Kamundi v Nilson & 2 others (Cause E021 of 2021)
[2023] KEELRC 636 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 636 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

CAUSE E021 OF 2021

ON MAKAU, J

MARCH 3, 2023

BETWEEN

EUSTACE NDEKE KAMUNDI ..... CLAIMANT

AND

NB FRIDE NILSON ..... 1ST RESPONDENT

NELSON MUNYI ..... 2ND RESPONDENT

JOSHUA MALANDA ..... 3RD RESPONDENT

RULING

1. The court delivered judgment herein declaring termination of the claimant's services as unfair and awarding him Kshs.2,354,600.00 damages plus costs. The respondent has since preferred an appeal and brought the Notice of Motion dated January 17, 2023seeking stay of execution of the impugned judgment pending the appeal. The applicant avers that his appeal has high chances of success and unless the stay order is granted execution will proceed and occasion on them irreparable loss. The appeal will also be rendered an academic exercise.

2. The claimant has filed a replying affidavit sworn on January 30, 2023 opposing the application on ground that the application is filed too late; that the applicants have disobeyed court orders and are using the police to harass him regarding documents he used in this suit; that the Notice of Appeal was filed out of time and it was not served on him; that the respondent is a man of means because he owns Private schools in Nairobi and Kitale; and that if stay is granted, the applicants should be ordered to pay half of the decretal sum to him and the other half to be secured by a bank guarantee from a reputable financial institution.

3. The motion was argued on February 2, 2023, Mr.Karatu argued the application for the applicants. He stated that the applicants have already filed their appeal being Civil Appeal No.149 of 2022 hence the

need for stay of execution of the impugned decree to ensure that the appeal is not rendered an academic exercise.

4. It was further submitted that the claimant is a man of straw with no capacity to refund the decretal sum of the appeal succeeds after the execution. Therefore it was submitted that the applicant will suffer substantial loss since the claimant has not shown that he has the capacity to refund the decreed sum if the appeal succeeds.

5. Reliance was made on the case of *Johnson Mwiruti Mburu v Samuel Macharia Ngure* (2004) eKLR and *Metropol Credit Reference Bureau Ltd v Evans Messop Mongare & another* (2022) eKLR where the court held that once the applicant alleges that the respondent has no means of refunding the decretal sum if the appeal succeeds, the burden of proof shifts to the respondent to prove his capacity to refund.

6. It was further submitted that the application was filed without unreasonable delay since the judgment was delivered on September 28, 2022and the application was made on October 23, 2022. The said application was however withdrawn on January 18, 2023and the present motion filed the same day.

7. Further it was submitted that applicant is willing to deposit security in the form of Insurance security subject to court discretion.

8. Finally, it was submitted that the appeal was filed on November 24, 2022, which was within the required time. Therefore the court was urged to allow the application with costs.

9. On the other hand, the claimant opposed the application and relied on his replying affidavit. He contended that he has land and title deeds in his name. He further submitted that if the court grants stay, then the decretal sum should be deposited in court as security or in a bank account opened jointly between him and the applicant.

10. He further contended that his life was in danger because the 1st applicant has threatened his life.

11. In his rejoinder, the applicant's counsel submitted that the respondent has not filed any evidence to prove that he is registered owner of land as alleged. He denied the demand for security in the form of cash deposit in court and submitted that courts have held that Insurance Bond is sufficient security. Reliance was placed on the case of *Modern Coast Builders & Contractors Ltd v Martin Wangila Wanyama* (2022) eKLR.

12. Finally, it was submitted that the allegation by the claimant that his life is in danger is not backed by evidence.

Determination

13. The issue for determination is whether the application herein meets the legal threshold for granting stay pending appeal. Order 42 rule 6(2) of the *Civil Procedure Rules* provides that:-

> " No order for stay of execution shall be made under sub rule 1 unless:-
>
> a. The Court is satisfied that substantial loss may result to the 1st 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."

14. The applicant submitted that they will suffer substantial loss because the claimant has no means of refunding the decretal sum if the appeal succeeds after execution. The claimant has denied that allegation and contended that he owns land which is registered in his name.

15. The Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2016) eKLR held that

> " Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge..."

16. In this case the applicants have registered apprehension that the claimant has no capacity to refund the decretal sum should the appeal succeed, after execution of the impugned decree. The claimant has failed to adduce documentary evidence to prove that he indeed own land which is registered in his name. He has also not adduced any evidence of whatever nature to prove that he is capable of refunding the decretal sum if the applicants succeed after execution of the decree. Consequently, I find that the applicants have satisfied the court that substantial loss may be occasioned to them if stay order is withheld and the appeal eventually succeeds.

17. As regarding prompt filing of the application, I agree that the application was filed without undue delay. The impugned judgment was delivered on September 28, 2022 and the applicants filed a stay application on October 19, 2022. The application was withdrawn on January 18, 2023 and the instant application was filed on the same day. In the circumstances, I find that the application for stay was made timeously.

18. The last factor to consider is whether the applicants are willing to deposit security for the due performance of the decree should their appeal fail. The applicants have offered to deposit Insurance Bond as security. They have not stated from which Insurer, the Bond will come from. The claimant insists that half of the decretal sum should be released to him and the other half be deposited in a bank as security.

19. I have considered the rival contentions above and the background information of the suit in the court record. Both the applicants and the claimants have no capacity to raise the decretal sum without difficulties should the appeal succeed or fail. The purpose of ordering deposit of security is to ensure that the appeal is not rendered nugatory, or the decree holder is not denied the immediate enjoyment of his judgment should the appeal fail to succeed.

20. Putting the above on the weighting scale of justice, I find that security in form of both cash deposit and Insurance bond will be the fairest condition for granting stay pending appeal. Consequently the applicants are granted stay pending appeal on condition that:-

    a. They deposit in this court Kshs.300,000.00 within 21 days hereof.

    b. Deposit in court within 30 days of today, an Insurance Bond for the balance of the decretal sum from a reputable insurance company and serve the claimant.

    c. In default of any of the above conditions the stay order shall lapse automatically.

Costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF MARCH, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE