



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

MISC. APPLICATION NO.E047 OF 2021

DOLCE & LOUNGE LIMITED.....APPLICATION

VERSUS

WYCLIFFE A MORUMBER & ANOTHER.....RESPONDENT

RULING

Background – the applicant filed application dated 16th March, 2021 on 17th March, 2021 and the court issued directions on equal date and attendance on 20th April, 2021 when both parties attended and the respondent applied for more time to reply and parties to address the application by way of written submissions which was granted and mention on 6th May, 2021 to confirm. On the due date, the respondent had not replied or filed any written submissions.

The applicant filed Supplementary Affidavit dated 27th April, 2021 in response of a *Replying Affidavit* by the respondent. Such document is not on record both in the physical and online files. There are no written submissions by the respondent on record.

Notice of Motion

The applicant filed application dated 16th March, 2021 under the provisions of Order 42 Rule 6, Order 50 Rule 6 of the Civil Procedure Rules and section 1A, 1B, 3A, 63(e) and 95 of the Civil Procedure Act and seeking for orders that;

- a) *There be stay of execution of the judgement and decree of the subordinate court in Milimani Commercial Court CMEL Cause No.62 of 2018 pending the hearing and determination of the application.*
- b) *The court be pleased to grant the applicant/proposed appellant leave to file the memorandum of appeal and appeal out of time against the decision of the Chief Magistrate delivered on 28th May, 2020 in Milimani Commercial Court CMEL Cause No.62 of 2018.*
- c) *There be stay of execution of the aforementioned judgement and decree of the subordinate court in Milimani Commercial Court CMEL Cause No.62 of 2018 pending the hearing and determination of the intended appeal.*
- d) *This court be pleased to deem the draft memorandum of appeal herein as duly filed and served.*
- e) *Costs be provided for.*

The application is supported by the affidavit of Tawhida Mohamed Chelimo and on the grounds that the applicant is dissatisfied with the judgement of the subordinate court in Milimani Commercial Court CMEL Cause No.62 of 2018 seek to file appeal against the whole judgement and time for filing appeal lapsed on 28th June, 2020 and therefore seek enlargement of time to lodge the appeal and have stay of execution. The applicant was not able to file appeal in time as there was no notice of the judgement upon delivered due to Covid-19 pandemic and therefore lost time.

Mr Chelimo in his affidavit avers that there is an arguable appeal with high chances of success as the subordinate court delivered judgement in favour of the respondent herein without analysing the evidence and the same was never served upon the applicant until warrants of attachment were served. The cumulative amount in the notice is Ksh.1, 805,647.33 which is inordinately high.

The reason for failing to file an appeal in time was due to failure to issue notice of the judgement and the trial magistrate was on transfer. There shall be no prejudice where the orders sought are issued.

The applicant also filed Supplementary Affidavit and avers that the court has jurisdiction to hear and determine the instant application. Time for filing appeal has since lapsed and application is seeking for enlargement of time to file appeal which has high chances of success. The alleged bad faith and that the applicant intends to relocate its assets and frustrate the judgement is without evidence and the allegation that the business is owned by a foreigner is not true.

There was no notice of the judgement in Milimani Commercial Court CMEL Cause No.62 of 2018 and there is no evidence of service.

There is no reply as noted above.

The applicant filed written submissions that the leave sought to appeal out of time is necessary as there was notice to the judgement and under section 79G of the Civil Procedure Act the court has power to allow and grant time and admit appeal out of time as held in **Jennifer Njuguna & another v Robert Kamiti Gichuhi [2017] eKLR**. the delay herein was not inordinate as judgement by the subordinate court was delivered on 28th May, 2020 and the applicant only became aware upon service of the proclamation on 11th March, 2021 and then filed the instant application and hence has shown there was a good cause for not filing the appeal on time due to challenges of Covid-19 pandemic.

There is an arguable appeal with high chances of success and a challenge to the judgement of the subordinate court on matters of law and the award granted is highly excessive in the circumstances of the case. Where execution is allowed to proceed the applicant shall suffer prejudice and stay of execution be granted as held in **Antoine Ndiaye v African Virtual University [2015] eKLR**.

Under Order 42 Rule 6(2) an applicant is required to secure the due performance of the judgement where the appeal is not a success which the applicant has satisfied and execution be stayed pending hearing of the intended appeal.

Determination

Despite their being no responses or submissions filed by the respondent, the twin issues the court should determine herein are that;

Whether there should be stay of execution of the subordinate court judgement pending hearing of intended appeal; and Whether leave to file appeal out of time should be granted.

On the second issue with regard to leave to file appeal out of time, it is admitted that judgement in Milimani Commercial Court Case No. CMEL Cause 62 of 2018 was delivered on 28th May, 2020 and the instant application filed on 17th March, 2021 after the applicant had been served with a proclamation and notice of attachment on 11th March, 2021.

Section 75G of the Civil Procedure Act provides that;

79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

It is not in dispute that the time and 30 days within which to lodge an appeal fell within the COVID-19 period and necessitating closure of court so as to address the pandemic. Immediately the applicant was served with proclamation and notice of attachment on 11th March, 2021 they moved with speed and without delay and applied for stay of execution and for time extension to file appeal out of time.

The court finds reasonable cause to allow such prayer.

On the issue of whether stay of execution should be allowed, the guiding principles are Order 42 Rule 6(2) of the Civil Procedure Rules that;

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.

The court enjoys discretion to grant stay of execution of decree pending appeal. In **JMM v PM [2018] e KLR** it was held that;

... If it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.

Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court wide discretion to stay execution of decrees pending appeal. From the draft Memorandum of Appeal, it is clear to me that it is not frivolous. It raises triable issues of whether or not the trial magistrate erred in law and fact in holding the applicant liable for the unfair termination of employment and granting all sums claimed by the

claimant without going into the merits of each claim.

the decree is a money decree and therefore the question of the appeal being rendered nugatory if successful does not arise as it was not shown that the Respondent decree holder is so impecunious that she cannot refund the decretal sum awarded if the same is paid out as held in **Kenya Power & Lighting Company Ltd v Rose Anyango & another [2020] eKLR.**

The applicant in submissions asserted that there is satisfaction of the stay condition with security which is not demonstrated in any material way. To secure the judgement of the lower court, such is imperative and on this basis, stay of execution shall be conditional. The applicant shall make a security deposit through a bank guarantee. Such is reasonable and just in the circumstances of this case.

accordingly, stay of execution of judgment /decree in Milimani Commercial Court CMEL No.62 of 2018 pending hearing and determination of the intended appeal subject to the applicant issuing a Bank Guarantee to this court for the entire decretal sum awarded from a reputable Commercial Bank within the next 21 days of this ruling in default the stay granted lapses.

Each party shall bear own costs.

Delivered in open court at Nairobi this 22nd day of April, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi.....

and