



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC NO. 285 OF 2018

JACKSON MUTISYA KETHI.....CLAIMANT

VERSUS

NJORO CANNING FACTORY(K) LTD.....RESPONDENT

RULING

1. Before me for determination is the Respondent/ Applicant's Notice of Motion dated 14th December, 2021 filed under certificate of Urgency pursuant to Section 63 (e) of the Civil procedure Act and Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, seeking the following Orders;-

1) Spent.

2) That pending the hearing and determination of the Application, this Honourable Court be pleased to stay execution of the judgement delivered on the 2nd December, 2021 and or any other orders issued therein and or incidental therefrom including the order on costs.

3) That pending the hearing and determination of the Intended Appeal, this Honourable Court be pleased to stay execution of the judgement delivered on the 2nd December, 2021 and or any other orders issued therein and or incidental therefrom including the order on costs.

4) That the costs of this Application be awarded to the Applicant.

2. The application is based on the grounds on the face of the application and in the supporting Affidavit deposed upon by Mercy Lagat, the Respondent's Human Resource manager, on the 14th December, 2021. The grounds were as follows; -

a) That Judgement was entered in this matter was delivered on the 2nd December, 2021 in favour of the Claimant as against the Respondent who was ordered to pay Kshs. 1,198,000 for unfair termination.

b) That the applicant is aggrieved by this Court's judgement and has already lodged an appeal vide its notice of appeal dated 7th December, 2021. Further that the applicant is in the process of preparing his record of appeal.

c) The Applicant avers that it has an arguable appeal with immense chances of success and therefore urged this Court to stay execution to allow it lodge and prosecute its intended Appeal.

d) It is stated that if the orders for stay of execution are not allowed then the Applicant's intended Appeal will be rendered nugatory.

e) It then intimated his willingness to abide by conditions given by this Court in granting the stay of execution Orders.

3. The Claimant/ Respondent herein opposed the application and filed a replying affidavit deposed upon on the 17th February, 2017 alleging that the applicant is using this application to evade payment of the decretal sum and further stated that if this Court is inclined to allow this application then the Respondent/ Applicant be compelled to deposit the entire decretal sum in a joint interest earning account.

4. The application was disposed of by way of written submissions with the Applicant filing on the 4th March, 2022 and the Respondent filing on the 14th March, 2022.

Applicant's Submissions.

5. The applicant submitted that it has reached the threshold for grant of an order of stay of execution as laid down under Order 42 Rule 6 of the Civil Procedure Rules, 2010. In support of its argument it relied on the case of **HGE V SM [2020] Eklr** where the Court held that;

“An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (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 as may ultimately be binding on the applicant has been given.”

6. Accordingly, it was submitted that the damages awarded to the Claimant was manifestly excessive in the circumstances and a subject of the intended appeal which if execution is allowed, then their appeal will be rendered nugatory. In this they relied on the case of **RWW V EKW [2019] Eklr** where the Court held that; -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

7. It was then submitted that the application has been brought in a timeous manner and also that the applicant is willing to abide by the conditions that this Court will order when granting the stay of execution Orders. Additionally, the applicant cited the case of **Mwaura Karuga t/a Limited Enterprises V Kenya Bus Services Ltd & 4 others [2015] eklr** and urged this Court to consider it in determining the issue of security for costs.

Respondent's Submissions.

8. The Respondent concurred with the applicant that this Court has powers to grant stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules. However, that for this Court to allow the prayer for stay there are conditions that must be met by the applicant as was held in the case of **Trust Bank Limited V Ajay Shah & 3 others [2012] eklr**.

9. The Respondent admitted that the application was filed without unreasonable delay, it having been filed 42 days after delivery of judgement. On substantial loss, it was submitted that the applicant has failed to demonstrate through evidence or otherwise the substantial loss it will incur if the stay of execution orders is declined. In this they relied on the case of **Kenya Shell Limited V Benjamin Karunga and another [1986] eklr** and the case of **Peter Ndungu Ngae & 2 others V John Mugane Karomo [2015] eklr** where the Court held that:-

“To prove substantial loss the applicant is under a duty to do more than merely stating that he will suffer loss, details and particulars must be given and the Court will therefrom determine whether such loss will ensue and if it so does, that the applicant is likely to suffer substantial injury pending the hearing of the appeal. Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay of execution.”

10. On security for due performance, it was submitted that the applicant has not offered any security for the due performance of the decree even though it expressed its willingness to abide by any reasonable condition. On the other hand, the Respondent is agreeable to the entire sum being deposited in the joint interest earning account. The Respondent then cited the case of **Mwaura Karuga t/a Limited Enterprises V Kenya Bus Services Limited & 4 other [2015] eklr**. where the Court held that;-

“the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick”

11. Accordingly, it was submitted that for the applicant to satisfy the due performance of the decree, costs and interest of Kshs. 1,500,000 should be deposited in a joint interest earning account to safeguard the interests of the decree holder.

12. I have examined the averments of the parties herein. The applicant has sought for stay arguing that he has filed an appeal which has great chances of success.

13. In order to avoid a miscarriage of justice and render the intended appeal nugatory, I will allow stay on condition that the Respondent deposits the entire decretal sum in a joint interest earning account held in joint names of the counsels on record within 30 days.

14. In default execution may proceed.

15. Costs to abide outcome of appeal.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kahiga for Applicant/Respondent – present

Mbiyu for Respondent/Claimant – present

Court Assistant - Fred