



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 694 OF 2013

(Before D.K.N Marete)

EVALYNE NGONYERE DEDOGO.....CLAIMANT/RESPONDENT

VERSUS

SUPERFOAM LIMITED.....RESPONDENT/APPLICANT

RULING

This matter is an application by way of a Notice of Motion dated 26th March, 2013 by way of a certificate of urgency of the same date and filed on the following date. It seeks the following orders of court;

1. ***THAT*** this application be certified as urgent, service of the same be dispensed with and it be heard *ex-parte* in the first instance.
2. ***THAT*** pending the hearing and determination of this application inter parties, this Honourable Court be pleased to issue a stay of execution of the award delivered on 21st February, 2013 and all consequential **ORDERS** thereto in the first instance.
3. ***THAT*** this Honourable Court be pleased to issue a stay of execution of the Award delivered on 21st February, 2013 and all consequential Orders thereto pending the hearing and determination of the Respondent/applicant's appeal.
4. ***THAT*** this Honourable Court be pleased to issue such and/or further orders as it may deem fit to do so.
5. ***THAT*** costs of this application be provided for.

It is grounded on the supporting affidavit of Martin Njiru Ireri sworn on 26th March, 2013 and the following other grounds;

1. ***THAT*** the court delivered its award on 21st February, 2013.
2. ***THAT*** the court declined to grant a stay of execution despite a humble prayer for the same by the Respondent/Applicant's counsel.
3. ***THAT*** the Respondent/Claimant's Advocates applied to be issued with a certified copy of the award on 21st February, 2013 and the court indicated that it would be available once typo corrections were effected on the award.

4. **THAT** since that day, the respondent/applicant has made valiant efforts to acquire a copy of the award but has always been informed that the file is not available or is with the Learned Judge in chambers.
5. **THAT** the respondent/applicant's advocates have written a protest letter to the registrar of the Industrial Court voicing their frustration in acquiring a copy of the award
6. **THAT** the respondent/applicant's advocates having not been in a position of advise their clients and to seek further instructions having not seen the award, save to add that they have filed a Notice of Appeal to safeguard their client's rights.
7. **THAT** the claimant/respondent has commenced the execution process and the respond/applicant is apprehensive that the same may proceed to the detriment of the respondent/applicant.
8. **THAT** the respondent/applicant has a good and arguable appeal on merits.
9. **THAT** unless his application is heard and determined urgently, the claimant/respondent may levy execution against the respondent/applicant to its detriment and great prejudice as the claimant/respondent has no known sources of income and would thus not be in a position to reimburse the respondent/applicant in the event that its appeal succeeds.
10. **THAT** the respondent/applicant is ready to abide by any orders of this honourable court as to security.
11. **THAT** it is in the best interest of justice that a stay of execution herein be granted pending the hearing of this application and the respondent/applicant's intended appeal.
12. **THAT** there has been no inordinate delay in bringing this application.

As is rightly pointed out in this application, judgement in this matter was delivered on 21st February, 2013. Counsel holding brief for Mr. Njiru for the respondent applied for stay of execution but this was declined on grounds that no substantial or judicious grounds were offered in support of the oral application for stay of execution.

The application under a certificate of urgency came for hearing on 27th March, 2013 whereby the applicant/respondent sought the matter be certified as urgent and sought orders for stay pending hearing off appeal. Counsel particularly sought prayers 1 and 2 and an *inter parties* hearing date. There is a protest letter to the Registrar of the Industrial Court that the respondent cannot access the file on 26th March 2013 – MN1 and a Notice of Appeal together with the affidavit in support thereon. The court upon hearing the application dated 26th March, 2012 and the grounds thereof and the affidavit of Martin Njiru and submissions in court directed to follow 27th March, 2013.

1. **THAT** the application dated 26th March, 2013 is hereby certified as urgent.
2. **THAT** temporary stay of execution do issue for seven days pending mention of the matter before Rika, J. for taking up the hearing dates and directions.
3. **THAT** the application came for hearing before Rika, J. and in the process of both parties issued the following orders of court.

On 8th April, 2013 the application came for hearing before Rika, J. and in the presence of both parties issued the following orders of court;

1. Hearing of the application be on 10th May, 2013
2. Interim orders extended.

On 10th May, 2013 the matter was placed for hearing before Rika J and in the presence of the parties. Rika J. made the following orders.

1. **THAT** the decision in this matter having been made before Marete J. the application should be heard before the trial judge.
2. Mention on 17th May, 2013.

The matter was placed for hearing on 17th May, 2013 before this court and both parties appeared and made their submissions. Mr. Njiru for the respondent submitted on the history of the application and court orders by Justice Rika that the same be heard before this court whereas the claimant/respondent submitted that the matter had been circuitous and she had suffered immensely as a consequence of this process. She prayed that the matter of the application be dismissed and that she be paid her dues. The court fixed the matter for hearing on 27th May, 2013 at 900 hours.

