



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 208 OF 2018

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT/RESPONDENT

VERSUS

MATTAN ISSA RESTAURANT.....RESPONDENT/APPLICANT

RULING

1. This ruling relates to a Notice of Motion application dated 21st October, 2021, brought pursuant to Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2010. The Applicant seeks the following orders:-

a) Spent

b) Spent

c) There be a stay of execution of the judgment dated 6th October, 2021 and decree issued by this Honourable Court pending the hearing and determination of the intended appeal.

d) The costs of this application be provided for.

2. The application is supported by grounds set out on the face thereof and the affidavit sworn by **ISMAIL MOHAMED HAJI ISSA** the Managing Director of the Applicant on 21st October, 2021.

3. The application is premised on a Judgment and Decree delivered on 6th October, 2021, wherein the trial court declared the suspension of the Grievant unlawful and award him compensation.

4. The Applicant being aggrieved by the Judgment of the court, preferred an appeal to the Court of Appeal, which it asserts to be arguable and has chances of success.

5. The Applicant avers that it is apprehensive that the Claimant/respondent will proceed with the execution process with the result that its intended appeal will be rendered nugatory.

6. The Applicant states that it is ready to comply with any directions that the Court may make to expedite the hearing and determination of the intended appeal.

7. The application is opposed through the Respondent/Claimant's Replying Affidavit sworn by **CHADWICK OLOTO NG'ONO** on 5th November, 2021 and filed before court on even date.

8. The Respondent/Claimant's position is that the Applicant vide their draft appeal has not demonstrated triable issues and this application is only intended to delay the execution and the conclusion of this case.

9. The Respondent further states that the application does not meet the threshold for grant of orders of stay of execution and neither has it declared intent to meet the threshold set under Order 42 Rule 6 of the Civil Procedure Rules.

10. Both parties filed submissions and which had been duly considered.

Determination

11. I have considered the application, the grounds and affidavit in support and the replying affidavit in opposition filed by the Respondent/Claimant together with the Parties' submissions. The sole issue for determination is whether the application as filed, meets the threshold for grant of orders of stay of execution.

12. Order 42 Rule 6(2) of the Civil Procedure Rules, sets out the threshold to guide the court in determining whether or not to grant an order of stay of execution in following words: -

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) that substantial loss may result to the applicant unless the order is made

(b) that the application has been made without unreasonable delay and

(c) that such security as the Court orders for the due performance of such decree or order has been given.”

13. The general principle for grant of orders of stay of execution was settled in the case of **Butt-vs Rent Restriction Tribunal (1982) eKLR**, where the court held that in the absence of an overwhelming hindrance, a stay must be granted so that an appeal is not rendered nugatory where the decision is reversed.

14. The question for this court is whether the Applicant stands to suffer substantial loss if the orders of stay are not granted.

15. The Court vide its judgment of 6th October, 2021, declared the suspension of the Claimant/Respondent unlawful and proceeded to make an award for amounting to Kshs. 87,054/-. The amount subject of the award, may be colossal to the Claimant and he may not be in a position to refund the same, should the Court of Appeal reverse the award.

16. Secondly, the judgment subject of this ruling was delivered on the 6th October, 2021 and the application herein filed on 21st October, 2021. The application was thus made without inordinate delay as required under the law. The Court finds and holds that the instant application, meets the threshold for grant of orders of stay of execution.

17. In light of the foregoing, and in the interest of balancing the fortunes of the parties, **(See Banking Insurance and Finance Union (Kenya) –vs- Co-operative Bank of Kenya Limited (2017) eKLR)** the Court makes the following orders:

a) That an Order of stay of execution of the Judgment delivered in this matter on 6th October, 2021 and the Decree thereof, is granted on condition that the Applicant deposits the total Decretal Sum in Court within 30 days of this ruling.

b) In the event the Applicant does not comply with order (a) above, the stay orders shall automatically lapse and the Respondent/Claimant shall be at liberty to execute.

18. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. E. Ngame present for the Claimant/Respondent

Ms. Mwangi present for the Respondent/Applicant

Ms. Christine Omollo-C/A