



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1936 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MARTIN WAMAE WANGU & 294 OTHERS.....CLAIMANT

VERSUS

BIDCO AFRICA LIMITED.....RESPONDENT

RULING

Before me, for determination is the Respondent/Applicant's Notice of Motion Application dated 2nd November, 2020. It seeks the following orders that:

1. Spent.
2. That this honourable court be pleased to grant interim ex-parte orders of stay of execution of its Judgment delivered on 7th November, 2019 pending hearing and determination of this application
3. That the execution of the judgment delivered on 7th November, 2019 and the resultant decree there from be stayed pending the hearing and determination of the applicant's intended appeal
4. That the costs of and occasioned by this application be costs in the intended appeal

This Application is premised on the grounds that:

1. Judgment in this case was delivered on 7th November, 2019 in favour of the Claimants as against by the Respondent.
2. The Respondent/Applicant being dissatisfied with the Judgment lodged Notices of Appeal evidencing its intention to Appeal the decision of this Honourable Court and further proceeded to request the Court through its Deputy Registrar seeking to be furnished with the typed proceedings and the certified copy of the Decree to enable it file an Appeal.
3. Further, the Respondent/Applicant did file a Notice of Motion Application dated 2nd November, 2020 seeking for stay of execution of the Judgment and decree of this Honourable Court dated 7th November, 2019. The Application was certified urgent and set down for interpartes hearing on 23rd November, 2019.
4. On 13th November, 2019 the hearing did not proceed as the Claimants sought 7 days to file their response to the Application and directions issued that the Application be disposed of by way of written submissions.
5. The claimant indicated they do not wish to file submissions as such the respondent/applicant was granted leave to file a supplementary affidavit and written submissions.
6. The claimant **MARTIN WAMAE** filed a replying affidavit sworn on the 19th November, 2020 having authority to swear the same on behalf of all the claimants.
7. That party and party bill of costs have been filed and are awaiting ruling by the taxation court.
8. The Applicant now seeks stay of execution pending hearing and determination of the applicant's intended appeal as the same will be rendered nugatory should execution proceed.

9.The Applicant is apprehensive that its Appeal would be rendered nugatory, as it would not be able to recover any sums from the Claimants in the event the Appeal is successful as they are currently unemployed with no steady income and with therefore not be able to repay the decretal sum if the same is paid out to them.

The Application is further supported by the Affidavit of **JUDY REBECCA MOMANYI**, the Respondent/Applicant's Head of Legal of the sworn on 2nd November, 2020 in which she reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Sections 3, 12(3) and (4) of the employment Act, Rule 17 of the Employment and Labour Relations Court (procedures) Rules 2016, Order 42 Rule 6 of the Civil Procedure Rules, 2010.

In response to the application, the Claimant's filed a Replying Affidavit dated 19th November, 2020, sworn by MARTIN WAMAE, the 1st Claimant in which he contends that the Applicant has not met the threshold for the grant of the Orders sought in the Application.

The Affiant further maintains that the Application has been filed in bad faith and that it is only meant to delay him and his co-claimants from enjoying the fruits of the Judgment entered in their favour as against the Respondent.

He further contends that the respondent applicant filed the appeal out of time and the claimant herein filed an application to have the record of appeal struck out, that both applications are pending ruling and due to the above, the application is incompetent and should be dismissed with costs to the claimant.

The claimants urge that should the court be inclined to grant stay, it should order the Respondent applicant to pay the claimants half the decretal sum and have the balance deposited in a joint interest earning account.

Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

The Respondent/Applicant submits that it has met the threshold for the grant of the Orders sought in its Application as provided under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 and therefore urged this Court to allow the same as prayed.

The Applicant maintains that it will be unable to recover any sums from the Claimants should its Appeal be successful thus rendering it nugatory as the Claimants herein are currently unemployed with no known source of income. It further maintained that for this reason the Court should allow its Application as prayed. The Applicant relied on the cases of **Meteine Ole Kilelu & 10 Others v Moses K. Nailole (2009) eKLR** and **Sarah N. Sakwa v Elizabeth Wamwanyi T/A Namukhosi Limited & Another (2017) eKLR** where the Courts held that an Application for stay of execution ought to be allowed where an Applicant has shown that it would suffer substantial loss by not being able to get a refund of the decretal sum should execution proceed.

The Applicant further urged this Court to protect the substratum of its intended Appeal by allowing its Application in terms of the prayers sought therein.

It is further the Applicant's contention that it has an arguable Appeal and that there is a need to preserve the subject matter in dispute in order to safeguard its interest. For emphasis the Applicant relied on the case of **John Mwangi Ndiritu v Joseph**

Ndiritu Wamathai (2016) eKLR, where the court held: -

"...even though I am not determining the appeal, it is important that the applicant must demonstrate that he has an arguable appeal. I am fully aware that I cannot go into the merits of the appeal at this stage but for purposes of the application before me, it is necessary to satisfy myself that the applicant has arguable grounds."

The respondent/Applicant further submitted that it has filed its Application without unnecessary delay the Judgment having been delivered on 7th November, 2019 and the notice of appeal on 21st November, 2019. That it also requested for typed proceedings on the same date to facilitate lodging of an appeal at the court of Appeal. That in the intervening period the matter has been in active litigation as an application had been filed to review the judgment which was later withdrawn hence necessitating the filling of the current application.

