



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.E016 OF 2021

KENYA WINE AGENCIES LIMITED.....APPELLANT

VERSUS

LENNY KIMATHI MURUNGI.....RESPONDENT

[Being an appeal from the judgement and decree of the Principal Magistrate

at Milimani Commercial Court Nairobi Hon. E. M. Kagoni

delivered on the 26th January, 2021

in CMCC No.3516 of 2006]

RULING

The appellant, Kenya Wine Agencies Limited filed application and Notice of Motion dated 29th February, 2021 under the provisions of section 12(3) and 13 of the Employment and Labour Relations Court Act, 2011 and Order 42 Rule 6 of the Civil Procedure Rules and seeking for orders that;

There be a stay of execution of the judgement of 26th January, 2021 by the Honourable E. M. Kagoni PM pending the hearing and determination of the appeal.

The application is made on the grounds that judgement was delivered on 26th January, 2021 in CMCC No.3516 of 2006 in favour of the respondent herein with an award of Ksh.2, 415,838.50 on account of payment of salary, Ksh.100, 000 as nominal damages, Ksh.50, 000 for general damages, interest and costs. The court also allowed stay of 30 days and which lapsed on 25th February, 2021.

The appellant, aggrieved by the judgement of the trial court has lodged an appeal before this court and which appeal has merit and reasonable prospects of success and unless stay of execution is allowed the respondent will commence execution proceedings. There is real risk that the appellant will suffer substantial loss and the appeal rendered nugatory unless the order of stay is granted. The respondent testified that he lives in Uganda and the appellant is not aware of his means and hence will not be able to recover the decretal sum if the appeal is successful.

In the Supporting Affidavit of Doris Macharia the appellant's company secretary and legal services director she avers that upon the judgement of the trial court in favour of the respondent, the appellant was aggrieved and has filed an appeal and on the grounds that the trial court erred in finding that employment terminated without communication to the respondent; that the respondent was entitled to aggravated damages and proceeded to award general damages for breach of contract in a case for unfair termination of contract of employment; that the respondent was entitled to nominal damages and awarding the same in a case of termination of employment; and that salary and benefits were assessed from November, 2005 to July, 2009. The stay sought will not prejudice the respondent and the respondent is willing to deposit security on terms and conditions the court will issue.

The respondent filed his Replying Affidavit and avers that even where the appellant has the right of appeal against the judgement of the trial court, he was employed by the appellant on 1st February, 1999 and later deployed to Uganda on 4th December, 2002. Upon the deployment, the appellant failed to comply with the Employment (Foreign Contracts of Service) Rules as contained in the repealed Employment Act of 1976.

The appellant has abandoned him and family in Uganda and refused to pay for transportation back to Kenya and although he managed to come back to Kenya after many years, his goods are still held in Uganda and shall cost approximately Ksh.500,000 to transport them back to

Kenya and which includes packaging, storage and ancillary costs. The appellant has not paid salary since November, 2005 to date causing extreme suffering.

The respondent also avers that the appellant is intent on withholding his salary and emoluments thereby extending his pain, anguish and stress and if the decretal sum is withheld or deposited in court or in a joint account of the advocates the same shall not be accessible and will not help him at all. He needs such monies for his upkeep and to transport his goods still held in Uganda. The court to consider special circumstances of this case and direct the appellant to release part of the decretal sum to him pending the hearing of the appeal.

The respondent also avers that the appellant has treated him in an inhumane manner by withholding his salary and emoluments and this has put him in great financial distress. He had been deployed out of the country but he was abandoned and he now requires his personal possession still held in Uganda and the funds from the judgement being his salary and emoluments so as to sustain himself and family and where there is partial release of the decretal sum the respondent can proceed with the appeal.

Both parties attended court and made oral submissions.

The appellant submitted that they are willing to deposit the entire decretal sum in a joint interest earning account held by the advocate for the parties so as to secure the subject to the appeal which has been filed immediately upon the judgement of the trial court on 26th January, 2021. The appellant has moved without delay to seek stay of execution and where the orders sought are not issued there shall be substantial loss as the respondent has averred he is in financial distress and shall not be able to refund the same where the appeal is a success. The decretal sum is substantial at ksh.2.5 million and there are good and reasonable grounds of appeal with high chances of success. The Memorandum of Appeal has been filed challenging the entire judgement and findings of the trial court.

