



THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1291 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

THE TRUSTEES OF PREMIER ACADEMY CHARITABLE TRUST

T/A PREMIER ACADEMY..... CLAIMANT

VERSUS

THOMAS NDANI NJUGUNA.....RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 29th July 2020 seeking orders that:

1. Spent;
2. Pending the hearing and determination of this Application inter-partes this court be pleased to stay execution of the Judgment delivered on 17th July 2020 and any consequential decree or order;
3. Pending the hearing and determination of the appeal by the Court of Appeal this Court be pleased to stay the execution of the judgment delivered on 17th July 2020 and consequential decree or order; and
4. Costs of the application be in the cause.

The Application is premised on grounds that:

1. This Court delivered its Judgment on 17th July 2020 in which it dismissed the Claimant/Applicant's claim and found for the Respondent in the sum of Kes.150,415.00 together with costs thereon.
2. The Applicant is aggrieved by the said decision and has filed an appeal which has overwhelming chances of success.
3. The Respondent has commenced execution proceedings and has served the Applicant's advocates with a demand for payment of the Judgment sum and costs.
4. Unless stay is granted the Applicant will suffer substantial loss as it shall be forced to make payments to the Respondent without assurance that it will be able to recover the same should its appeal be successful.
5. The Applicant is ready and willing to deposit the judgment amount of Kes.150,415.00 in Court pending the hearing and determination of the appeal.

The application is supported by the affidavit of Chimnoy Banerjee the Chief Executive Officer of the Applicant sworn on 29th July 2020. He deposes that the appeal has overwhelming chances of success, *inter alia*, the Judge erred in finding that the counter-claim was uncontroverted and also failed to consider the Respondents list and copies of documents. He also deposes that the whereabouts of the respondents are unknown and there is no assurance of recovery of the same.

In response to the application, the Respondent filed a Replying Affidavit sworn by himself on 26th August 2020. He deposes that the test for an arguable appeal with chances of success is not a test applicable for the grant of stay of execution before this Court since it is the same Court that issued the judgment in the matter.

He denies that the applicant's appeal is merited or has any chance of success and avers that no defence to the counter-claim was filed or served upon him. He avers that the Court did not err as alleged in awarding him his gross salary for the month of July 2018.

He further avers that the Applicant is obliged to demonstrate the test applicable for grant of stay of execution and that the Applicant has no basis for its claim for substantial loss hence the application should fail.

He avers that he resides in Nairobi and is well represented by his advocates on record whose address is disclosed. He further avers that he is currently employed by Peponi School earning a gross salary of Kshs.426,889 per month thus there is no clear risk that the Applicant will suffer substantial loss if the monies are paid to him as he cannot fail to refund it.

He denies that there is any threat of execution as his advocates had written in good faith requesting the Applicant to comply with the terms of the Judgment. He avers that there is no justification why he should not be allowed to enjoy the fruits of the judgment hence the application should be dismissed.

The Application proceeded by way of written submissions.

Applicant's submissions

The Applicant submitted that Order 42 Rule 6(1) of the Civil Procedure Rules provides that an appeal does not operate as stay of execution and that Rule 6 (2) set out the factors that a Court should consider before exercising its discretion in an application for stay pending appeal.

It submitted that the purpose for stay of execution was expressed in the case of **Beatrice Ndunguri Mwai & another v Sicily Wawira Titus & another [2020] eKLR** that it is to preserve the subject matter so that the right of appeal can be exercised without prejudice to the Applicant.

It relied on the decision **Magnate Ventures Ltd v Simon Mutua Muatha & another [2018] eKLR** that the substantial loss does not mean a colossal amount of money and that it is sufficient if an applicant demonstrates that it would go through hardship to recover the decretal sum in the event the appeal is successful. It further relied on the case of **Superior Homes (Kenya) Limited v Musango Kithome [2018] eKLR** where the Court cited **Silverstein v Chesoni (2002) 1 KLR 867** that "*substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.*"

It argued that although the Respondent avers that he will be able to refund the decretal sum, and that he had annexed payslips for the months of April and June 2020, he did not provide an affidavit of means to prove his capacity to refund the amount. It submits that there is no guarantee that the Respondent would remain in the employment of Peponi School until the Appeal is determined. It submits that if the Court's determination is not stayed the Applicant's ability to hold any of its employees to the terms of their contract would be compromised to the prejudice of its students.

It was its submission that the application was filed without undue delay because Judgment was delivered on 17th July, 2020 and it filed a Notice of Appeal and a request for proceedings on 23rd July, 2020 respectively. Thereafter it filed the instant application on 30th July, 2020.

It submits that subject to the Court's directions issued on 3rd December, 2020, the decretal sum of Kes.150,415 was deposited in a joint interest earning account held by the parties counsel. Therefore, Order 42 Rule 6(2)(b) of the Civil Procedure Rules has been met.