It further argued that the delay in obtaining the said proceedings was not occasioned by it but rather the Office of the Deputy Registrar who failed to assess the requisite fees for payment of the same. The Applicant urged this Court to be guided by the case of **Jaber Mohsen Ali & Another v Priscillah Boit & Another (2014) eKLR** where the Court in dealing with the question of unreasonable delay held that the same is dependent on the surrounding circumstances of each case. It therefore urged this Court to find that its Application was made within a reasonable time.

On the issue of security, the Applicant submitted that it is ready to offer security on the terms as imposed by this Court for the due performance of the Orders sought to ensure protection of the interests of the parties hereto. The Respondent/ Applicant cited that it is ready to pay a sum of Kshs. 6,456,742.96 to the claimants pending the hearing and determination of the appeal The Respondent/Applicant relied on the case of **Richard Muthusi v Patrick Gituma Ngomo & Another (2017) eKLR**.

In conclusion, the Applicant urged the Court to allow the instant Application as prayed.

Claimant's Submissions

The Claimants/Respondents did not file any submissions and instead relied on their replying affidavit dated 19th November, 2020.

Analysis and Determination

After considering the parties' arguments and the evidence adduced, I find that there is only one issue for determination being whether the applicant meets the threshold for grant of the orders sought in the application.

What is the threshold of Stay Pending Appeal Applications?

Order 42 Rule 6(2) of the Civil Procedure Rules bars this Court from ordering stay of execution pending appeal unless

- a) The Application is brought without inordinate delay.*
- b) The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and*
- c) The Applicant is willing to give security as the Court may deem fit to order.*

The requirements for grant of stay of execution pending Appeal set out in **Butt v Rent Restriction Tribunal [1982] KLR 417**, where the Court of Appeal held that: -

- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end
of the proceedings.*
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*
- 5. The court in exercising its powers under Order 42 Rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

Inordinate delay

Judgment in this cause was delivered on 7th November, 2019. The Applicant being dissatisfied with the Judgment filed Notices of Appeal dated 21st November, 2019 and also proceeded to write to the Deputy Registrar seeking to be furnished certified copy of the Judgment and typed proceedings for purposes of lodging its appeal.

It is also noted that prior to the instant Application the Applicant filed an Application for review of judgment which was later withdrawn.

The claimants have also filed a Bill of Costs, which is pending ruling. This is what prompted the Applicant to file the instant Application which was heard under Certificate of Urgency on 5th November, 2020 and directions given to dispose the same by way of written submissions.

From the foregoing I find that there was delay from 7th November 2019 to 2nd November 2020 when the Application was filed. I however note that the delay has been sufficiently explained by the Applicant

Substantial Loss

The right to Appeal is enshrined in the right to a fair hearing. A party has the right to seek justice to the highest court of the land. However, a court determining an application for stay must not forget the rights of a litigant who has a valid decree for the court. The court must therefore balance the rights of both parties.

In the instant Application the Claimants have not demonstrated that they will be able to refund the decretal sum should the appeal succeed. This would mean that should the appeal succeed, the Applicant risks losing substantial sums of money with respect to the individual Claimants together with costs and interest. The appeal may well be rendered nugatory and be reduced to an academic exercise. I however also take into account the fact that judgment herein was delivered on 13th July, 2018 and it has taken long for parties to agree on tabulation. The court notes the respondent made a tabulation of Kshs.6,456,742.96 which is therefore not in dispute. I have considered the grounds of Appeal and note that the appeal is not on the judgment but on the quantum only. The grounds of appeal that do not touch on the quantum are therefore superfluous. The Appellant has for example not disputed the itemised figures used in the tabulation, which according to the

judgment consisted of only **one month's salary in lieu of notice and one month's salary in lieu of leave for each year worked**. Other than the tabulation, the judgment is not disputed and is not the subject of appeal. The judgment delivered on 13th July 2018 was as follows –

“In the circumstances, the court would not make a finding on the issue of unfair termination of service. The court will in the circumstances order that each of the claimants be compensated as follows:

- a. One month's salary in lieu of notice on termination of service.***
- b. One month's salary in lieu of leave for each complete year of service from 2009 to 2013 for those in service during this period.***
- c. Counsel for the parties liaise with their respective clients for computation of orders (a) and (b) are return to Court on 11th October 2018 for recording of final orders.***
- d. Costs of the suit.***

The Respondent/Applicant is therefore bound to pay both items as per judgment. The likelihood of the success of the appeal is therefore in my opinion doubtful.

However, in the interest of justice, stay of execution of Judgment and decree be and is hereby allowed pending appeal on conditions that: -

- 1. The Respondent/Applicant do pay the claimant the sum of Kshs.6,456,742.96 that has not been disputed and a further one half of the balance that is Kshs.7,981,455.50. The balance of the decretal sum to be deposited in a joint interest earning account within 30 days from the date hereof.**
- 2. Failure by the Respondent/Applicant to meet conditions in (1) above, the Claimants/Respondent be at liberty to proceed with execution for the entire decretal sum.**

Costs of the Application shall be costs in the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE