



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.E.124 OF 2021

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

TIRE WORLD LIMITED.....CLAIMANT

VERSUS

BERYL AGATHA JARRA.....RESPONDENT

RULING

1. The application dated 22nd October, 2021 seeks for order for stay of execution against the Judgement of Hon. E. Wanjala delivered on 24th September, 2021 in **CMC CASE NO.318 OF 2020** and all consequential decrees or orders arising thereon.
2. Judgement was entered against the Respondent in CASE NO. 318 OF 2020 for a sum of Kshs.1,030,499.99 together with costs on 24th September, 2021.
3. The Respondent has since filed a memorandum of appeal dated 21st October, 2021 and filed on 22nd October, 2021 being aggrieved by the aforesaid judgement.
4. The application for stay of execution is supported by the affidavit sworn by **MARION NZYIMI, HUMAN RESOURCE OFFICER OF THE APPELLANT COMPANY**.
5. The Claimant has deponed a supplementary affidavit dated 10th November, 2021 where she avers that the Appellant has not demonstrated an appeal with an arguable case.

Further she says it has not been proved she is not a person of means capable of refunding the decretal amount should the appeal be allowed and it succeeds.

DECISION

6. I have considered the applications, supporting affidavits and the grounds for objection as well as submissions and authorities produced therein.

Order 42 (6) (1) (2) of the Civil Procedure Rules provide

“no order for stay of execution shall be made under subrule 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 undue delay.

(b) And 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. In **VISHRAM RAVJI HALAI VS THORNTON & TURPIN CIVIL APPLICATION NO.15 OF 1990** the court of appeal held that whereas the court of appeal power to grant a stay pending appeal is unfettered, the jurisdiction to do so is under order 41 Rules and as is fettered by three conditions namely:-

- (i) Establishment of a sufficient cause
- (ii) (ii) satisfaction of substantial loss and
- (iii) the furnishing of security.”

Further the application must be made without undue delay.

8. At the same time the stay can be granted in light of the overriding objective stipulated in Sections 1A and 1B of the Civil Procedure Act.

9. As held in the case of **MICHEAL NTUOTHI MUTHEU VS ABRAHAM KIVONDO E.052 OF 2021** some of the objectives of Section 1B of the Civil Procedure Act are to ensure just determination of proceedings, efficient disposal of business of the court and efficient use of available judicial and administrative resources and timely disposal of proceedings and all other proceedings in the court at a cost affordable by the respective parties.

10. In the main issue of substantial loss likely to occur it should not be just a mathematical formula but is a qualitative concept. The Appellants averment is that the decretal sum being Kshs.1,039,499.99 is not a small amount of money together with costs and if execution takes place it is not proved the Claimant would be in a position to refund the same should appeal succeed.

11. The case of **VICTORY CONSTRUCTION VBM (2019) eKLR** also shift burden on the Respondent to prove that should there be necessity to refund the money the Respondent would be in a position to pay the same.

12. As for the requirement that application is brought without undue delay the same was filed on 22nd October, 2021 after delivery of Judgement on 24th September, 2021. The same was about one month after delivery of judgement and that is not unduly long.

13. As for the limits for security it must be security for due performance of decree and court should take into account that such security has been offered in deciding an application thereunder.

In the **CASE OF MWAURA KARUGA T/A LIMIT ENTRPRISES VS KENYA BUS SERVICES LINTIED AND 4 OTHERS (2015) eKLR** it was held security must be one which shall achieve due performance of the decree which might ultimately be binding on the appellant. The rule does not therefore envisage first any security.

The words ultimately be binding are deliberately used and are useful here for they refer to ensure the entire decree sum as well be payable at the time the appeal is lost.

The presumption is that the security include the entire decree and costs and interest.

14. As for the chances of the merits of appeal the proviso is not the ultimate chance of the success of the appeal but the requirement is to have an arguable case.

The Appellant has filed a memorandum of appeal with arguable grounds and that would suffice.

15. Taking all relevant factors into consideration and so as not to render intended appeal an illusion while at the same time securing interests of the Respondent, I am persuaded to grant the stay of execution of the decree herein. The same is granted on condition the Appellant/Respondent deposit 60% of the Judgement sum in a joint interest earning account in a reputable financial institution operated by the advocates of the respective parties together with costs and accruing interest 30 days from the date of this Ruling. The other 40% judgement sum to be paid to the Respondent also within 30 days from the date of this Ruling. Appeal to be filed within 45 days from the date of this application.

In default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute forthwith.

Costs to abide in the appeal.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of**

Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE