



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. E163 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

BENISA LIMITED.....CLAIMANT

VERSUS

JOHN NGOTHO MAINA.....RESPONDENT

(Being an appeal from the whole judgement of the Senior Principal Magistrate's Court at Ruiru

delivered by Hon. J. A. Agonda (Principal Magistrate) on 22nd November 2021 in Ruiru SPM

ELRC No. 36 of 2020 – John Ngotho Maina v Benisa Limited)

RULING

1. By a Notice Motion dated 23rd December 2021 and filed on 28th December 2021, the Applicant/Appellant moved the Court under a certificate of urgency seeking orders that: -

(i) The application be certified urgent, service be disposed with and the same be heard ex-parte in the first instance.

(ii) The Court be pleased to stay the execution of the judgment issued on 22nd November 2021 in Ruiru SPM ELRC No.36 of 2020 pending the hearing and determination of this application inter partes.

(iii) the Court be pleased to stay execution of the judgment issued on 22nd November 2021 in Ruiru SPM ELRC No. 36 of 2020 pending hearing and determination of the Appeal.

(iv) Costs of this application be provided for.

2. The Court granted interim orders in terms of prayer number (i), (ii) and (iii) pending inter partes hearing.

3. The application is expressed under Section 12(1) and (3) of the Industrial Court Act 2011 and Rule 16(1) of the Industrial Court Procedure Rules.

4. The Application is based on the following grounds and supporting affidavit of Benjamin Kubai Macharia.:

a) That judgment in Ruiru ERLC No. 36 of 2020 was delivered in favour of the Respondent on 22nd November 2021 who was awarded Kshs.624,000/= as general damages plus costs and interest.

b) The Applicant/Appellant is aggrieved by the judgment of the trial Court and preferred an appeal against the judgment.

c) The Respondent is on the verge of executing the judgment and decree and has issued letters expressing so.

d) The Applicant/Appellant stands to suffer substantial loss in that it will incur huge amounts of money from a judgment which it has already appealed against.

e) *The Respondent means are unknown to the Applicant/Appellant and there is no guarantee that he can refund the decretal amount in the event the appeal succeeds.*

f) *The Applicant/Appellant is ready and willing to furnish security as the Court may direct for due performance of the decree.*

g) *The application has been made timeously and without unreasonable delay.*

h) *It is in the interest of justice that the orders sought be granted.*

5. The supporting affidavit of Benjamin Kubai Macharia rehashes the grounds relied upon.

6. The Application is opposed on the grounds that:

(1) *The Applicant has not demonstrated by evidence how it stands to suffer any or substantial loss if the application is not granted.*

(2) *The Applicant has not shown why the Respondent will be incapable of refunding the decretal if the appeal succeeds.*

(3) *The Application is a ploy to delay the enjoyment of the fruits of the judgment.*

(4) *The Applicant has the wherewithal to settle the entire decretal sum and should not be granted leave merely because it can furnish security.*

(5) *There is need to strike a balance between the rights of the Respondent as the decree holder and the Applicant who seeks a stay without tendering evidence to support the grounds relied upon.*

(6) *The right to enjoy the fruits of a legally obtained judgment should be balanced with the right of appeal.*

(7) *The appeal has no chance of success is brought **mala fides**, frivolous, groundless and an abuse of the Court process.*

(8) *The Application was not filed without undue delay since the appeal was filed on 6th December 2021 and the Application was filed on until 23rd December 2021 after the Respondent expressed his intention to execute the decree.*

(9) *The judgment is of a Court of competent jurisdiction and for a stay pending appeal so issue, the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 must be met.*

Submission

7. The Applicant identifies three (3) issues for determination. These are whether:

i) There is an arguable case;

ii) Security;

iii) Appellant stands to suffer substantial loss.

8. As to whether there is an arguable case, the Applicant relies on the decision in **Growers Association & Another v Kenya Plantations and Agricultural Workers Union [2012] eKLR** to urge that as long as there is a single bona fide arguable issue, the application meets the legal threshold. That the memorandum of appeal on record has triable issues namely was the Claimant an employee of the Appellant/Applicant? Was he unlawfully terminated and the quantum of compensation.

9. Relatedly, the Respondent filed a cross appeal. There are indeed triable issues.

10. As regards security, reliance is made on Order 42 of the Civil Procedure Rules to urge that the purpose of the interim orders is to protect the substratum of the sum by delaying the execution process. Until determination of the appeal and the remedy is discretionary and equitable principles apply such as clean hands as held in **Jaybhay v Cassim [1939] AD 537 -551**. The decision in **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**, **Transport & Allied Workers Union v Glory Driving School [2021] eKLR** and **Patrick Kanaka Munyao v Cementers Ltd [2017] eKLR** are also relied upon to buttress the principle of good faith where an applicant proposes to furnish security.

11. As to whether the Appellant stands to suffer substantial loss, it is submitted that if the stay of execution is not granted, the Applicant stands to suffer substantial loss as the decretal sum is substantial and the appeal would be rendered nugatory since the amount may not be recoverable from the Respondent. The Court of Appeal decision in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** is relied upon to urge that the Applicant is only required to show that it has reasonable fear of the Respondents inability to pay back the decretal sum and the shift in the burden of proof to show ability to refund the decretal sum.

12. It is submitted that the Respondent has not discharged the evidential burden since he had only filed grounds of opposition.

