



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1560 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

NICHOLAS MWANGANGI WAMBUA.....CLAIMANT

VERSUS

SAMAX LIMITEDRESPONDENT

RULING

1. The Applicant/Respondent filed an application via notice of motion dated 15th November, 2021 praying for order of stay of execution of judgement delivered on 4th November, 2021 and all consequential orders arising there from in case No.1560 of 2016.
2. The said application is supported by affidavit sworn by **RICHARD WANJALA** Director of the Applicant/Respondent Company. The Applicant's avers that the Judgement entered by the court on 4th November, 2021 against the Applicant/Respondent of Kshs.320,568/= was oppressive to the said Applicant/Respondent and should be set aside with orders substituted thereon dismissing the Claimant's suit against the Applicant/Respondent with costs.
3. It is deposed that if the decretal sum is paid out to the Claimant as a result of the execution process the Claimant will not be able to repay the amount in the event the Applicant/Respondent is successful in the Appeal ad hence can cause the Applicant/Respondent substantial loss.
4. The Claimant filed his grounds of objection dated 29th November, 2021 and stated that there is no valid appeal preferred by the Respondent as the notice was not served upon the Claimant in contravention of Rule 77 (1) of Court of Appeal Rules.
5. He says that the notice of appeal is invalid and also has no chance of success and is punctuated by malice and bad faith.

DETERMINATION

6. I have considered the application and the supporting affidavit as well as the grounds of opposition and submissions thereto.
7. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

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.

8. The first Principle that stay shall not be granted unless court is satisfied that substantial loss may result to the applicant unless the order is made and that the application is made without unreasonable delay. So the tenets for grant of stay are (1) a question whether substantial loss will result if application for stay is not granted (2) security given by the Applicant for due performance of any decree as may eventually become binding on the appellants upon determination of appeal and (3) application brought without unreasonable delay.
9. On the issue of arguable appeal the question is not on the necessity of success of the Appeal but at least demonstrate appeal is not frivolous and indeed is arguable.

The Applicant/Respondent faults the findings of the court and especially as refers to the discharge voucher signed by the Claimant which Applicant/Respondent claims the court failed to consider. The Applicant/Respondent can be given a chance to argue his appeal.

10. On the question of possible substantial loss to the Applicant/Respondent the Applicant has not demonstrated the loss it is likely to suffer should the decretal sum be paid to the Claimant.

He only says that the Claimant is not able to refund the decretal sum should the same be paid to him.

11. On the other hand the Claimant has not addressed this matter. There are authorities to the effect that once the Applicant raises doubts as to the Claimant's ability to refund the decretal sum the burden shifts to the Claimant to show he has the means to make the refund. This is so because such information is peculiarly within his knowledge as per Section 112 of the Evidence Act.

In the case of **NATIONAL INDUSTRIAL CREDIT BANK LIMITED VS AGUINAS FRANCIS WARKE AND ANOTHER (2006) eKLR** the Respondent failed to indicate whether she has financial muscle to pay and court found that the Applicant had demonstrated the likelihood of suffering substantial loss.

12. In this case the Claimant has failed to address the issue of his financial capacity and so the court will grant the Applicant the benefit of doubt that it is likely to suffer substantial loss.

13. The matter of whether application was brought out without unreasonable delay the Judgement was delivered on 4th November, 2021 and the application was filed on 15th November, 2021. There was no inordinate delay.

14. As for the security for the due performance of decree the parties did not address themselves to that. The court however finds that it is only fair that security is provided.

15. (a) In view of the foregoing the court will grant the stay of execution of the Judgement delivered on 4th November, 2021 and all consequential orders arising therefrom pending the hearing and determination of the pending appeal.

b. The Applicant/Respondent to pay Kshs.100,000/= to the Respondent within 30 days from today's time.

c. The balance of Kshs.220,568/= to be paid in a joint interest earning account of the respective advocates within 30 days from today's date.

d. Memorandum of Appeal to be filed and served 30 days from today's date and the suit be set for hearing without unnecessary delay.

e. In default of the payment and deposit as per the above orders (b), (c) and (d) the stay of execution herein granted shall lapse and be of no effect.

f. The costs of this application shall abide the outcome of the appeal.

g. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 5TH DAY OF APRIL, 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 Civil 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

