



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
ELRC CAUSE NUMBER 42 OF 2019
EVANS MUNGASIA ANNOH.....CLAIMANT/RESPONDENT
-VERSUS-
SIERRA FLORA LIMITED.....RESPONDENT/APPLICANT
(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

I. INTRODUCTION

1. In a Judgment dated and delivered on 28th September, 2021 the trial court (Lady Justice Wasilwa) found in favour of the Claimant in the sum of Kshs.410,063/= plus costs.

2. On 19th November, 2021 the Respondent filed a Notice of motion dated 18th November, 2021 under a certificate of urgency seeking the following:-

- 1. THAT this application be certified as urgent and service be dispensed with in the first instance.**
- 2. THAT the Applicant be granted leave to appeal out of time against the judgment delivered on 28th September, 2021.**
- 3. THAT pursuant to granting of prayer (2) above the Applicant be allowed to file and lodge their Notice of appeal out of time.**
- 4. THAT this Honourable Court be pleased to stay execution of the judgment dated 28th September, 2021 pending the hearing and determination of this Application.**
- 5. THAT this Honourable Court be pleased to stay execution of the judgment dated 28th September, 2021 pending the hearing and determination of the intended Appeal.**
- 6. THAT the costs of this application be provided for.**

3. In support of the application is an affidavit sworn by ANAND SHAH, a Director of the Respondent/Applicant on 18th November, 2021 and several annextures thereto.

4. The application was certified urgent on 22nd November, 2021 and counsel for both parties appeared in court (virtually) on 6th December, 2021 when a temporary stay of execution was granted to the Respondent/Applicant pending the hearing and determination of the application. By consent of both counsel it was directed by court that the application be disposed of by way of written submissions.

5. In opposition to the application the Claimant/Respondent filed a replying affidavit sworn by **EVANS MUNGASIA ANNOH** on 23rd November, 2021 together with two annextures thereto.

6. The Respondent's/Applicant's counsel filed written submissions on 14th December, 2021 and Claimant's/ Respondent's counsel filed on 11th January, 2022.

7. The Party and party costs for the cause were assessed on 7th December, 2021 at Kshs.105,145/= and a decree was issued on 10th November, 2021.

II. ISSUES FOR DETERMINATION

8. This court has carefully gone through the Notice of motion, the supporting affidavit and the annexures thereto, the replying affidavit and the annexures thereto, and the written submissions by counsel for both parties and the court identifies the following issues for determination:-

(i) Should the Respondent/Applicant be granted leave to appeal out of time against the judgment delivered on 28th September 2021?

(ii) Should the Respondent/Applicant be granted stay of execution of the judgment/decree herein pending the filing, hearing, and determination of the intended appeal?

(iii) Who should meet the costs of this application?

III. LEAVE TO APPEAL OUT OF TIME

9. The second issue of stay of execution is very dependent on this first issue because if leave is not granted to file the notice of the appeal and the appeal out of time the stay cannot be granted pending the filing, hearing, and determination of the intended appeal. This first issue hence calls for serious consideration.

10. The Notice of motion is expressed to be brought under **Section 12 of the Employment and Labour Relations Court Act, Section 95 of the Civil Procedure Act, and Order 50 Rule 6 of the Civil Procedure Rules. Section 12 of the Employment and Labour Relations Court Act** provides for the various orders/reliefs that this court may grant in exercise of its jurisdiction and of particular relevance to this application is section 12(3)(viii) which provides that this court may grant **“any other appropriate relief as the court may deem fit to grant.”**

11. **Section 95 of the Civil Procedure Act** is on enlargement of time and provides as follows:-

“Where any period is fixed or granted by the court for the doing of any Act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

This provision on enlargement of time is further expounded under **Order 50 rule 6 of the Civil Procedure Rules** wherein it is provided:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

12. Clearly, from the foregoing, this court has unfettered discretion in enlarging time for the various situations that may arise in the cause of proceedings. However, that discretion is to be exercised in a fair and just manner and the court should not be whimsical or capricious in making such a decision. The discretion must be exercised based on sound reasons that are logical, legal, and reasonable based on the peculiar circumstances of each case. What is as clear as daylight is that enlargement of time is not a right to any party or Applicant.

13. Counsel for the Respondent/Applicant has relied on **Mombasa County Government VS. Kenya Ferry Services & Another (2019) eKLR** wherein the Supreme Court provided for a sample of factors or principles that a court should consider when dealing with an application for extension of time and this court fully appreciates the reasons of the highest court on land on this issue.

