



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Appeal 193 OF 2007

BAMBURI CEMENT LTD ::::::::::::::::::::APPELLANTS/APPLICANT

VERSUS

JOSEPH KAMULI KAINDI::::::::::::::::::;::::::::::RESPONDENT

RULING

1. That applicant herein, **Bamburi Cement Company Limited** by its Notice of Motion premised on order XLI Rule 4 of the Civil Procedure Rules seeks an order that the execution of the decree obtained in **CMCC.No. 921/2007(Machakos)** be stayed pending the hearing and determination of **H.C. Civil Appeal No.193/2007(Machakos)**. There is also the prayer that costs be provided for.
2. That Application is based on the following grounds that appear on the face of it;
 - a. That the judgment delivered by the Honourable Court in Chief Magistrate's Civil Suit Number 921 of 2007 is erroneous.
 - b. That the award given by the Honourable Court in Chief Magistrate's Civil Suit Number 921 of 2007 is erroneous.
 - c. That unless a stay of execution is granted herein the Appellant's intended Appeal will be rendered nugatory.
 - d. That the Appellant's Appeal has high chances of success.
3. In the Supporting Affidavit sworn on 22.10.2007 by **Betty Kanyagia**, Legal Manager of the Applicant Company, it is deponed that the subordinate court delivered its judgment on 20.9.2007 and awarded the Respondent Kshs.217,436.35 as special damages for wrongful dismissal, together with costs and interest thereon. The Applicant then preferred the Appeal aforesaid and it now argues that the Appeal has high chances of success and that the Respondent who is allegedly admittedly unemployed and therefore a man of straw cannot ever repay the decretal sum if the Appeal succeeds. The Applicant, it is further deposed is able and willing on the other hand, to deposit any security as may be ordered by court for the due performance of the decree.
4. In response, the Respondent in a Replying Affidavit sworn on 12.11.2007 has deposed that the intended Appeal has no merit and further that the Applicant has not met the conditions set out in Order XLI Rule 4 of the Civil Procedure Rules and in particular that no evidence of any substantial loss to be suffered has been shown. It is further stated that the Applicant delayed for 30 days before filing the

instant Application.

5. The Respondent has also made the point that he is able to repay the decretal sum should the Appeal succeed and that the Applicant has withheld his retirement benefits which can be used to off-set the decretal sum in that eventuality.

6. I have heard and considered the submissions by both advocates appearing and to determine the present Application, I should first refer to the provisions of order XLI Rule 4(1) and (2) which are as follows:-

“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from may except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to appellate court to have such order set aside.

No order of stay of execution shall be made under sub-rule (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.”

7. Contrary to Mr. Sila’s submission that one must always file an application for stay of execution before the trial court, the language of Rule 4(1) above is different. A party may seek a stay of execution in the trial court, fail to do so and is still at liberty to seek the same orders in the appellate court as the Applicant may have done. In any event, Rule 4(2) is clear in its language that a party seeking the exercise of discretion for stay of execution pending appeal must establish that unless the order is granted;

a. it will suffer substantial loss; and

b. it has brought the Application without delay; and

c. is willing to deposit such security as the court may order.

8. In the instant case, the Respondent was an employee of the Applicant and the decree in the lower court arose as a result of a judgment awarded to him for alleged wrongful dismissal. I have perused the lower court record and in support of his case, the Respondent stated that since his dismissal, he has remained unemployed and has no other means of sustenance. He has not in this Application said anywhere that he now has a means of income so that if the Appeal succeeded he would easily refund the decretal sum. To my mind, Kshs.217,436.35 is a such sum that an unemployed man cannot easily refund and the loss to the other party cannot in such a circumstance be anything but substantial.

9. Further, whereas the Applicant came to court 30 days after judgment was delivered, I do not consider that such a period can seriously be said to be so inordinate as to hold it against the Applicant.

10. Having so said however, the Respondent holds a judgment given in his favour by a competent court. To let him go away without that money being secure and earning interest for his benefit if the Appeal fails would be unjust in the circumstances.

11. In the event, while granting the order for stay pending appeal, I will order that the Applicant do deposit the entire decretal amount in a joint interest earning account to be held in the names of the

Advocates for the Applicant and Advocates for the Respondent. The deposit should be made within the next 21 days failure to which the order of stay of execution will lapse without further extension and execution may issue forthwith thereafter.

12. Costs of the Application shall abide the Appeal.

13. Orders accordingly.

Dated and delivered at Machakos this 20th day of February, 2008

ISAAC LENAOLA

JUDGE