



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC APPEAL NO. E036 OF 2021

PROTECTIVE CUSTODY LIMITED.....APPELLANT

VERSUS

TOM OMUNABI OMUKUBA.....RESPONDENT

RULING

1. By a Notice of Motion application dated 19th October, 2021, the Applicant/Appellant herein, seeks orders of stay of execution of the Judgment and decree delivered on 23rd September, 2021, in **KISUMU CELRC NO. 223 OF 2019- TOM OMUNABI OMUKUBA V PROTECTIVE SOCIETY LIMITED** pending the hearing and determination of the Appeal.
2. The application is supported by grounds on the face of the motion and an affidavit sworn by one **Jane Michori**, the basis being that the award to the Respondent by the Trial Court is erroneous as the claim of underpayment is not true.
3. The Applicant/Appellant further states that it stands to suffer loss as the amount awarded is colossal and the Respondent will at any moment proceed to execute his decree for the decretal sum of **Kshs. 819,989.00**. The applicant further avers that the Respondent has no known assets or source of income, hence will not be in a position to make a refund to the Applicant should her appeal succeed.
4. The Applicant undertakes to deposit security for the due performance as would be directed by the court.
5. The Applicant submitted that it has met the requirements of Order 42 Rule 6 of the Civil Procedure Rules, which is the threshold for determining whether or not to grant orders of stay of execution. It cited the Case of **Kenya Power & Lighting Co. Ltd V. Esther Wokabi (2014) eKLR** for the holding that an applicant must satisfy the conditions under Order 42 Rule 6 to deserve orders of stay.
6. The Respondent opposed the application and argued that the Applicant's appeal does not raise arguable issues. He further seeks that should the court be inclined to grant the orders sought, half the decretal sum be released to the Respondent, and the remaining half be deposited in an interest earning account in the names of counsels for both parties. He cited the Court of Appeal decision in **Nairobi Court of Appeal Nyeri Civil Application No. 23 of 2020- Board of Trustees National Social Security Fund v Caroline Wanjiku Karori (202) eKLR** to support this position.

Determination

7. I have carefully appraised the application, the affidavits sworn by both parties and the submissions filed both in support and in opposition to the application. The legal principles that guide the court in determining an application for stay of execution of Judgment pending appeal, are as set out under Order 42 Rule 6 of the Civil Procedure Rules.
8. The Court's exercise of discretion in staying execution of a Judgment, is guided by the grounds set out in the case of **Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No. 6726 of 1991** where the Court emphasized that:

“For the Court to grant stay of execution there must be:

(a). Sufficient cause.

(b). Substantial loss.

(c). No unreasonable delay and security offered for due performance of the decree.”

9. The decretal sum for which the Applicant faces execution, is Kshs. 819,989.00. The Applicant told this court that the Respondent has no known source of income nor assets to guarantee a refund should her appeal succeed, pointing to a possibility of it suffering substantial loss. The Respondent has on his part not adduced any evidence to rebut this proposition.

10. The Court of Appeal in *Vishram Ravji Halai V. Thornton & Turpin Civil Application No. 15 of 1990 (1990) KLR 365* held that the High Court's (Read ELRC) power to grant a stay pending appeal, is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. The Applicant has undertaken to deposit security for the performance of the orders of the court.

11. The Judgment and decree subject of this ruling was rendered on the 23rd September, 2021, while the instant application was filed 22nd October, 2021, a day short of a month later. This in my opinion does not amount to an unreasonable delay.

12. Weighing the pros and cons of a stay order as against the prejudice the Respondent will suffer in further delaying realization of the fruits of his judgment, the latter are unlikely to lead to undesirable and absurd results.

13. In view of the foregoing, I find the motion dated 19th October, 2021 merited and I do order a stay of execution of the Judgment and decree delivered on 23rd September, 2021, in **KISUMU CELRC NO. 223 OF 2019- TOM OMUNABI OMUKUBA V PROTECTIVE SOCIETY LIMITED** pending the hearing and determination of the appeal, on the following conditions:

- i. That the Applicant will release Kshs. 300,000 to the Respondent within 30 days of this ruling.
- ii. That the balance of the decretal sum shall be deposited in a joint interest earning account in the names of the Counsel for both parties within 45 days of this ruling.
- iii. That in default, the orders herein shall lapse and the Respondent will be at liberty to execute.

14. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Applicant

Mr. P.D. Onyango present for the Respondent

Christine Omollo – C/A