



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 330 OF 2017**

**(Before D.K.N.Marete)**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**KITUI WATER AND SANITATION COMPANY.....RESPONDENT**

**RULING**

This is an application dated 4th November, 2020 seeks the following orders of court;

1. *THAT this Application be certified urgent and service be dispensed with in the first instance.*
2. *THAT pending hearing of this application inter partes the Honourable Court do issue interim orders of stay on the execution of order/decreed in Cause No.330 of 2017.*
3. *THAT there be stay of execution of the judgment and decree made on 15th day of May, 2019 in Employment and Labour Relations Court at Nyeri by Honourable Justice Nzioki wa Makau in Cause No.330 of 2017 pending the hearing and final determination of Civil Appeal No.41 of 2020 at the Court of Appeal Nyeri.*
4. *THAT there be a stay of execution of the judgment and decree made on 15th day of May, 2019 in Employment and Labour Relations Court at Nyeri by Honourable Justice Nzioki wa Makau pending the hearing and determination of the Appeal.*
5. *THAT Costs be provided for to the Applicant.*

It is grounded as follows THAT;

- i) *The Claimant being aggrieved by the whole of the decision of the Employment and Labour Relation Court made on 15th day of May, 2019 lodged an Appeal against the whole of the said decision as per Rule 75 of Court of Appeal Rules.*
- ii) *On 12th March, 2020 the Claimant lodged an appeal on the same matter whereas the same was served upon the Respondent accordingly.*
- iii) *On 19th August, 2020 the Claimant received a notice of taxation on the same matter.*
- iv) *The Claimant on its letter dated 27th August, 2020 requested the Deputy Registrar to put the proceedings on taxation on hold since the matter is still pending hearing and determination at the Court of Appeal under Civil Appeal No.41 of 2020 but all in vain.*
- v) *The Appeal shall be rendered nugatory unless this application is allowed.*
- vi) *The Appeal is not only arguable but has very good chances of success.*
- vii) *The Claimant shall suffer irreparable loss and damages unless this Application is allowed.*
- viii) *The Honourable Deputy Registrar in her proceedings and have indicated that the taxation will proceed on since there is no*

orders of stay on the matter.

ix) *There is no inordinate delay in filing this application.*

x) *The same Advocate is still acting for the Respondent at the Court of Appeal under Civil Appeal No.41 of 2020 which is pending hearing and determination therefore the present taxation is invalid and ought not to have been filed.*

xi) *That allowing taxation before conclusion of the Appeal would create a bad precedent whereby Advocates could tax their bill at will and this could result to a variety of taxations in the same Application which is harmful.*

xii) *It is in the interest of justice and imperative that this Application be allowed.*

The Respondent in a Replying Affidavit sworn on 30th November, 2020 opposes the application for *inter alia* being frivolous, vexatious, bad in law, untenable and a gross abuse of the process of court.

The Claimant/Applicants case is that being aggrieved on the entire decision on the subject of this matter made on 15th May, 2019, she lodged a Notice of Appeal against this judgment. She thereafter filed Civil Appeal No.41 of 2020 and this was served onto the Respondent.

The Claimant/Applicants for the case is that sometimes on 19th August 2020, she was served with a taxation hearing notice and Bill of costs which was for hearing on 9th September, 2020. She wrote a protest letter to the Deputy Registrar dated 27th August, 2020 and requested the court to await the outcome of the appeal. This was conceded by the Deputy Registrar when the matter came for taxation on 16th September, 2020.

The hearing of the application has ever since been replicated and the applicant fears that this would render the appeal nugatory in the circumstances.

The Respondent, in the Replying Affidavit aforementioned opines and submits that the Claimants application does not satisfy the mandatory provisions of Order 42 rule 6 of the Civil Procedure Rules on stay of execution.

Further, the applicant has not demonstrated in evidence that she is likely to suffer any substantial loss in the absence of a grant of stay of execution.

Two, judgment was delivered on 15th May, 2019 and therefore, there has been inordinate delay (more than twelve (12) months) in bringing this application.

The Respondents further case is that no appeal or second appeal operates as an automatic stay of execution. She puts it thus;

*7. The standard and conditions for staying execution by the trial court are provided for under Order 42 Rule 6 of the CPR as follows:-*

*6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(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.*

*8. These conditions are mandatory. Therefore, before granting an order of stay, this Honourable Court must be satisfied that:*

*a) 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.*

*9. These three (3) prerequisites conditions cannot be severed. The keyword is “and”. It connotes that all there (3) conditions must be met simultaneously by the Claimant/Applicant.*

*10. Further, the law is well settled that no appeal, first or second, shall operate as an automatic stay of execution.*

It is her penultimate case that in the circumstances of this case, this application should be dismissed and taxation allowed to continue.

The Claimants/Applicants in their submissions dated 22nd December 2020 reiterate their case as earlier pleaded. They are empathic that there has not been inordinate delay in filing the application as this nature of applications can only be launched on a need basis.