The appellant also submitted that where there is partial release of the decretal sum and the appeal is successful, the respondent has not demonstrated he has means capable of repaying the same back to the appellant. He has sought for payment of Ksh.500, 000 to transport his goods from Uganda to Nairobi but has not demonstrated how such amounts were arrived at and in any event he had claimed for Ksh.220, 000 before the trial court and since this was not an amount agreed upon in the contract of service, such is not due.

The appellant shall abide any conditions granted for a deposit of security.

The respondent submitted that this is a case which requires special consideration noting the master/servant relationship between the parties and the conditions required for the grant of stay of execution requires the discretion of the court. The special circumstances in this case warrant the partial or full payment of the decretal sum.

The respondent was employed by the appellant in the year 1999 and then redeployed in Uganda and movement back to the country has been central to the entire suit. Before the trial court the respondent amended his plaint and claimed transportation from Uganda to Kenya. He is still held up in Uganda and seek the court to enable and facilities his return plus his goods.

The court as the employment and labour relations court should put a human face to the proceedings and ensure justice is achieved for the parties before it. The servant has a right to be transported back to the country at the end of his employment and the court ought to intervene to ensure the master has facilitated such movement. The sum of ksh.500, 000 shall facilitate the packaging, storage and transport of goods from Uganda to Kenya.

Determination

The instant application seeking stay of execution of the judgement of the trial court in CMCC No.3516 of 2006 is premised on the provisions of Order 42 Rule 6 and more fundamentally under the provisions of section 12(3) and 13 of the Employment and Labour Relations Court Act, 2011.

With regard to grant of orders of stay of execution, Order 42 Rule 6 requires that;

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 subrule (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.

3. ...

4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

In this case, the appellant made oral application for stay of execution immediately judgement issued on 26th January, 2021 and was granted 30 days and immediately upon the lapse of such stay, moved this court for stay of execution pending the hearing of the appeal and a Memorandum of Appeal has herein been filed.

The court has been moved without delay. the appellant has offered security deposit for the due performance of the appeal and upon conditions that the court shall issue.

Further, the power of the court to grant or refuse an application for a stay of execution is discretionary. the discretion should be exercised in such a way as not to prevent an appeal and the general principle in granting or refusing stay is so that an appeal may not be rendered nugatory. also, the court should not refuse a stay if there are good grounds for granting it merely because a better remedy may become available to the applicant at the end of the proceedings. And, fundamentally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements. See **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**; **Antoine Ndiaye v African Virtual University [2015] eKLR**; and **Butt v Rent Restriction Tribunal [1979] KLR**.

In the case **HGE v SM [2020] eKLR** the Court held that;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however must balance the interests of the Appellant with those of the Respondent.

In this case, the appellant is keen to deposit the entire decretal sum into an interest earning account in the joint names of the parties so as to secure the substratum of the appeal. The respondent on his part does not wholly challenge the grant of stay of execution subject to partial payment of his transportation costs from Uganda to Kenya.

Without going into the merits of the appeal, before the trial court and as noted in the judgement delivered on 26th January, 2021 the respondent had pleaded for the award of ksh.220, 000 to pay the transportation of his good from Kampala, Uganda to Nairobi, Kenya. The trial court dismissed this particular claim on the grounds that;

- the same was non-monetary emolument and it was for the Defendant [appellant herein] to arrange for transport and nowhere was any money to be paid to the Plaintiff. The prayer as worded is not merited as again parties are bound by their pleadings.

This claim having been declined by the trial court cannot be revived within the instant application and before the court has heard the merits of the main appeal. Whether the transportation costs are due or not, such can be quantified and paid, if at all due, where the appeal is heard in full.

The issue of payment of transport costs is contested and should await the full hearing of the appeal. Save the appeal shall be heard on priority basis taking into account all matters between the parties.

The instant application thus addressed, the same is found with merit and stay of execution is hereby granted subject to the appellant deposit of security in the following terms;

a. The appellant shall cause the deposit of the total decretal sum into a joint interest earning account held in the names of both advocates for the parties;

b. The respondent shall identify the banking institution as (a) above and within the next seven (7) days;

c. The appellant shall proceed and address as (a) and (b) above and within the next 30 days;

d. Where the respondent fails to address as directed (b) above, the appellant shall proceed and identify the banking institution and deposit the same as (a) above within the next 45 days;

e. Where the appellant fails to address as directed above, stay of execution shall lapse on the 45th day from the date hereon;

f. The appeal shall be heard on priority basis; and

g. Costs shall abide the outcome of the appeal.

DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF MARCH, 2021

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and