On 27th May, 2013 the matter was heard with the submissions of the parties. Mr. Njiru for the applicant/respondent opened his submissions by introducing the historical and systematic analysis of the application from the date of judgement. He further submitted that the claimant has started the process of execution and that if this is allowed to save to on conclusion, the applicant would suffer prejudice.

He further submitted that he has made futile attempts to avail the proceedings and judgement of court with a view to advising the respondent and also seeking further instructions but he has been frustrated by non issue of the relevant materials by the Court Registrar. This has disabled his ability to expeditiously launch his appeal as intended.

The applicant further argues that he has an arguable and meritorial appeal and that if this application is not allowed, the respondent is apprehensive that the claimant is a person of no known income and that if the appeal is allowed, it shall have been negated. He is ready to abide by any conditions on security in this cause.

He further argues that inasmuch as the claimant is acting in person and therefore lay, this application is not made with an intention of frustrating the claimant or in any way circumventing justice. It is a pursuit of legal right supported by statute law and precedent.

The two major criteria for deciding matter of this nature are;

- i. That the applicant must show that he has an arguable appeal.
- ii. That the appeal will be rendered nugatory if the stay sought is not granted.

The other factors are security and action by the applicant without undue delay-expedition. The claimant respondent in response and opposition to the application submits that this application does not founder on the tenets of justice. It is a delay tactic by the respondent and intended to frustrate her efforts to realize the fruits of judgement. She contends that upon service of the decree unto the respondent/applicant, he told her that the matter would delay up to 2015.

Again she has continued to suffer despite rendering fourteen year's service which was climaxed by the unfair termination.

The first issue for determination is whether the applicant has been duly diligent in his pursuance of appeal as expressed. In his supporting affidavit, the applicants counsel deponed that efforts to get a certified copy of the award judgement were frustrated by the court – see paragraph 4-7 of the affidavit. Apart from

the letter dated 6th March, 2013, dubbed protest letter, there is no evidence of any formal requisition for the proceedings or judgement or at all of the materials in support of the applicants appeal. No application for such materials was made to court on the date of delivery of judgement or at all. This is telling on the diligence of the applicant.

This application is dated and filed on 26th March, 2013, a month after the date of judgement and refusal of the oral application for stay of execution. The applicant in his supporting affidavit and grounds of the application depones that the claimant/respondent has initiated the process of execution and if this is had, the intended appeal would be rendered nugatory. Why would the applicant not have acted any earlier than the process of execution in his quest for appeal or stay of execution and appeal? This case does not sound convincing or genuine to me.

The documentation offered in support of this application are;

- i. Applicant's letter to the Registrar, Industrial Court of Kenya dated 6th March, 2013.
- ii. Copy of notice of Appeal by the respondent dated 5th March, 2013 and filed on 6th March, 2013.
- iii. Letter referenced 'Acknowledgement of the decree Cause No. 694/2012 VS Super Foam Ltd and received by the respondent on 21st March, 2013 inclusive of decree.
- iv. Copy of notice of Appeal by the respondent dated 5th March, 2013 and launched on 7th February, 2013.

The applicant argues that he has an arguable appeal and meritorial appeal but throughout the application and proceedings this is not in any manner demonstrated. He has not annexed a copy of a memorandum of appeal or even a draft of the same. It is clear that so far, no appeal has been launched. Apart from the Notice of Appeal annexed to the application, there is no other indicator of any attempt at an appeal. Is this diligence or absence of undue delay? My answer to both is no.

In the absence of an appeal, or even a draft memorandum of the same, this court finds it difficult to rationalize and acclaim the submissions of an arguable and or meritorial appeal. The applicant has failed to demonstrate this in fact and evidence and therefore cannot benefit from the same. The applicant submits that he is willing to abide by any conditions on security and the claimant/applicant seems to support this conditionality.

The provision of security is a critical facet in granting orders for stay of execution. However, this must be juxtaposed with the other circumstances of the case. It has been argued that justice delayed is justice denied. Inasmuch as justice is a multipronged tool of application in legal practice as is demonstrated in this and other cases, in the instance case, this matter tilts in favour of the claimant/respondent. This is because despite plausible submissions on the requisition for stay of execution, the applicant has not come out of his way to clearly demonstrate diligence in his quest for an appeal and therefore the justification for stay of execution. His submissions and averments on lack of diligence of the Court Registrar in furnishing materials for his action, advice and intended appeal are mere allegations which have not been demonstrated in evidence. The applicant/respondent cannot by any means claim ignorance of the formal procedure for requisition for any materials sought from the Court Registrar. These are mere excuses and cover-ups.

This application must on the basis of the foregoing fall by the way side and I so order. The application is therefore dismissed with costs to the claimant/respondent.

Dated signed and delivered this 13th day of June, 2013

D.K.Njagi Marete

JUDGE

Appearances

1. Claimant/respondent in person
2. Martin Njiru Ileri instructed by Federation of Kenya Employers for the respondent.