



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL APPEAL NO. 28 OF 2019

G4S KENYA LTD.....APPELLANT

V E R S U S

FRANK KIBEGWA *Alias* FRANK KIBEWA OMBOGA.....RESPONDENT

RULING

1. The application pending before me is a Notice of Motion dated 21/5/19 brought under a certificate of urgency and seeks orders that there be stay of execution of the Judgment in Kerugoya CMCC No. 67/2016 pending the hearing and determination of this application inter parties and the hearing and determination of this appeal.
2. The application is based on the ground that the trial Magistrate awarded damages of Kshs 8,447,460/- in respect of damages for injuries sustained in the course of employment and which claims were governed by the **Work Injury Benefits Act**. The appellant became aware of the Judgment on 4/6/18 and sought to apply for a review of the Judgment on the ground of want of jurisdiction but the application was dismissed.
3. There is real risk of execution and the applicant may suffer substantial loss if stay is not ordered. The appeal maybe rendered nugatory unless stay of execution is ordered. They may not be able to recover the decretal sum if the appeal is successful. The applicant is ready to provide security as may be ordered by the court.
4. The application is supported by the affidavit of the Boniface Ngunyu the Human Resource Manager of the appellant. He has reiterated the above grounds in the affidavit. It is deponed that the respondents claim was assessed by Directorate of Occupational safety and Health services under Work Injury Benefits Act (WIBA) and the respondent was paid Kshs 608,193.60/- by a Barclays Bank Banker's cheque in full and final settlement. The respondent did not disclose in the trial court that he had been compensated.
5. The respondent opposed the application and filed a Replying Affidavit sworn on 11/6/19. He disputes the contention by the applicant that the court had no jurisdiction. The respondent depones that he has not received compensation from the appellant. That the applicant is not likely to suffer substantial loss nor will the appeal be rendered nugatory if he is paid as the appeal is monetary decree. That execution is a lawful process and that there was in ordinate delay in bringing the application.
6. The appellant filed a further affidavit sworn on 25/6/2019 in response to matters raised in the affidavit of the respondent.
7. The application was disposed off by way of written submissions. Though the parties have raised various matters in the affidavits and the submissions, the main issue before this court is stay of execution of the Judgment of the trial Magistrate. I have considered the application. The legal provision governing stay of execution is **Order 42 Rule 6 (2) (a)&(b) Civil Procedure Rules (CPR)**

It provides –

“No order for stay of execution shall be made under subrule (1) unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

The main consideration is whether the applicant may suffer substantial loss if stay is not ordered. The other considerations are whether the

application has been brought timeously and security has been provided as the court may order. I will therefore proceed to consider whether the application meets the threshold for the grant of stay of execution.

8. Substantial loss:

The applicant is supposed to demonstrate that the substantial loss may result. The applicant submits that the respondent was fully compensated and that amount of compensation not considered. It is also submitted that (under ground No. 5) that the applicant stands to suffer substantial loss as the assets of the respondent are unknown and is apprehensive that it will not be possible to recover the amount of Kshs 8,447,460/- and costs from the respondent in the event that its appeal is successful. The applicant is not expected to know the means of the respondent. So when he alleges that the respondent will not be able to refund, he effectively shifts the burden to the respondent to prove that he is able to refund. This was what was stated in **Kenya Orient Insurance Co. Ltd –v- Paul Mathenge Gichuki & Another (2014) eKLR** where the court stated that the burden of proof that the respondent can refund the decretal sum of the appeal succeeds, shifts to the respondent the moment the appellant states that it is unaware of the respondents resources. The court cited with approval the holding in **C. Application Nai 75/2002 ABN Amro Bank, N. V.V Le Monde Foods Limited** where the court stated:-

“all an applicant can reasonably be expected to do is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances the legal burden still remains with the applicant but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has such as land, cash in the bank and so on.”

9. In this case the burden ie evidential was shifted to the respondent to prove that he would be able to refund. No attempt was made by the respondent to prove that he will be in a position to refund. The court when granting an order for stay exercises discretion. It must balance the interests of the parties the one who has a judgment in his favour and wants to enjoy the fruits of Judgment and the one who has a right to be heard on appeal. In this case it is true to say that the appeal would be rendered nugatory if stay is not ordered and the appeal succeeds. Though this is a money decree, it is in the interests of justice that stay of execution be granted as there is no prove that the respondent would be in a position to refund.

Whether application was filed without unreasonable delay.

From the record of the lower court upto the filing of the application in this court, the applicant was vigilant although, he applied for the review of the Judgment, he filed Memorandum of appeal and this application within a span of 30 days. There was no delay. Equity aids the vigilant. Though the respondent avers that there was delay in filing the application for application review the delay has been explained. In any case the delay which is in issue here is in filing the application for stay. The delay in filing the application for review ought to have been raised during the hearing of that application.

The delay in filing this application was not in ordinate. In **Global Tours and Travels Ltd (21)** the court stated that the court exercises Judicial discretion which has to be exercised in the interests of justice. Such discretion is unlimited and should be exercised rationally and the sole question is the interest of justice. I have stated that in the circumstances of this case it would be in the interest of justice to order stay of execution.

3. Security

It is the court which has to order security. The applicant has stated that he is ready to provide security in form of an insurance quaranTEE for the due performance of the decree.

From the submissions by the parties, many issues were raised which believe border on the merits of the appeal. I do not wish to address them at this stage.

10. In Conclusion:

I find that the application for stay of execution has merits. I order as follows:-

- 1. There be stay of execution pending the hearing and determination of this appeal.**
- 2. The applicant to provide security by an insurance quaranTEE for the due performance of the decretal sum Kshs 8,447,460/-. The same be executed within 21 days.**
- 3. Costs to the applicant.**

Dated at Kerugoya this 27th Day of February 2020.

L. W. GITARI

JUDGE