It is the Claimant/Applicants case that *bona fides* should always be had in dealing with matters industrial (relations) and this would in appropriate taxation in the circumstances.

The Respondent in her submission dated 18th January, 2021 empathically reiterates her case. This is by relying on the authority of **James Wangalwa & Another vs Agnes Naliaka Cheseto Misc Application No.42 of 2011 (2021) eKLR** where the court held thus;

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs. Chesoni (20021) I KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:*

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

Further, in **Utalii Transport Company Ltd & 3 Others Vs. NIC Bank Ltd & Another (2014) eKLR** where the court held as follows;

*“whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.*

*Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore inexcusable. On applying the courts mind on the delay caution is advised for courts not to take the word “inordinate” in its dictionary measuring but in the sense of excessive as compared to normality”.*

Again, in the case of **Gahir Engineering Works Ltd v Rapid Kate Services & Another (2015) eKLR**, where the court held thus;

*“It is worth considering that it is the norm and good practice for advocates to advise their clients and further (seek) their client’s instructions on the way forward. Obviously, this is a not a one day business. There are some factors that may in some cases occasion delay which delay is excusable. Even if I am found to be wrong on that disposition it is in the interest of justice to determine whether even with an inordinate delay justice can still be done to the parties.”*

Further, in **Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee) (2019) eKLR**, where again the court held thus;

*“The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the applicant, it should not be inferred or implied or left for the court to make an order for security for due performance as that would amount to stepping into the arena of dispute. I find in this matter the applicant has failed to meet the four mandatory tenets under which this application is brought. The applicant has failed to satisfy any of the four mandatory tenets under which stay of execution can be granted. The court, is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the court to exercise its discretion in this matter; hence it is of the view that the application is not merited.”*

The Claimants/Applicant in her Applicant’s Highlight of Submission dated 2nd February, 2021 brings out, *inter alia*, the following highlights of their submissions in and as response to the Respondent’s written submissions as follows;

4. *The reason why the applicant did not file the application for stay at the time of filing appeal was because there was no sign of execution and immediately the Respondent moved the Honourable Court for taxation the applicant in good faith pleaded with the Respondent to put on hold the taxation hearing pending determination of the appeal but all in vain.*

5. *That it is only procedurally fair for the appeal to be dispensed with before the taxation proceeds.*

9. *It will further lead to multiple litigations on one suit hence contrary to Section 3 of Employment and Labour Relations Court Act which states;*

1. *The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate*

*resolution of disputes governed by this Act.*

2. *The court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).*

3. *The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.*

Besides amplifying their case in this answer, the Applicants invokes the oxygen principle (overriding objective) of this court in mitigation and furtherance of her case. She prays that this court exercises its mandate to imbue a just, expeditious, efficient and proportionate resolutions of disputes governed by this Act and relate this to the circumstances of her present case.

The Claimant/Applicant's case and submission is that denial of grant of stay of execution would occasion substantial loss to herself. This is because taxation would ensue and a Bill of Costs totaling to Kshs.515,613.00, if taxed and executed would jeopardise her operations and lead to job losses. This to me would be substantial loss in the circumstances. The circumstances of this case take into account the ground in which these events would occur, if the complained of taxation takes place.

Inordinate delay, this would also depend on the circumstances of the case. The Claimant/Applicant elicits a case of applying for stay of execution on a need basis. This is interesting but untenable. However, one falls for the explanation that all was calm in the execution of the matter until the Claim for taxation arose wherein she made interventions including this application. This is understandable. Look at this, in the authority of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Talai Secondary School (2016) eKLR** the court observed as follows;

*Inordinate delay would be a matter to be determined on the peculiar facts or circumstances of each case, depending on the circumstances, a delay of even one day may be inordinate while a delay of 7 months may not be inordinate.*

This is applicable and in support of the application. There was no inordinate delay in the circumstances.

The Claimant/Applicant *in toto* fails to offer security as a means of containing the Respondent's interest on the matter. It is however notable that the issue is one of taxation and not execution of a decree. In the events of loss at the appellate court, this can be followed up and effected.

This is a delicate exercise. The circumstances and facts of the case however directs a finding in favour of the application. This is because at all times during these proceedings, it was calm until the inception of the quest for taxation by the Respondent. There before, as is submitted by the Applicant, it was needless to seek stay of execution. This arose at this stage and therefore the issue of inordinate delay in filing the application does not arise.

The Claimant/Applicant's case illustrates that she would suffer loss if taxation and or execution is had before hearing and determination of the appeal. Further, no prejudice would be had to the Respondent in the events of an issue of stay of execution in the circumstances. I agree.

I am therefore inclined to allow the application with orders that each party bears their costs of the application.

**Dated and delivered at Nyeri this 25th day of February 2021.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

**1. Miss Macharia holding brief for Mr.Dickens Atela for the Union/Applicant**

**2. Miss Kyania instructed by BM Musau & Company Advocates LLP for the Respondent.**