



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 248 OF 2019

CONSOLIDATED WITH

CAUSE NO. 247 and 249 of 2019

MUSA MOHAMED KALEVE.....1ST CLAIMANT

PETER NDUNGU MATHERI.....2ND CLAIMANT

CHARLES MAINA JESSE.....3RD CLAIMANT

VERSUS

EAST AFRICA PORTLAND

CEMENT COMPANY LIMITED.....RESPONDENT

RULING

Introduction

1. This ruling is in respect of the respondent's Notice of Motion dated 3.3.2020 seeking stay of execution of the judgment herein dated 14.2.2020 pending intended appeal. The application is brought under Rule 17 of the Employment and Labour Relations Court (ELRC) Procedure Rules and Order 42 Rule 6&7 and order 51 Rule 1 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 Ms. Sheila Kahuki.

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 appeal with very high chances of success; that impugned judgment is a substantial amount of gratuity awards wrongly computed using a formula set out under an expired CBA; that if the stay order is withheld, it will suffer substantial loss and the appeal will rendered nugatory because the claimants have no known assets or source of income from which it can recover the decretal sums should the appeal succeed; that it is a publicly owned company capable of honouring the Court Judgment in the event the appeal fails to succeed; that the application was made without undue delay; 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. Musa Mohamed Kaleve on 10.3.2020. In brief the claimant's case is that the application is fatally defective and it is an abuse of the Court process; that the application lacks merits and it is a delaying tactic intended to defeat the cause of justice and deny the claimants 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 the impugned judgment was correctly entered under section 59(1) of the labour Relations Act which incorporates the terms of a CBA into every employee's contract of service covered by the CBA; that the applicant's intended appeal has no chances of success; that applicant has not established that the claimants are persons of straw; that they are willing and capable of repaying the decretal sum if the appeal succeeds; that the applicant has not demonstrated that it will suffer irreparable harm; that the applicant is heavily indebted to Kenya Commercial Bank to the tune of KSHS. 1.4 Billion declared in Cause number 2119 of 2014 and may collapse leaving the decretal sum herein unpaid; and that the Court should balance the interests of both parties by ordering the applicant to pay the claimants Kshs.7,113,170.61 and deposit the other Kshs 7,113,170.61 in court. **Submissions**

4. The application was canvassed by written submissions in which the applicant contended that 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 on 4.3.2020 after the delivery of the impugned judgment on 14.2.2020.

5. It further submitted that substantial loss will be occasioned to it if the stay order because the judgment is a substantial amount and the claimants have not demonstrated that they have the means of refunding the decretal sum should the appeal succeed. It maintained that should the appeal succeed, it will be impossible for the claimants to refund the decretal sum awarded or it will require protracted proceedings for recovery. It urged the court to balance the claimants right to enjoy the fruit of their judgment and its right of appeal by ordering it to furnish security. For emphasis, it relied on **Tassam Logistics Ltd v David Macharia & another [2018] eKLR** and **Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 others [2012] eKLR**.

6. On the other hand, the claimants submitted that the applicant has not proved that the intended appeal is arguable and contended that the appeal raises no strong grounds since under section 59 (1) of the Labour Relations Act the terms of the CBA were the ones applicable in computing their gratuity. They further submitted that the applicant has not demonstrated that it will suffer substantial loss if stay is declined because it has not proved that they are persons of straw. For emphasis **Carter & Sons Ltd v Deposit Protection Fund Board & 2 others Civil Appeal No. 291 of 1997**.

7. They further argued that the applicant has not offered or shown any willingness to furnish security for payment of the decretal sum should the appeal fail to succeed. They contended that the applicant is heavily indebted to Kenya Commercial bank to the tune of Kshs.1.4 Billion and it likely to collapse before paying the decretal sum herein. Therefore, they urged the court to order the applicant to pay them Kshs. 7,113,170.61 and deposit the balance of equal amount in court or in an interest earning account to ensure that the interest of both sides are protected pending the appeal.

Analysis and determination

8. 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.

9. The applicant contended that the application herein was made without undue delay after the impugned judgment. I have perused the Court record and confirmed that the judgment was delivered on 14.2.2020 and the application was on 4.3.2020. The time taken was less than a month and by then the costs of the suit had not been determined by the Taxing Officer of the court. Under Section 94 of the Civil Procedure Act execution of a decree of a superior court cannot take place before ascertainment of the costs, if awarded, except with the leave of the court. Therefore, I find that in the circumstances of this case, the application was made without unreasonable delay.

10. 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.

11. 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.”

12. 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.”

13. 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.”

14. 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.

15. In this case, the Applicant has contended that she stands to suffer substantial loss because the claimants have no known assets and consequently, she is apprehensive that if execution proceeds and her appeal succeeds, she will not recover the decretal sum from the claimants at all or without protracted legal proceedings. The claimants have confirmed that they are now retired from gainful employment and they have also not shown that they own any assets or any source of income which can be used to repay the decretal sum should the appeal succeed. Therefore, I do not hesitate to find that the applicant has established that substantial loss may be occasioned to it if the stay order is withheld.

16. As regards the issue of security, the applicant did not indicate that it is ready and willing to offer security for payment of the decretal sum should the appeal fail to succeed. However, in the written submissions it admitted that it is ready to offer security. The claimants are agreeable to security being offered provided that half of the decretal sum is released to them immediately and the balance be deposited in Court or in an interest earning bank account.

17. 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 should the appeal succeed, on the one hand; and that the applicant is ready and willing to offer 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.

18. In this case, I am satisfied that stay pending the intended appeal is merited on condition that the respondent deposits the whole decretal sum 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 not proved that they are capable of repaying the decretal sum, 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 3.3.2020 in the following terms: -

- a. An order for stay of execution of the judgment delivered on 14.2.2020 be and is hereby granted pending the hearing and determination of the intended appeal on condition that the whole decretal sum be deposited, within 21 days of today, into 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 5th day February, 2020.

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