



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISCELLANIOUS APPLICATION NO.E012 OF 2021

SPICE 'N' SPAN CLEANING SERVICES LIMITED.....APPLICANT

VERSUS

RUTH NYABOKE MANYINSA.....RESPONDENT

RULING

The applicant herein filed application dated 27<sup>th</sup> January, 2021 and seeking for orders of stay of execution pending the hearing and determination of the intended appeal and on the grounds that on 22<sup>nd</sup> January, 2021 there was judgement entered in favour of the respondent in CMELRC No.1506 of 2019 in the absence of the applicant and hence did not have the opportunity to seek stay of execution at that moment.

Other grounds in support of the application are that the applicant is dissatisfied with the judgement and orders of the trial court and where an award issued is excessive considering that the respondent was not terminated from employment and the court failed to consider the defence and evidence of the applicant.

Where stay of execution is not allowed the applicant's application shall be rendered nugatory and suffer irreparable loss and damage.

The application is also supported by the affidavit of Nicholas Mwenda and the managing director of the respondent company.

In reply, the respondent filed the Replying Affidavit of Lemmy Regau Nyawade advocate for the respondent and who avers that there is no evidence of what substantial loss shall be suffered by the applicant if stay of execution is not allowed and there is no evidence that the intended appeal has any chances of success. The respondent is entitled to the fruits of the judgement and no security for the due performance of the judgement if the intended appeal is not successful has been offered and the application should be dismissed with costs.

Both parties filed written submissions.

The applicant submitted that there is loss to be suffered if stay orders are not allowed as the appeal shall be rendered nugatory. On 3<sup>rd</sup> February, 2021 ELRC Appeal no.E009 of 2021 was filed and served upon the respondent.

Under Order 22 Rule 25 of the Civil Procedure Rules stay of execution should be allowed pending suit between a decree-holder and judgement- debtor being determined on terms as to security deposit. The applicant did not have a chance to apply for stay before the trial court.

In the case of **Butt v Rent Restriction Tribunal [1982] KLR** the court addressed the conditions for the grant of stay of execution and that the court is required to exercise its discretion and should look at the special circumstances of each case. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** the court held that it is unreasonable to expect an applicant to know in detail the resources owned by a respondent or the lack of them so as to demonstrate one is able to pay back the decretal sum upon a successful appeal. An application involving a money decree, a stay of execution should readily issue.

The respondent submitted that there is no demonstration of an arguable appeal as a condition under Order 42 Rule 6 of the Civil Procedure Rules. The substantial loss to be occasioned to the applicant is not stated and even where the application is made without delay, such cannot be the only ground for the grant of stay as held in **Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR** and in **Cris Muna N Bichage v Richard Nyagaka Tongoi & 2 others [2013] eKLR**.

Determination

On the application, the affidavits and written submissions, the sole issue for determination is whether the court should allow stay of

execution in CMELRC No.1506 of 2019 pending the hearing of the intended appeal.

The application herein was filed on 27<sup>th</sup> January, 2021. Parties were issued with hearing directions on 16<sup>th</sup> February, 2021.

Ordinarily, an application seeking stay of execution of the judgement should be before the trial court. the reasons given by the applicant herein as to why stay was not applied for is that the judgement was delivered in their absence. However, such absence did not stop the applicant from moving the court formerly with an application seeking stay of execution of the judgement in CMELRC No.1506 of 2019. See Order 42 Rule 6(1) of the Civil Procedure Rules;

*No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.*

The above put into account, pending the hearing directions, the applicant filed ELRC Appeal No.E009 of 2021 on 3<sup>rd</sup> February, 2021. In reply, the respondent has not contested the fact of the appeal. See **Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR.**

An order of stay of execution is discretionary save it is regulated under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the foundation should be that the applicant must demonstrate that there is an appeal which is likely to be negated where stay is not allowed and such refusal will occasion substantive loss and damage and affect the substratum of the appeal. Further the court can order the applicant to give security for the due performance of the judgement pending the hearing of the appeal. See **Butt v Rent Restriction Tribunal [1982] KLR.** the issue of substantial loss is critical since where the respondent is able to refund the judgement sum where the appeal is successful, the right to enjoy the fruits of the judgement just delivered should not be curtailed.

In the Supporting Affidavit of Nicholas Mwenda at paragraph 4 he avers that;

*The award granted to the respondent is excessive considering the fact that her employment services were never terminated.*

There is no further information given with regard to the circumstances of the respondent save to confirm that she is in employment.

The Draft Memorandum of Appeal is on two grounds only, that the trial court misconducted itself by failing to consider the defence and the award is excessive. The nature of *excess* is not addressed and suppose this will be the subject of the appeal hearing save, such cannot amount to a ground that there shall be substantive loss occasioned to the applicant to justify the grant of orders of stay.

The parameters of the decretal sum not stated and there being no good case on what substantive loss shall be occasioned to the applicant, despite the offer to deposit security, the conditions set for the court to exercise its discretion with regard to issuing an order of stay of execution even where an appeal has been filed is lost.

**Accordingly, application dated 27<sup>th</sup> February, 2021 is hereby found without merit and is dismissed. cost shall abide the outcome of the appeal.**

**DELIVERED AT NAIROBI THIS 29TH MARCH, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:.....