

(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.

12. Sufficient cause being a technical as well as a legal requirement will depend entirely on the Applicant satisfying the court that ***Substantial loss may result to the applicant unless the order is made,*** and therefore the court may direct for the deposit of ***Such security for the due performance of the decree or order as may ultimately be binding on the applicant*** where an applicant has been able to satisfy to the Court that ***the application has been made without unreasonable delay.***

13. These conditions are the essence of Order 42 Rule 6 CPR which I need not recite in verbatim. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in ***Mukuma V Abuoga (1988) KLR 645*** reinforced this position.

14. On the issue of substantial loss occurring, no doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR and Rule 17 of the Industrial Court Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of ***Silverstein versus Chesoni [2002] 1KLR 867***, and also in the case of ***Mukuma V Abuoga*** quoted above. The exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasise the centrality of substantial loss thus:

...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

15. With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. Equally where no appeal exists the obvious outcome is that there is nothing to peg the stay on. And even in a case like this one where the respondents state that they have arguable grounds to submit before the Court of Appeal, no such draft has been attached to their Notice of motion or to the supporting Affidavit of Ronald Luby. The only admonition however, is that the Court should not base the exercise of its discretion under Order 42 Rule 6 of the CPR and Rule 17 of the Industrial Court Procedure Rules only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.

16. The question is; whether the respondent has demonstrated that substantial loss will occur unless an order for stay of execution is issued. The respondent as the applicants in answer to the above question say that substantial loss will result as their appeal will be rendered nugatory. The Appellant on the other hand, says the respondents have not established that substantial loss will occur unless an order for stay is made.

17. After considering all the rival arguments herein, I am of the view that indigence or lack of a party who has a good judgement to outline what assets they possess is not a bar to their enjoyment of the fruits of the judgement. To the contrary, such a party holds a valid order of the court that they should be made to enjoy. There is a money decree herein, the claimant gave evidence that she is in gainful employment and that notwithstanding, has a judgement of this court.

The application herein was filed without undue delay soon after the judgment herein was delivered. In light thereof, I make the following orders

- a. **The Applicants shall release 50% of the judgement amount to the claimant within the next seven (7) days;**

b. The applicants have stay of 14 days from the date of this ruling, if no appeal is filed and served upon the claimant, the same will terminate.

Delivered in open court at Nairobi this 16th Day of September 2014

M. Mbaru

Judge

In the presence of:

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