



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 111 OF 2018

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: ARTICLES 2, 3, 10, 22, 23, 27, 28, 29, 41, 47, 48,

159, 162, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTIONAL

RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 27 28,

28, 41, 47 AND 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER: CONSTITUTIONAL PRINCIPLES OF FAIRNESS,

REASONABLE AND LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: SECTION 5, 25, 27, 28, 45, 46 AND 87 OF THE EMPLOYMENT ACT 2007

BETWEEN

WAMBATI SIMIYU MERIT.....PETITIONER

AND

MUSIC COPYRIGHT SOCIETY OF KENYA.....RESPONDENT

RULING

1. The Claimant filed a Petition praying for declaration inter alia that the Respondent violated their rights to fair labour practices to fair administration action under Articles 10, 27, 43 and 47 also of the Constitution of Kenya 2010.

Also he pleaded for a declaration that he was unlawfully terminated from his employment.

2. Judgement was entered in his favour on **23rd September, 2021** and was awarded Kshs.23,663,098/92.

3. Being dissatisfied with the Judgement of the court the Petitioner filed this application on **22nd October, 2021** and is praying for the following:-

(i) Pending the determination of this application inter-parties the court issues an order for stay of execution of its judgement dated

23rd September, 2021 and consequential orders in **NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT PETITION NO.111 OF 2018.**

(ii) Pending the hearing and determination of appeal to the court of appeal, this honourable court do issue an order of stay of execution of its judgement dated 23rd September, 2021 and any consequential orders in **ELRC PETITION NO.111 OF 2018 WAMBATI SIMIYU MERIT VS MUSIC COPYRIGHT SOCIETY OF KENYA.**

(iii) Court be pleased to order the Respondent deposit reasonable security for costs within 90 days from the date of Ruling.

(iv) Costs be in the cause.

DECISION

The court no doubt has discretion to grant stay of execution. The court in coming to its decision must consider whether substantial loss may result to the applicant unless the order is granted and whether the application has been made without undue delay.

Thirdly court considers whether security if any is ordered for due performance of such decree or order may be binding.

4. It is quite evident court has power to stay proceedings pending appeal. This jurisdiction is meant to avoid waste of Judicial time and to avoid multiplicity of suits, if stay is not granted and should defendant succeed in appeal the same would be nugatory.

The court therefore tries to ensure the application is not in vain and substantial loss and harm is not suffered once the matter proceeds and should the appeal succeed.

5. As earlier stated the application should be filed without undue delay.

The power of the court as earlier stated is discretionary and hence need to ensure the application is made promptly by the party that intends to appeal.

In the case **RE GLOBAL TOURS AND TRAVELS LTD VS HCWS NO.13 OF 2000 Ringera J.** stated

“As I understand the law whether or not to grant stay of proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice.....”

6. In essence in granting stay of proceedings the court must consider the need for expeditious disposal of the suit and if a prima facie case merits of the intended appeal and is not a matter whether appeal will succeed or not but whether it is an arguable one and whether the application has been brought without undue delay.

7. The court decree herein involves Kshs.23,663,098/92 which is not a small amount of money.

The same is with interest and costs and reflecting on substantial loss the order would commend itself to persuade me to allow the order.

8. The Applicant has not been slothful in filing the application and that tilts the balance in his favour.

9. Considering the scales of justice weighs both ways, I am hesitant to deny the Claimant the fruits of their judgement. This would be counter to the dictates of justice that justice be done to all irrespective.

10. In the premises, the court has also considered the assertion by the Respondent in his Replying Affidavit that the notice of appeal has not been filed.

The importance of having filed a record of appeal is to convince the court that he has an arguable appeal and will be rendered nugatory if stay is not granted and should the appeal succeed.

11. Having said so the Claimant claims he has filed notice of appeal and other documents and has satisfied the requirement of having an arguable appeal. The requirement is not to demonstrate an appeal that is successful but that is arguable and is not frivolous.

12. I have considered carefully the requirements for granting of stay of execution and especially not to hinder appeal and all other special circumstances in each case. I am persuaded

the applicant has demonstrated he has an arguable case. He has not been sluggish in filing the application as he filed within a month or so of delivery of judgement and also the decretal amount is quite colossal and there could be substantial loss should the Respondent execute for the judgement and in the meantime the appeal succeeds.

13. In the interest of justice I grant the following:-

(i) The stay of execution of judgement dated 23rd September, 2021 and any consequential orders in **NAIROBI ELRC 111 OF**

2018. I also order the Respondent/Applicant to deposit 50% of the decretal amount as security within 45 days from this date in a joint interest earning account in the names of the advocates of both parties.

(ii) The Respondent/Applicant is hereby directed to file his appeal within 45 days from the date hereof and typed proceedings to be availed forthwith within 20 days.

(iii) Failure to meet conditions (i) and (ii) of the orders above this stay is vacated and Claimant will be at liberty to execute.

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

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 17TH 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