



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NUMBER E037 OF 2021

BETWEEN

ELIJAH OTIENO OLUOCH.....APPELLANT

VERSUS

GOLDEN BISCUITS [1985] LIMITED.....RESPONDENT

RULING

1. The Appellant unsuccessfully sued his former Employer, the Respondent herein, at Milimani CMELRC No. 493 of 2019.
2. His claim was dismissed on 19th March 2021, prompting the filing of this Appeal.
3. On 20th September 2019, he had been issued by the Trial Court orders, requiring the Respondent herein, to deposit the sum of Kshs. 1,000,000, being the approximate sum, enough to satisfy any Judgment that could have issued in favour of the Claimant.
4. The Appellant had argued and convinced the Trial Court that, the Respondent had disposed of its assets and business, and terminated the contracts of all Employees. It was found likely not to be in a position to satisfy any Judgment made in favour of the Appellant.
5. Now that Judgment was not in favour of the Appellant, he is apprehensive that the Respondent will walk back to the Trial Court, and cart away the Kshs. 1,000,000 which had been deposited as security for performance of decree. He would if successful on Appeal, be left chasing the wind.
6. He has filed an Application dated 17th May 2021, supported by his Affidavit sworn on the same date, asking the Court to bar the Respondent from accessing the deposit, and that the deposit continues to be held in the account of the Court, until the Appeal is heard and determined.
7. The Respondent is opposed to the Application, relying on Grounds of Opposition dated 8th June 2021.
8. These are that: order 42 Rule 7, of the Civil Procedure Rules presupposes that where there is an order for execution of a decree, the Court can grant orders for deposit of security for performance of a decree; the Trial Court orders in this case are negative orders and there is nothing to execute, other than costs as the Trial Court dismissed the Claim; that even where an order for stay is given, the Applicant is required to give security as to costs, which the Appellant has not; and the Application should be dismissed with costs.
9. The Court granted the Appellant interim orders for preservation of the status quo, on 21st May 2021.
10. Parties consented on 10th June 2021 to have the Application argued and determined on the basis of the record. They confirmed filing of Submissions, on 22nd October 2021.

The Court Finds: -

11. The factors which persuaded the Trial Court to grant the Appellant the orders of 20th September 2019, are still relevant in this Application.
12. It is true the Trial Court dismissed the Appellant's Claim. The orders issued are negative orders. The Appellant has appealed the decision

of the Trial Court. His Application, is not that the orders dismissing his Claim are stayed. Rather, he seeks that the security for performance of decree, deposited in the Trial Court, is transitioned into security for performance of any decree that may issue in his favour on Appeal. His Application is more to do with Sections 3 and 12 of the Employment and Labour Relations Court Act, rather than Order 42 of the Civil Procedure Rules.

13. His former Employer has sold its business and assets. It has dismissed Employees. It is unlikely that the Appellant would succeed in executing any decree issued in his favour on Appeal. The Respondent would access its deposit effortlessly, if the Appellant is unsuccessful. There is no prejudice occasioned to the Respondent, if the money stays in the account of the Judiciary a little longer. The interest of justice is in favour of allowing the Application by the Appellant, dated 17th May 2021.

IT IS ORDERED: -

a. Deposit made by the Respondent in Court as security for performance of decree, in the orders issued by the Trial Court on 20th September 2019, shall remain in the account of the Court, pending hearing and determination of the Appeal filed herein.

b. Costs of the Application in the Appeal.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND

JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF JANUARY 2022.

JAMES RIKA

JUDGE