It finally submits that it would be in the interest of justice if the orders sought by the Applicant are granted. It further submitted that by depositing the decretal amount each party is assured that if it is successful on appeal the decretal sum will be available to it.

Respondent's submissions

The Respondent submitted that it is not proof of substantial loss to state that his whereabouts and means are unknown thus the application should fail. In support of this position, he relied on **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR** where the Court held that the application for stay failed because there was no evidence of substantial loss to the

Applicant.

He argued that he has discharged his evidentiary burden of demonstrating that he is a man of means hence no alleged loss would be occasioned on the Applicant in the event the appeal is successful. He relied on **Kenya Shell Case [supra]** where the court held that the 1st Respondent was a man of substance with a good position and prospects and there was no evidence that he would not remain in his job until pensionable age. He further relied on **Kiraita Abuta v Richard Nyandika Nyangoya [2019] eKLR**.

He submitted that having failed to meet the test of irreparable loss, the other conditions must fail automatically. It was his submission that in **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** the Court held the failure to satisfy one of the tenets is fatal to the application.

He submitted that Order 42 Rule 6 of the Civil Procedure Rules clearly sets out the tests and uses the conjunction "*and*" to connect/coordinate the tests. He urged the Court to find that even though the application was brought without unreasonable delay, the Applicant has failed to substantiate the crucial test of irreparable loss hence the application must fail. To buttress this position, he relied on the case of **Mary Ajemo Gachiriga v Jephther O.Opande [2016] eKLR**.

He submitted that though the applicant has furnished security, it has failed to substantiate the first crucial test of irreparable loss hence the application must fail. He maintained that the test for an arguable appeal with chances of success is not a test applicable for the grant of stay of execution before this Court. He relied on the **Equity Bank Case** where the Court cited the decision in **Carter & Sons Ltd v Deposit Protection Fund Board & Two Others Civil Appeal No. 291 of 1997** that “...the mere fact that there are strong grounds of appeal would not, in itself justify an order for stay.”

He urged the court to dismiss the application with costs.

Determination

The main issue for determination is whether the Applicant has met the threshold for grant of stay of execution. The conditions that ought to be satisfied are set out under Order 42 Rule 6(2) of the Civil Procedure Rules provides:

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.

The Court of Appeal in **Butt v Rent Restriction Tribunal [1979] eKLR** held:

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory... The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the **Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59.**”*

Substantial loss

The Applicant states that it would suffer loss as it shall be forced to make payments without assurance that it will be able to recover the same. It further states that there was no certainty that the Respondent would continue working for the Respondent. It submitted that it would suffer substantial loss because of its ability to hold any of its employees to their terms of employment which would affect its students. The Respondent on his part was certain that he has the ability to refund the amount as he is currently employed by Peponi School.

To prove this, he annexed his payslips which confirm that his gross monthly salary is Kes.426,889 and his net pay is equally above the decretal sum in this matter. In my view this is sufficient proof that he is a man of means capable of refunding the decretal sum, should the appeal succeed. It is not material for the Applicant to file an affidavit of means since in his reply he already demonstrated that should the monies be paid to him he would invest the amount for its multiplication.

The Applicant’s contention that it would suffer substantial loss due the Respondent’s lack of means or unknown address is not valid as the Respondent has adequately stated his ability to refund the decretal sum should it be paid to him and his place of work is disclosed.

In **National Industrial Credit Bank Limited v Aquinas Francis**

Wasike and Another [2006] eKLR, the court stated 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 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.**”*

[Emphasis Added]

The Respondent herein has proved that he has the capacity to refund the decretal sum if paid to hi. There is thus no proof of substantial loss.

It is therefore my finding that the Respondent has therefore discharged his evidentiary burden that he is in a position to refund the decretal sum should the applicant’s appeal be successful.

Unreasonable delay

The parties herein admit that the application was brought without undue delay thus this condition has been met by the Applicant.

Security

The applicant states that the decretal sum was deposited in a joint interest earning account in the names of the parties' counsel. The Respondent submitted that because the Applicant did not meet the test of substantial loss, the condition for provision of security fails. This Court is expected to balance the interest of the parties and it would be unjust to deny the Respondent the fruits of his judgment even if deposited in a joint interest earning account. It is therefore unnecessary to continue holding the decretal sum in a joint interest earning account for reason that the Respondent has demonstrated that he is in a position to refund the entire amount.

In **Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR** the Court held:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal...

Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay merely on the ground of annoyance to feelings. Indeed, remote contingencies would not warrant the court's interference with the ordinary course of justice and the process of law.”

Having demonstrated he is capable of refunding the decretal sum should the appeal be successful, I find no reasons to deny the Respondent the benefit of the fruits of his judgment.

For these reasons, the application is dismissed with costs to the Respondent. I further order the release of the decretal sum deposited in an interest earning account in the names of Counsel for the parties be released to the Respondent forthwith.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MARCH 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