



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 211 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

ALEXANDER IRUNGU WANJIRU.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY(KENYA)

T/A "MATER MISERICORDIE HOSPITAL"RESPONDENT

RULING

Judgment in this case was delivered on 29th May 2020. The Claimant was awarded Kshs.6,575,125 as compensation. The Respondent was aggrieved by the judgment and filed notice of appeal on 2nd June 2020.

Vide an application dated 29th July 2020 filed under certificate of urgency the Respondent/Judgement Debtor (herein after referred to as Applicant) seeks the following orders: -

1. Spent.
2. The Court be pleased to extend the Order of Stay of Execution of the Judgement and Decree given on 29th May 2020 pending the hearing and determination of the Intended Appeal.
3. Costs of and incidental to this application abide the Intended Appeal.

The grounds in support of the application as set out on the face of the application and on the supporting affidavit of EVELYN N. MAINA, the Applicant's In-house Advocate sworn on 29th July 2020 are that the Applicant intends to appeal against the judgment and decree herein and has filed notice of appeal and applied for certified copies of typed proceedings and judgment by letter dated 29th May 2020. That the Claimant/Decree Holder (hereinafter referred to as the Respondent) has also evinced the intention to file a cross appeal against part of the said judgment by filing a notice of cross appeal dated 18th June 2020. That both parties have a mutual interest in the extension of the orders of stay that were granted by the court at the time of delivery of judgment, the court having taken judicial notice of COVID-19 pandemic to grant a stay from 29th May 2020 when judgment was delivered to 1st October 2020. It is the Applicant's averment that the Applicant does not have the means to either ascertain the financial resources or assets at the disposal of the Respondent, nor have knowledge of the same, and is apprehensive that the Respondent will be unable to reconstitute the decretal sum if released to him, should the appeal by the Applicant be successful.

It is further the Applicant's averment that the application has been brought without undue delay, being within the stay of four months granted by the trial court at the time of delivery of judgment.

The Applicant states it is willing to provide security in the form of a Bank Guarantee or such other security as may be ordered by this court for the due performance of such decree as may ultimately be binding on it.

The Respondent opposes the application. He filed a replying affidavit sworn on 18th August 2020 in which it contends that the appeal has no merit as the judgment was based on the Applicant's own witness testimony of Dr. Agnes Chege who admitted that none of the reasons that the Applicant relied on to terminate the Respondent's employment were valid. It is his averment that the intended appeal is frivolous and an abuse of court process. That the appeal is intended to delay him from enjoying the fruits of his judgment.

He prays that the application for stay be denied, but should the court be inclined to grant the same, it should be conditional upon release of three quarters of the decretal sum to the Respondent and the deposit of the remaining quarter in a joint interest earning account in the names of the Applicant's and Respondent's advocates. That the security should be in the form of cash and not a Bank Guarantee.

The Respondent contends that he is not a man of straw. That he owns two land parcels being TITLE NUMBER RUIRU/RUIRU EAST BLOCK 3/5124 and RUIRU/RUIRU EAST BLOCK 3/5123 measuring 0.0471 Hectares and 0.0472 Hectares respectively. That he is willing to have the title deeds deposited as security in Court so that in the event of the intended appeal being successful, the Applicant is guaranteed to recover the sum that will have been released to the Respondent.

It is his position that the Applicant ought not to be apprehensive about recovery of the released sum should the appeal be successful.

That besides the parcels of land, he managed to secure employment with Family Heritage Hospital after the termination of his employment by the Respondent and worked there for two years until his contract expired. That he opted not to apply for renewal of the contract, as he wanted a sabbatical leave to focus on his Doctorate Degree in Strategic Management at Kenyatta University which he successfully concluded and graduated in December 2019. That with his solid academic credentials, he is seeking employment in senior management positions and is certain to secure a job while the appeal is pending. That in the meantime he is also offering management consultancies to keep him busy.

The Respondent states that his abrupt dismissal by the Applicant destabilised him as he stayed out of employment for over one year and therefore he needs the money rightly awarded to him to stabilise a few things in his life.

The Respondent deposes that his cross appeal is intended to be in respect of severance pay that was provided for in his contract of employment but which the court did not address. That the cross appeal, will therefore not prevent the Applicant from honouring the judgment of this court.

The Respondent appended to his affidavit copies of title deeds for the two parcels of land he owns in Ruiru together with valuation reports prepared in May 2014.

In a supplementary affidavit sworn on 4th September 2020, the Respondent annexed a valuation of the two properties in Ruiru dated 1st September 2020 in which the two parcels are each valued at Kshs.2,500,000 with a forced sale value of Kshs.1,900,000. He contends that since the money he had requested to be released to him is only Kshs.4,930,593.75, the property he owns is of higher value and will have risen higher by the time the appeal is determined.

He prays that the application be dismissed.

Analysis and Determination

The application was disposed of by way of written submissions. I have considered the application and grounds and affidavit in support thereof. I have further considered the affidavits filed by the Respondent and the rival submissions by both parties.

The issues for determination are whether the Applicant meets the criteria for grant of the orders sought.

Stay of execution is provided for in Rule 5(2) of the Court of Appeal Rules as follows: -

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

1. in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;

2. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

Further, Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provide as follows: -

[Order 42, rule 6.] Stay in case of appeal.

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—

1. 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

2. 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 principles governing the grant of stay of execution pending appeal were set out by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal (1979) eKLR** as follows: -

- i. 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.
- ii. 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.
- iii. 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.
- iv. 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 requirement."

The same position was echoed in the case of **Global Tours & Travel Limited v Five Continents Travel Limited [2015] eKLR** where the court held that:-

"... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously."

In the case of **Tabro Transporters Ltd v Absalom Dova Lubasis 2012 eKLR** the Court held that the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court, as such order does not introduce any disadvantage, but administers the justice that the case deserves.

In the case of **Elena Doudoladova Korir v Kenyatta University [2014] eKLR** my brother Nzioki Wa Makau J. had this to say:-

"the application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & another –vs- Thornton & Turpin Ltd** where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that –

"The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, Substantial loss would ensue from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay."

From the foregoing, it is clear that the court has wide discretion in granting stay of execution but such discretion is to be exercised judiciously, after considering the specific circumstances of the parties in the matter.

In this case, the judgment was delivered on 29th May 2020. It has been pleaded by the Applicant that it was aware of the judgment date but had difficulty accessing the online platform and therefore had no opportunity to seek stay of execution at the time of delivery of judgment.

The court on its own granted stay of execution in the orders in the judgment taking judicial notice of COVID 19 situation, up to 1st October 2020, a period of four (4) months.

Although notice of appeal was filed immediately, that is on 29th May 2020, no draft of grounds of appeal are on record. The application for stay of execution pending appeal was not filed until 5th August 2020, more than 2 months after the judgment was delivered. These are lapses which the Applicant has made no attempt to explain.

It has been held by courts on many occasions that the Applicant must demonstrate sufficient cause. Further, that the court must balance the interests of both parties, and not the Applicant only, at the expense of a decree holder who has a valid decree.

In the case of **Mohamed Salim T/A Choice Butchery v Nasserpuria Memon Jamat (2013) eKLR** the Court cited with approval and relied on the decision **M/S Portreitz Maternity v James Karanja Kabia Civil Appeal No. 3 of 1997** and stated that:-

"That right of appeal must be balanced against an equally weighty right, that of the Plaintiff, to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the Plaintiff of that right. ..."

In the case of **Machira T/A Machira & Co. Advocates v East African Standard (No. 2) [2002] 2 KLR 63**, the Court observed that:

“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 judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

The decree in the instant case is a monetary decree. The Applicant has stated that the security that the Respondent holds being title to land is not easily realisable hence it can only be protected if there is stay of execution. I do not think that land is a bad security, nor has the Applicant backed up its argument that the security would not be easily realised. Further, the mere fact that realisation of the security is not easy, when in fact the security is good, is not justification for the court to disregard the same. What the court should consider is whether there would be substantial loss as to render the appeal nugatory, should the appeal succeed.

In **Silverstein v Chesoni [2002]1 KLR 867** the Court held that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

The above position was also applied in the case of **Shell Ltd v Kibiru & Another, Civil Appeal No. 97 of 1986, Nairobi** where it was stated that:-

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

The Applicant has not demonstrated that there would be difficulty in realisation of the security offered by the Respondent such as would render the appeal nugatory.

On the security offered by the Applicant (Judgment Debtor), it is my view that a bank guarantee is good security, provided it is valid up to the date of determination of the appeal. The court further takes cognisance that the Applicant is one of the premium hospitals in Nairobi and in the county and would therefore be in a position to pay the decretal sum should the appeal fail.

On the cross appeal, I agree with the Respondent that it does not affect the application herein as the Respondent seeks an award of service gratuity which was not awarded in the judgment.

Conclusion

Having considered all the circumstances of the parties in respect of the application herein, and specifically the lapses on the part of the Applicant and the pecuniary circumstances of the Respondent, I make the following orders: -

1. That stay of execution of the judgment and decree herein be and is hereby granted pending the filing, hearing and determination of the Applicant's intended appeal.

2. That the stay of execution shall be conditional upon: -

i. The Applicant releasing to the Respondent 50% of the decretal sum.

ii. The Applicant providing a Bank Guarantee that will remain valid and binding until the appeal is determined.

iii. The Applicant complying with (i) and (ii) above within 30 days.

3. The Applicant (Judgment Debtor) shall bear the costs of this application in any event

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF APRIL 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