



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 919 of 2010

CAPTAIN MOHAMED NOOR.....CLAIMANT

VERSUS

C.M.C. AVIATION LIMITED.....RESPONDENT

RULING

The Application before me is the Respondent's Notice of Motion dated 18-10-2012. It seeks the following orders:-

1. The application be certified urgent and be heard *ex-parte* in the first instance.
2. There be an order of injunction to restrain the Claimant by himself, or his agents from executing the Decree of this Court or enforcing any orders of the Court consequential to the ruling made on 8th October 2012 pending the hearing and determination of the application.
3. There be an order of injunction to restrain the Claimant by himself, or his agents from executing the Decree of this Court or enforcing any orders of the Court consequential to the ruling made on 8th October 2012 pending the hearing and determination of the intended appeal filed in the Court of Appeal.
4. The orders of the Court made on 8th October 2012 dismissing the Respondent's applications dated 4th June 2012 and 19th June 2012 respectively be suspended pending the hearing and determination of this application, and of the appeal.
5. The Respondent do furnish security for the performance of the decree by providing a bank guarantee for the sum of USD 119,363.50 and consequent thereon, there by a stay of execution pending the hearing and determination of the Appeal.
6. In the alternative, the order of Stay of execution pending appeal `granted on 8th October 2012, and which lapsed on 17th October 2012 be reinstated and extended pending the hearing *interpartes* and

determination of the application.

7. There be a stay of execution pending the hearing and determination of the appeal upon the judgment amount of USD 119,363.50 being deposited in a joint interest bearing account to be set up in the names of the advocates for the parties within 7 working days.

8. The cost of the application be provided for.

It is supported by the affidavit of Michi Kirimi Advocate for the Respondent.

The application is opposed by the claimant vide the affidavit sworn by the claimant personally and another one by his Advocate Mr. Jomo Nyaribo.

The application was argued before me on 3-10-2012 by Mr. Kiragu Counsel for the Applicant and Mr. Nyaribo Counsel for the Claimant.

I have carefully gone through the application the supporting affidavits and the affidavits in opposition to the application. I have also considered the submissions by the Learned Counsel and the judicial precedents cited.

The issues for determination are:-

- (a) Whether the application is res judicata?
- (b) Whether the prayers sought ought to be granted?

Before addressing the foregoing issues, I wish to observe that prayers 1, 2 and 6 of the application are spent and therefore, not forming part of my ruling herein.

As regards the issue of res judicata, I will refer to the court record. It is obvious from the record that the trial court delivered an award on 10-11-2011. That subsequently the Respondent/Applicant filed a Notice of Appeal and filed an application for staying pending Appeal on 1-12-2011 being *Civil Application No. Nai 269/2011*. That no stay order was made although the application was certified urgent and the same mentioned twice in the presence of the Counsel for the two parties.

That in the meanwhile the Applicant filed application dated 20-12-2011 before this court seeking Stay of Execution pending hearing and determination of the aforesaid application for stay in the Court of Appeal. That the Court heard the Application dated 20-12-2011 and dismissed on 29-5-2012.

The applicant was not pleased and on 4-6-2012, she brought another application this time seeking review of the ruling delivered on 29-5-2012. The application came up for hearing on 7-6-2012 when the parties recorded a consent order to the effect that stay of execution be issued pending *inter partes* hearing of the same application upon condition that the applicant deposits the sum of USD 119,362.50 in court within 14 days in default of which execution was to proceed. The application was to be heard on 3-7-2012.

The Applicant defaulted to depositing the money as ordered and instead she changed Advocates and filed another application dated 19-6-2012 seeking review and/or setting aside the consent order dated 7-6-2012. The latter two applications were heard together and I delivered my ruling on 8-10-2012 whereby I dismissed the applications.

The effect of my said ruling was to restore the *status quo* as it were on 29-5-2012 when stay pending determination of Application for stay pending Appeal was dismissed by Justice S.M. Madzayo. The only option left for application was now to pursue the same application of Stay that she neglected in the Court of Appeal dated 2-12-2011.

Consequently, Miss Kirimi for the applicant made an application informally in court for stay of 14

days in order to seek instructions whether to pursue the said stay application pending before the Court of Appeal where the hearing date had not been forthcoming. Despite opposition by the Claimant, I gave 7 days' stay on top of the 2 days which had remained from the Consent Order of 7-6-2012 to enable the applicant to seek formal stay through the Application dated 2-12-2011 pending in the Court of Appeal.

Instead, the applicant appealed against my ruling dated 8-10-2012 and filed the present application. The prayers sought now in my view are substantively different from the ones sought in the previous applications. Prayer 3, 4, 5, 7 are all different from the other applications because they are meant to stay execution pending the hearing and determination of the intended Appeal. In the previous application especially the primary application dated 20-12-2011, the order sought was stay of execution pending the hearing and determination of the substantive application for stay pending the determination of the intended Appeal in the Court of Appeal. Whatever semblance the application dated 4-6-2012 and 19-6-2012 may have had with the present application in my view did not render the same res judicata.

As regards the issue of merits of the application before me, I regret to say that there was none. Firstly, the prayer to restrain the decree holder from executing a lawful decree of this court did not make sense at all to me. In my view, injunction being an equitable remedy should only be issued where the other party is in breach of the law or equity itself and in circumstances where the injury likely to be suffered is one which cannot be remedied by way of damages.

I will not grant prayer 3 of the application. I will also not grant prayer 4 of the application because it has no basis in law. Granting it is like shutting my eyes to the reality. What would be the rationale for suspending my ruling of 8-10-2012? In my view it will only serve the purpose of reinstating the application dated 4-6-2012, 19-6-2012 and the Interim orders which have been in force since 7-6-2012. This is what I would call abuse of the process of the Court.

The position is not made better by prayer 5 and 7 which in my view should have been made as alternatives. In my view they are in conflict with each other and are directly relevant in the substantive application pending in the Court of Appeal. In my view, these two prayers are similar to the application pending before the Court of Appeal. I would not want to deal with an application similar to the one pending in the Court Appeal. If I were to grant the two prayers, apart from causing conflicting orders of stay, I would also overtake the application before the Court of Appeal.

Even if there was no other similar application in the Court of Appeal, I would still not have granted the stay orders. The reason for the foregoing view is because there is no substantial loss to the applicant that has been demonstrated and also the fact that the application has been made after an unreasonable delay.

The upshot of this ruling is that the application dated 18-10-2012 is dismissed with costs to the claimant.

Orders accordingly.

DATED and DELIVERED at Nairobi this 16th day of November, 2012.

Onesmus Makau
JUDGE