13. On laches, the Applicant submits that it filed the application less than two months after the judgment but lodged the Notice of Appeal within time and has since requested for typed copies of proceedings to prepare the record of appeal.

14. The Respondent had not filed submissions by the time the ruling was written.

Analysis and Determination

15. After careful consideration of the application herein, and supportive evidence, grounds of opposition and submissions by the Applicant, the issues for determination is whether the application herein is merited.

16. In **Butt v Rent Restriction Tribunal [1979] eKLR** the Court of Appeal expressed itself as follows:

(i) The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

(ii) The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance a stay must be granted so that the appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion.

(iii) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings."

17. The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements."

18. Similarly in **Elena Doudoladova Korir v Kenyatta University [2014] eKLR** Nzioki Wa Makau J. stated that:

*"The application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & another v Thornton & Turpin Ltd [1990] eKLR** where the Court of Appeal held that:*

"The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

*In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as has been held in the case of **Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR** as follows:-*

"In addition, the Applicant must prove that if the orders

sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other."

19. As regards substantial loss, Gikonyo J. had the following to say in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**:

"The Applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail ... Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

20. In this application, the Applicant submits that if the stay of execution is not granted it would suffer substantial loss since the decretal sum is substantial. That the amount would be irrecoverable from the Respondent since his source of income, assets owned or how he would repay the sum should the appeal succeed is unknown. That the appeal would be rendered nugatory.

21. It is not in dispute that in **Ruiru SPM ELRC Case No. 36 of 2020**, the trial Court awarded the sum of Kshs.624,000/= with interest at Court rates from the date of judgement.

22. It is also not in dispute that the Respondents grounds of opposition make no reference to the sources of income of the Respondent nor assets or his capacity to repay the decretal sum if the appeal were to succeed. Such an assurance is critical in such a case. The allegations that the appeal has no chance of success is not supported by any evidence.

23. As the Court of Appeal observed in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another (supra)**

"... while the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. 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."

24. Similar sentiments were expressed in **Directline Assurance Company Limited v Michael Njima Muchiri & another [2020] eKLR**.
25. In the instant application, the Respondent has not discharged this evidential burden. The grounds of opposition are deficient in details.
26. For the above reasons, the Court is satisfied that the Applicant has on a balance of probabilities demonstrated reasonable apprehension that the decretal sum will be irrecoverable if the orders sought are not granted and the appeal eventually succeeded.
27. As regards provision of security, the Applicant submits that it has approached the Court with clean hands as encapsulated by the equitable maxim that “*he who comes to equity must do so with clean hands.*”
28. Reliance is made on the decision in **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another (supra)** where the Court stated:
- “Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith and the application for stay is not just meant to deny the Respondent the fruits of judgment. My view is that it is sufficient he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”*
29. In **Patrick Kanaka Munyao v Cementers Ltd (supra)** the Court expressed itself as follows:
- “The defendant has proposed to provide an insurance bond as security for the due performance of the decree. The Plaintiff opposed this proposal alleging that due to the turbulent times in the insurance industry, the suggested security may not guarantee due performance of the decree. There is no doubt that the Court is given unfettered discretion to determine the kind of security to be given. I think the response the Plaintiff gave in answer to the defendant’s offer on security in my view is too general and cannot be used to diminish an insurance bond as a form of security.”*
30. The Court is guided by these sentiments.
31. The Applicant submits that payment of half of the decretal sum to the Respondent and depositing the other half in a joint interest account is inopportune on account that liability is a challenged issue and the lower Court’s judgment may be overturned and the Respondent has not demonstrated capacity to refund any amount if the appeal is successful.
32. As to whether there has been inordinate delay, the Applicant contends that it has acted with reasonable dispatch in that whereas judgment was delivered on 22nd November 2021, the application was filed on 23rd December 2021 and the Memorandum of Appeal on 6th December 2021. Finally, the Notice of Appeal was filed within time.
33. The Respondent on the other hand contends that application was not filed without unreasonable delay in that the Applicant was indolent after filing the Memorandum of Appeal until 23rd December 2021 when it filed the application, after about 17 days.
34. Was the 17 days of inaction on the part of the Applicant unreasonably long? The Court is not so persuaded and finds that although the Applicant did not act with haste, the 17 days of inaction may not in the circumstances be characterised as unreasonable delay, the Court so finds.
35. Finally, the Memorandum of Appeal raises several issues which the Appellant contends and seeks determination including entitlement to house allowance and contract of service between the parties among others.
36. In a similar version, the Amended Memorandum of Cross Appeal dated 15th January 2022 raises several issues including computation of the Respondent’s salary, commission payable, as well as general, punitive and exemplary damages.
37. The Court is in agreement with the Applicant’s submission that the fact that the Respondent has filed a cross-appeal reinforces the Applicant’s case for a stay order pending the hearing and determination of the appeal.
38. Finally, balancing the rights of the Applicant against those of the Respondent as the decree holder, the scale of justice is tilted in favour of granting the instant Notice of Motion application dated 23rd December 2021 in terms of prayers No. 3 subject to the following conditions:

(i) The Applicant/Appellant to deposit the decretal sum in a joint interest earning account in the name of Advocates for both parties within 45 days from the date of this ruling.

(ii) If the Applicant/Appellant fails to meet the above condition within 45 days from the date hereof the stay order stands vacated and the Respondent will be at liberty to execute.

(iii) Costs of this application shall be in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022

DR. JACOB GAKERI

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 Civil 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.

DR. JACOB GAKERI

JUDGE