14. Counsel for the Claimant/Respondent on the other hand has relied on **Nicholas Kiptoo Arap Korir Salat VS. IEBC & 7 Others (2014) eKLR** from the Supreme Court to drive his point home on the factors/principles applicable when a court is considering extension of time. These are the same factors that are set out in the **Mombasa County Government** case (Supra).

15. **Under Rule 75 of the Court of Appeal Rules** the Respondent/Applicant ought to have filed a Notice of Appeal with this court (ELRC) within 14 days of the judgment delivered on 28th September, 2021.

16. Paragraph 5 of the supporting affidavit confirms that by 6th October, 2021 counsel for the Respondent/Applicant was in possession of a copy of the judgment. In Paragraph 6 of the supporting Affidavit the Director of the Respondent/Applicant depones as follows:-

“THAT unfortunately, upon receipt of the judgement, we needed to consult as a team and this took a long time which resulted in the lapse of time within which we were required to file an appeal.”

17. There is absolutely no reason or explanation given why a Notice of appeal, which is a simple notice expressing an intention to appeal was not filed within 14 days of the judgment. The reason given as to why an appeal was not filed is also neither logical nor plausible. The deponent states that *“We needed time to consult as a team and this took a long time.”* The question is who (we) was consulting who? What

was the consultation about yet the Respondent/Applicant has a competent counsel on record who is qualified to give a professional opinion on the issues? How long did the consultation take and why? Why did it take long to consult? Were any meetings held and or necessary? What was so difficult in the Respondent/Applicant making a decision on whether to appeal or not?

18. Almost two (2) months after the judgment was delivered the Respondent/Applicant came to court seeking time to file that which it ought to have filed within 14 days of the judgment. Equity does not aid the indolent and this court is of the considered view that the Respondent/Applicant has not demonstrated that it was vigilant in pursuing filing of the appeal. The delay is inexcusable and inordinate and no explanation has been offered for that delay. It is the opinion of this court that the application herein is an afterthought by the Respondent/Applicant intended to delay satisfaction of the decretal sum plus costs which is highly prejudicial to the Claimant/Respondent who is lawfully entitled to the fruits of the judgment.

19. This court is not satisfied that the Respondent/Applicant took all the necessary steps to lodge the notice of appeal and the appeal for that matter. No plausible or logical reason has been given for the delay and this court is not at all persuaded into in exercising its discretion in favour of the Respondent/Applicant.

20. The request to allow the Respondent/Applicant to lodge a notice of appeal out of time is denied and with it goes the prayer to file an appeal out of time.

IV. STAY OF EXECUTION

21. As stated above, this second issue is very dependent on the outcome of the first issue above. This is because the stay of execution sought is intended to remain in force pending the filing, hearing, and determination of the intended appeal. The finding and holding of this court above denies the Respondent/Applicant, for now, an opportunity to file a Notice of appeal and effectively the appeal, out of time.

22. This court would have stopped here and denied the prayer for stay of execution. However, in the interest of justice and for completeness this court will deal with the issue as hereunder.

23. **Order 42 Rule 6 of the Civil Procedure Rules** provides as follow;

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such an application and to make such order thereon as may to it seem just and any person aggrieved by an order to stay made by the court whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 unreasonable delay; and

(b) 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.

24. The above quoted provision points to the direction that this court has fettered discretionary judicial powers in granting or refusing an application for stay of execution. Fettered because in exercising that discretion this court is guided by the provisions of the law, including **order 42 rule (6)** above, **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21), Section 3(1) and (2) of the Employment and Labour Relations Court Act No 20 of 2011**, and most importantly the overriding duty to do and dispense justice in all matters at all times.

25. The conditions set under **order 42 Rule 6** on which this court may grant a stay of execution are self-explanatory. Without splitting hairs, the said conditions are that:

(i) the court has to be satisfied that substantial loss may be occasioned to the Applicant if the stay order is not granted.

(ii) the Applicant has approached the court without unreasonable delay.

(iii) the court is satisfied that such security as the court orders, for the due performance of the decree, has been supplied by the Applicant.

26. The filing or pendency of an appeal is clearly not tantamount to an order for stay of execution and an application has to be made to the court appealed from or the court appealed to and an order obtained to stay the execution (see order 42 Rule 6(1) of the Civil Procedure Rules). Further, this discretion in granting or refusing stay of execution is distinguishable from that of the Court of Appeal under Rule 5(b) of that court's rules which is unfettered.

