



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, M'INOTI & MURGOR, JJA)

CIVIL APPLICATION NUMBER 106 OF 2020

BETWEEN

LETAN LIMITED.....1ST APPLICANT

LEDAMA OLE MESOPIR.....2ND APPLICANT

LLIOTA HILL SPRINGS.....3RD APPLICANT

AND

NDERITU KAGUU GITHAE & 8 OTHERS.....RESPONDENTS

(Being an Application for Stay of Execution against the Ruling and Order of the

Employment and Labour Relations Court at Nakuru by Mbaru, J

delivered on the 13th February, 2020) in

Claim Number 170 of 2018)

RULING OF THE COURT

On 22nd December 2018, the Employment and Labour Relations Court (ELRC) entered an *ex parte* judgment in favour of the respondents against the applicants, **Letan Limited**, **Ledama Ole Mesopir** and **Lliota Hill Springs** in *Nakuru Claim Number 170 of 2018 (Mbaru, J)* and ordered the applicants to deposit Kshs. 6,082,360 in court. For the purposes of this ruling we need not go into the particulars of the suit, save to point out that it concerned an employment dispute.

The applicants were aggrieved by the judgment, and by a Notice of motion dated 16th July 2019 they sought the following orders in the same court. That;

- i) *Iovanna Mesopir to substitute the 2nd respondent, Ledama Ole Mesopir;*
- ii) *pending the determination of the application that there be a stay of execution of the orders of the ELRC of 22nd November 2018 and*
- iii) *the court deem it fit to set aside the ex parte judgment of 22nd November 2018.*

The application that was supported by an affidavit sworn by the **Iovanna Mesopir** was brought on the grounds that, **the 2nd respondent, Ledama Ole Mesopir, (the deceased)** who was the managing director of the 1st and 3rd applicants had died on 27th July 2018; that his family had not become aware of the judgment until

18th April 2019 when the *ex parte* judgment of 22nd December 2018 was brought to their attention; that they also came to learn that the impugned judgment that was delivered after the deceased had passed on had ordered the applicants to deposit Kshs. 6,082,360 in court. Given these circumstances, they contended that it was only right and just for the impugned judgment to be set aside.

In the ruling dated 13th February 2020, the trial court issued the following orders;

- “a) That Lovanna Mesopir is hereby substituted as a respondent in place and instead of Ledama Ole Meitekini Mesopir;*
- b) That the respondent shall deposit the judgment sum with the court in 21 days;*
- c) That the parties shall proceed with taxation of the party and party bill of costs*
- d) That where there is no compliance as (sic) (b) above, the claimants shall move the court as appropriate...”*

The applicants were further aggrieved by the orders of the trial court and filed a notice of appeal dated 27th February, 2020. Simultaneously with that notice, the applicants filed a notice of motion dated 5th June 2020, that is now before us, predicated on **rules 5(2) (b)** and **41** of the **Court of Appeal Rules, 2010** and **Article 163 (4)** of the **Constitution of Kenya, 2010**, against the ELRC’s ruling and orders and seeking a stay of execution and a stay of any further proceedings of the trial court pending the hearing and determination of the appeal.

The application is supported by the grounds set out therein and the sworn affidavit of **Iovanna Mesopir** and the applicant’s written submissions.

These are to the effect that despite the trial court having been informed that at the time of the hearing of the dispute, the 2nd respondent was deceased, the court declined to set aside the *ex parte* judgment and instead went ahead to endorse its order for the decretal sum to be deposited in court; that the proceedings and judgment against the deceased had denied his estate the right to sufficient representation and the ability to mount a defense. It was further stated that since the deceased was a key witness in the suit, no proper hearing could have been conducted upon his demise without his having been substituted.

Citing the case of **Jaribu Holdings Ltd vs Kenya Commercial Bank Ltd CA No. 314 of 2007**, the applicants submitted that their appeal was arguable, and not frivolous and that it raised *bonafide* issues that were deserving of the full consideration of this Court. It was further contended that as a result of the impugned judgment, the respondent was irregularly and illegally attempting to execute the court’s orders against the deceased’s family property, and the limited liability companies; that consequently, the deceased’s family were exposed to the risk of losing their personal property and assets, including but not limited to their matrimonial home, all of which did not form part of the companies’ assets, and, were the respondents to proceed to enforce the judgment, the appeal would be rendered nugatory. The applicants argued that the respondents have since moved the ELRC seeking leave to execute the judgment, and a Notice to Show Cause was scheduled for 7th December 2020. Finally, it was contended that, the respondents have not demonstrated their ability to repay to the applicants in the events that the appeal were to succeed.

In a replying affidavit sworn by **Nderitu Kaguu Githae** on 18th November 2020 the respondents deponed that the applicants’ appeal is not arguable; that though the deceased died before the hearing of the claim, the dispute was against all the three applicants and therefore the reliefs awarded were joint and several. They emphasized that the proceedings were not heard in person and that the 1st and 3rd applicants properly survived the deceased and as such, his death did not extinguish the respondents’ claims against the applicants.

The respondents elaborated that no property belonging to the deceased was the subject of attachment and that any execution had yet to be initiated; that only a Notice to Show Cause was filed, and therefore the applicants claims that attachment of their personal and other property is imminent is unfounded. Lastly it was asserted that no evidence was adduced to show that the appeal would be rendered nugatory, but that nevertheless, the applicants remain in contempt of the court order to deposit the decretal sum in court.

In so far as applications filed under **rule 5 (2) (b)** of this Court’s rules are concerned, the threshold to be satisfied, as stated in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Upon considering the application, the affidavit in support and the submissions, the applicant's grievance is that in determining the motion, the learned judge failed to take into account that by the time of the hearing on 31st October 2018 and the delivery of the judgment on 22nd December 2018, the deceased who was the managing director of the 1st and 3rd applicant companies was already dead, and that therefore the applicants were not provided with an opportunity to defend themselves during the hearing.

Furthermore, following his demise, there was the next question of whether the deceased ought to have been substituted by his personal representative, and if so, whether his personal representative ought to have been provided an opportunity to be heard.

Order 24 Rule 4 of the Civil Procedure Rules specifies that;

“Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit. (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.”

In the instant case, the question as to when substitution ought to have taken place, if at all, is certainly an arguable point, and is an issue well worth ventilating before this Court having regard to the circumstances of this case.

Turning to whether the appeal would be rendered nugatory if we were to decline to grant the orders sought and the appeal were to succeed, we think so. The applicants have been ordered to deposit Kshs. 6,082,360 in court, and the respondents have admitted that they have filed a Notice to Show Cause that was scheduled for 22nd December 2020 (now past). What this clearly demonstrates is that the respondents are embarking *poste haste* to recover the decretal sums as soon as possible which action would effectively render the appeal nugatory.

As such, the applicants having adequately satisfied the two conditions necessary for stay of execution of the orders of the ELRC and stay of further proceedings, the Notice of Motion dated 5th June 2020 is merited, and is allowed. Costs in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR