



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1476 OF 2015
CONSOLIDATED WITH
CAUSE NO. 1467, 1468, 1469,1470,1471,1472,1473,1474,1475 OF 2015 &1629 OF 2016

FRANCIS M.P. NYAMU.....1ST CLAIMANT

MERCY WAIRIMU WAITHAKA.....2ND CLAIMANT

JOSELINE MAREGU NYAGAH.....3RD CLAIMANT

JOSIAH MWAURA NJOROGE.....4TH CLAIMANT

PERIS WAIRIGU KIGUTA.....5TH CLAIMANT

JOSEPH KIPROP BARTOCHO.....6TH CLAIMANT

JACKSON J. SOPHAS KHOLE.....7TH CLAIMANT

BRETTA MWIKALI MWOLOLO.....8TH CLAIMANT

JEDDAH KISIAVUKI LODENYI.....9TH CLAIMANT

WILSON NYARANGA MIMA.....10TH CLAIMANT

PETER MUSEMBI MUTHAMA.....11TH CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

Introduction

1. This ruling is in respect of the respondent's Notice of Motion dated 5.3.2020 seeking stay of execution of the judgment herein dated 24.1.2020 pending intended appeal. The application is brought under Rule 32(2) of the Employment and Labour Relations Court (ELRC) Procedure Rules and Order 42 Rule 6 of the Civil Procedure Rules (CPRs). It is premised on the grounds set out on the body of the motion and the supporting affidavit sworn by Mrs. Stephine Opiyo Obongo.

2. In brief the applicant's case is that it was aggrieved by the said judgment and has since lodged a Notice of Appeal; that the intended appeal is arguable with very high chances of success; that the impugned awards are excessively high and if the stay order is withheld, it will suffer substantial loss and the appeal will rendered nugatory because the claimants are without known source of income or known financial ability to repay the awarded sum; that the nature of suit before the court has far reaching effects on the bank and its business as multiple suits will arise from the impugned decision; and that it is just to grant the order sought in order to preserve the substratum of the intended appeal.

3. The claimants have opposed the application vide the Replying Affidavit sworn by Mr. Francis P. Nyamu on 10.3.2020. In brief the claimant's case is that the application lacks merits and it is a delaying tactic intended to delay justice and enjoyment of the fruits of the judgment; that it is true that they are unemployed and due to their advanced ages they have little to no chance of securing employment again; that they have suffered a lot and it would be torturous to take them through the intended appeal; that the intended appeal has no merits and its purpose is to inflict suffering on them since the court made the right decision; that applicant will not suffer irreparable harm because the bank is a huge institution with large asset base; that the applicant has not offered any specific security for costs in the event the appeal fails like readiness and willingness to deposit the decretal sum in joint interest earning account; that should the court be inclined to grant the stay order, then due to the delayed trial, at least half of the decretal sum be released to them through their Advocates and the balance plus costs be deposited in an interest earning account.

Submissions

4. The application was canvassed by written submissions. The applicant it has met the legal threshold for granting stay pending appeal as set out under Order 42 rule 6(1) and (2) of the civil Procedure Rules. It contended that the application was brought without delay after the delivery of the impugned judgment on 24.1.2020. It further submitted that substantial loss will be occasioned to it if the stay order because the claimants are not employed with steady source of income and as such they will be unable to refund the decretal sum should the appeal succeed after the execution. It urged that the purpose of the appeal will be defeated and the appeal rendered nugatory if stay is withheld and the claimants execute the impugned decree.

5. For emphasis, it relied on Court of Appeal decision in **Mateine Ole Kilelu & 10 others v Moses K Nailole [2009] eKLR** and **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR** where it was held that the issue of substantial loss is the cornerstone and should be prevented by preserving the status quo because such loss would render the appeal nugatory or ruin the applicant's business or threaten his very existence.

6. Finally, the applicant submitted that it has unequivocally stated that it is ready and willing to offer security on whatever terms as may be imposed by the Court in order to protect its interests. Consequently, it prayed for the application to be allowed.

7. On the other hand, the claimants submitted that the applicant has premised its application on grounds that are not required under Order 42 Rule 6(2) of the Civil Procedure Rules including the averment that the appeal has high chances of success. For emphasis, they relied on **Magnate Ventures v Simon Mutua Muatha & another [2018] eKLR**.

8. They further submitted that the respondent will not suffer irreparable harm if stay is declined because it has demonstrated such loss. They reiterated that the applicant is a larger legal entity with a large asset base of billions of shillings and is now owned by Kenya Commercial Bank, another large financial institution. They contended that they stand to suffer more than the applicant because they are senior citizen aged 63 years on average, and with no means to sustain their economic wellbeing, hence the judgment awards to each of them is their only expected source of relief for the coming years. For emphasis, they relied on **Butt v Rent Restriction Tribunal [1982] KLR 417**.

9. Finally, they contended that the applicant has not offered any specific security for the decretal sum and costs of the appeal. The claimants maintained that the application is a delaying tactic and as such it should be rejected so that they can enjoy the fruit of their judgment. In the alternative they urged for release of a portion of the decretal sum and the balance be invested in a joint in a joint interest earning account between the parties advocates, within a reasonable period as security for the award.

Analysis and determination

10. I have considered the application, affidavits and submissions filed by both sides. The main issue for determination is whether the applicant has met the legal threshold for granting stay of execution pending appeal as set out under Order 42 rule 6 (2) of the Civil Procedure Rules, which provides, thus –

“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.”

Whether the application was made without unreasonable delay.

11. The applicant contended that the application herein was made without undue delay after the impugned judgment on 24.1.2020. I have perused the court record and it is clear that he application was filed on 6.3.2020 which was slightly above one month. By then the costs of the suit had not been determined by the Taxing Officer of the court.

12. Section 94 of the Civil Procedure Act provides that execution of a decree of a superior court before ascertainment of the costs can only be done with the leave of the court. It follows that, there is no danger of execution until costs are ascertained and as such a judgment-debtor needs not rush to seek stay before there is eminent danger of execution. I therefore find that in the circumstances of this case, the application was made without unreasonable delay.

13. I gather support from **Eldoret Grains Limited vs. National Cereals Produce Board [2014] eKLR** where Fred Ochieng J held that: -

“In my considered view, the period to be taken into account when determining whether or not there had been inordinate delay is the period from when the Defendant became aware of the Ruling on taxation.

The reason for that is that although the Judgment was delivered on 8th May, 2012, execution could not issue immediately thereafter. Execution of a decree can only proceed after the Bill of costs had been taxed or after the Decree-Holder has obtained the leave of the court to proceed with execution prior to taxation.

Therefore, had the Defendant sought an order for stay of execution prior to the issuance of Certificate of Taxation, it could have been premature. In the circumstances, there is no inordinate delay by the Defendant, in seeking the order of stay of execution.”

Whether the applicant will suffer substantial loss if stay is denied.

14. Substantial loss is the main factor that the applicant for stay must establish to the court. In **Mateine Ole Kilelu & 10 others v Moses K Nailole [2009] eKLR** the Court of Appeal held that:

“where the decree appealed against is monetary decree, the Applicant has to show that either the once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis-à-vis his status, or business that the execution would in itself ruin his business or threaten his very existence.”

15. In **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR**, Yano J cited **Mukuna v Abuoga [1988] KLR 645** where the court held as follows concerning the centrality of the issue of substantial loss in granting stay pending appeal:

“... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by the status quo because such loss would render the appeal nugatory.”

16. In **National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another [2006] e KLR**, the court held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

17. In view of the foregoing precedents the applicant has the legal burden of demonstrating by affidavit that the decree-holder will not be able to refund the decreed sum should the appeal succeed after execution of the decree. Such burden is not discharged by mere allegation through generalized statements. It must be an apprehension founded on reasonable grounds in order for evidentiary burden to shift to the Decree-Holder.

18. In this case, the Applicant has contended that she stands to suffer substantial loss because the claimants are not in any gainful employment and their source of income is unknown and consequently, she is apprehensive that if execution proceeds and her appeal succeeds, she will not recover the decretal sum from the claimants. The claimants have confirmed the validity of the applicant’s apprehension by their Replying Affidavit and the Written Submissions in which they admitted that they are not only unemployed but also unemployable due to their old age. They further admitted that they have no other income nor do they foresee any other in future except the impugned awards. I therefore do not hesitate to find that the applicant has established that substantial loss may be occasioned to it if the stay order is withheld.

19. As regards the issue of security, the applicant indicates it is ready and willing to offer security on whatever terms the Court may impose to ensure that should its appeal succeed, it will be able to recover its money. The claimants are agreeable to security being offered provided that half of the decretal sum is released to them immediately and the balance plus costs is deposited into an interest earning bank account to be held in the joint names of the counsel on record for both parties.

20. The purpose of stay pending appeal is intended to protect the right of the appellant to be heard on the appeal by preserving the substratum of the case so that the appeal is not rendered nugatory. The right of being heard on appeal would be defeated and lost if execution of the impugned decision is done. Consequently, in my view, a stay of execution should be granted if the applicant establishes that the decretal sum will not be recovered at all, or without a considerable amount of difficulties, on the one hand; and that the applicant is offering sufficient security to guarantee payment of the decretal sum to the decree holder without any delay should the appeal fail to succeed, on the other hand.

21. In this case, I am satisfied that stay pending the intended appeal is merited on condition that the respondent deposits the whole decretal sum plus costs into an interest earning bank account to be held in the joint names of the counsel on record for both parties. Having found that the claimants have admitted that they are men and women of straw, I think the proposal that a portion of the decretal sum be released to them is likely to prejudice the applicant and it is rejected. Consequently, I proceed to allow the applicant’s Notice of Motion dated 5.3.2020 in the following terms: -

a. An order for stay of execution of the judgment delivered on 24.1.2020 be and is hereby granted pending the hearing and determination of the intended appeal on condition that the whole decretal sum plus the taxed costs of the suit are deposited within 21 days of today, in an interest earning account to be opened in a reputable financial institution in the joint names of the counsel on

record for both parties herein.

b. In default by the applicant to comply with the said condition, the stay order shall lapse automatically after the expiry of the 21 days' period.

c. For avoidance of doubt, should the default be caused by the claimant, the applicant will have the liberty to seek leave to deposit the said security in Court.

d. Cost of this Application shall be in the Appeal.

Dated and delivered at Nairobi this 22nd day January, 2021.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE