



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**ELRC APPEAL NO. E001 OF 2022**

**ABYSSINIA IRON & STEEL LTD.....APPLICANT**

**VERSUS**

**PETER MUSEMBI MULU.....RESPONDENT**

**RULING**

1. Before court is the Applicant's application dated 19<sup>th</sup> January, 2022, expressed to be brought pursuant to Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The Applicant seeks a stay of execution of the Judgment and decree issued on 14<sup>th</sup> December, 2021 in **Kisumu CM ELRC No. E007 of 2020 - Peter Musembi Mulu v Abyssinia Iron & Steel Limited**, pending the hearing and determination of the appeal filed herein.

2. The application is premised on the grounds on the face of the motion and the supporting affidavit of **James Abande**, the Counsel on record for the Applicant. The crux of the application is that the Applicant has preferred an appeal against the Judgment and Decree issued in **Kisumu CM ELRC No. E007 of 2020 - Peter Musembi Mulu v Abyssinia Iron & Steel Limited**, and which appeal, will be rendered nugatory if the stay is not granted.

3. The Applicant contends that the Respondent herein is a man of straw, and would not be able to refund the decretal sum if paid in the event the appeal succeeds. The Applicant has further indicated her willingness to abide by the terms and conditions that will be issued by the court in relation to security.

4. The Applicant states that the amount decreed in the subject judgment is a colossal sum, and requests the court to allow her to provide a Bank guarantee for the decretal sum, and which shall become payable as and when the court so orders.

5. The Respondent opposed to the application vide a replying affidavit sworn on 3<sup>rd</sup> February, 2022.

6. The Respondent avers that the Applicant has not proved to this court that her appeal is arguable as it has not filed her record of appeal and has left the court to rely solely on the opinion of counsel for the Applicant.

7. The Respondent further states that the conditions for grant of orders of stay referred to under Order 42 Rule 6, is couched in mandatory terms and is not depended on the discretion of the court.

8. It is the Respondent's submission that a Bank guarantee is not binding on the court, as it is a contract between the Bank and her client and cannot therefore stand as security. It is the Respondent's submission that should the court be inclined to grant the orders of stay; the decretal sum be deposited in an interest earning account in the names of counsels for both parties.

9. It is further submitted that the Respondent is not in good health and does not have a source of income.

**Determination**

10. I have considered the application, the grounds in support thereof, the replying affidavit in opposition and the parties' oral submissions. The issue for determination is whether the application meets the threshold for grant of orders of stay pending appeal.

11. In determining an application for stay of execution of Judgment pending appeal, the court is guided by the principles espoused under Order 42 Rule 6 of the Civil Procedure Rules. (**See Kenya Power & Lighting Co. Ltd V. Esther Wokabi (2014) eKLR**)

12. Order 42 Rule 6 (2) of the Civil Procedure Rules provides thus: -

**“(2) No order for stay of execution shall be made under sub rule (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.”**

13. Arising from the provisions of Order 42 Rule 6 of the Civil Procedure rules, this Court’s 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. This was the Court of Appeal’s holding in **Vishram Ravji Halai V. Thornton & Turpin Civil Application No. 15 of 1990 (1990) KLR 365**)

14. The Applicant submitted that the Respondent is currently in a poor state of health, and has no known source of income. The Respondent’s counsel did in his submission confirm this to be the position. Although the Respondent’s condition is more reason as to why the judgment and decree subject of this ruling should be executed, it is also the reason why the court should consider granting of the orders sought so as to safeguard the substratum of the appeal filed herein. In **Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979 Madan, Miller** and **Porter JJA** gave the following guidelines:

**“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...”**

15. The judgment and decree subject of this application was rendered on 14<sup>th</sup> December, 2021, and this application filed on 19<sup>th</sup> January, 2022. The application having been filed slightly over a month after the judgment was delivered was in the opinion of this court, filed timeously. Further, taking into account the amount in issue, coupled with the fact that the Respondent has no known source of income, goes to confirm that the Applicant’s stands to suffer substantial loss should the orders sought be denied and in the event her appeal succeeds.

16. On the issue of security, the Applicant has indicated willingness to provide a Bank guarantee in view of the amount decreed.

17. A bank guarantee is a contract by which the bank is obliged to secure payment of a third party by issuing the guarantee in favour of the creditor to pay in any case and on the conditions agreed upon. A Bank guarantee is in my opinion, and contrary to the Respondent’s submissions, a suitable means of security that serves similar purpose as money deposited in court.

18. In conclusion, the court makes orders as follows:

- i. That there be a stay of execution of the Judgment and Decree issued on 14<sup>th</sup> December, 2021, in **Kisumu CM ELRC No. E007 of 2020 - Peter Musembi Mulu v Abyssinia Iron & Steel Limited**, pending the hearing and determination of the appeal filed herein.
- ii. That the Applicant do provide a Bank guarantee for the decretal sum in the decree within 30 days of this Ruling.
- iii. The costs of the application shall abide the appeal.

19. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17<sup>TH</sup> DAY OF MARCH, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Abande present for the Applicant

Mr. Odhiambo present for the Respondent

Christine Omollo – C/A