27. The path of stay of execution is a highly travelled path- way. Along the way many precedents have been set especially on the interpretation of the law applicable and the principles.

28. Let me now turn to the law as set out above and the circumstances of this cause. In situations where a court has judicial discretion in

granting or refusing to grant an order prayed for, each cause has its unique characteristics and circumstances. Each condition shall be examined and applied to this cause and the application before the court with a view of answering the issues identified earlier on, that is, whether the application for stay of execution herein should be granted or denied.

29. In **Butt –vs- Rent Restriction Tribunal (1979)** the Court of Appeal opined that a court should not deny an Applicant stay if there is likelihood that such denial may render the appeal nugatory. An appeal is rendered nugatory if it becomes an exercise in futility or merely academic. If for example the outcome of an appeal reverses the decision of the lower court and the Appellant is not able to retrieve whatever he/she had paid in execution of the decree, then the outcome of the appeal is irrelevant and the same is nugatory. Such a situation would arise if, for example, the money paid out pursuant to a decree is not recoverable or that the *status quo* has shifted so much as to not afford the successful appellant *restitutio integrum*.

30. However, substantial loss must be distinguished from the usual obligation of a judgment debtor to satisfy a lawful decree. That obligation is not a loss as it is a legal obligation lawfully imposed by a court of law in a judgment. Examples of substantial loss is where a successful appellant is unable to recover monies paid in execution of a monetary decree or an execution that substantially alters the nature of a property in dispute to the foundation through for example demolition (See the holding of Kimaru J in **Century Oil Trading Company LTD VS. Kenya Shell Limited and Lady Justice H. Omondi** in ANM VS. VN Civil Suit No.22 of 2015(OS) – High Court at Eldoret).

31. In **Bungoma HC Miscellaneous Application No. 42 of 2011–James Wangilwa and Another VS- Agnes Naliaka Chesoto** the Judge had this to say about substantial loss:-

“The application must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful party in the appeal. This is what substantial loss would entail.”

Also see the sentiments of Gikonyo J in **Winfred Nyawira Maina VS. Peterson Onyiego Gichana (2015) eKLR**.

32. An application for stay of execution brings into collision the interests of a decree holder and those of a judgment debtor who is seeking stay of execution pending an appeal that the appellant fears may be rendered nugatory if the execution proceeds and the appeal succeeds. It is those interests that this court has been called to balance in this application.

33. In paragraph 14 of the supporting affidavit the Respondent/Applicant alleges that it may never be able to recover the decretal sum from the Claimant/Respondent in case the intended appeal succeeds. However, there is no reason given to buttress that allegation. It is not alleged that the Claimant/Respondent is a man of straw with no resources, means, or sources of income. The decree herein is of a modest sum of money and there is no ground or foundation laid to demonstrate that the Claimant/Respondent is incapable of repaying the money if ever an appeal is filed, heard, and determined in favour of the Respondent/Applicant.

34. On the issue of unreasonable delay, the judgment was delivered on 28th September, 2021 and this request for stay of execution was filed on 19th November, 2021. There is no reason advanced as to why it took a period of almost two (2) months for the Respondent/Applicant to make that request. Such unexplained delay if excused, without any reason given for the same would highly prejudice the Claimant/Respondent. This court takes the view that the filing of the application and this request is an afterthought on the part of the Respondent/Applicant. The delay is clearly unreasonable and this court holds so.

35. This court has examined the submissions by counsel for both parties on all the issues raised and there is nothing to persuade this court that the Respondent/Applicant would suffer substantial loss if stay is not granted.

36. Although the Respondent/Applicant has offered to give security for due performance of the decretal sum, the other relevant factors are overwhelmingly against granting of stay especially in view of this court’s finding on the first issue above.

V. COSTS

37. Costs follow event and the Claimant/Respondent is granted costs of this application.

VI. DISPOSAL

38. In respect of the Notice of motion application dated 18th November, 2021 this court orders that the said application be and is hereby dismissed with costs to the Claimant/Respondent.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF FEBRUARY, 2022

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DAVID NDERITU

JUDGE

In the presence of:-

Owino for Claimant/Respondent

Miss Wachira for Respondent/Applicant

Court Assistant - Mercy