



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 388 OF 2016**

**DR. JOHN NDUBA.....CLAIMANT/RESPONDENT**

**VERSUS**

**AFRICAN MEDICAL AND RESEARCH FOUNDATION**

**(AMREF HEALTH AFRICA).....RESPONDENT/APPLICANT**

**RULING**

1. This ruling relates to the Applicant's Notice of Motion dated 10.3.2020 and seeks the following orders:

**a. Spent.**

**b. That pending the hearing and determination of this application *inter-partes*, there be a stay of execution of the Judgment of the Honourable Court delivered on 7.2.2020.**

**c. That pending the hearing and determination of the intended appeal, there be a stay of execution of the judgment of the Honourable Court delivered on 7.2.2020.**

**d. That costs of this application be costs on the cause.**

2. The application is premised on grounds that:

a. On 7.2.2020, this Court delivered a judgment finding *inter alia* that the Applicant's failure to renew the Respondent's contract for 2 years amounted to unfair termination and awarding US\$ 149, 052 as compensation.

b. The Applicant intends to appeal against part of the judgment, has filed a notice of appeal and if stay of execution pending hearing and determination of the appeal is not granted, the intended appeal, if successful, will be rendered nugatory.

c. There is an imminent risk that the Applicant will not recover the substantial decretal amount in the sum of US\$ 149,052 together with costs in the event that her intended appeal is successful and that the Respondent has no information relating to the Respondent's assets and/or whereabouts.

d. The Respondent's legal representatives have taken steps towards commencing the execution process by serving the Applicant with a draft decree and awaiting execution proceedings will significantly enhance costs and apprehension and will place the Applicant at risk of her intended appeal being rendered nugatory and occasioning her grave injustice.

e. The potential or risk that the Applicant may not recover the substantial decree sum in the event that her appeal is successful will place in jeopardy her projects and her relationship with donors to whom she is financially accountable.

f. The applicant has an arguable appeal and seeks to challenge material errors of law and fact by the Honourable Court.

g. The applicant is ready and willing to furnish such security on terms as the Honourable Court may deem just.

3. The application is supported by the affidavit of Diana Amuhaya the Applicants Legal Officer sworn on even date, in which she reiterates the grounds on the face of the motion.

4. The respondent opposed the Application vide his Replying Affidavit sworn on 13.10.2020. He deposed that as the successful party, he is entitled to the payment of the decretal sum and he should not be deprived of the fruits of the judgment; that the chances of the success of the Respondent's appeal are irrelevant to the present Application as the Court has already pronounced itself in respect of the Claim and delivered judgment in his favour.

5. He contended that the Applicant is guilty of unreasonable delay in the prosecution of the application for reasons that; she filed an application on 11.3.2020 when the Court granted an interim stay of execution of Judgment until 18.3.2020 when the matter was placed before this court; the Chief Justice announced closure of court operations from 16.3.2020 following the announcement of the first Covid-19 case in Kenya thus the matter did not proceed on 18.3.2020; that after resumption of virtual hearings, the applicant failed to have the application fixed for hearing since March 2020; and that the interim order for stay lapsed on 18.3.2020 and the Applicant is not entitled to any fresh orders of stay pending hearing of the application or her intended appeal.

6. He denied that the Respondent will be unable to recover the decretal sum and averred that he is capable of refunding the decretal sum as he is a reputable doctor with over 32 years of experience having worked with the Respondent for considerable period before his unlawful termination. According to him, his financial standing is an irrelevant consideration for this Court in determining whether to grant the orders sought in the application.

7. He contended that the allegation that the Applicant relies on donor funding places her ability to pay the decretal sum into serious doubt if she intends to use funds from donors to implement specific projects.

8. He contended that he also intends to file a cross-appeal against the Applicant and if the Applicant is unsuccessful in her appeal and he is successful, he runs a risk in that he will be unable to recover the decretal sum and any judgment/ decree made in favour of his cross-appeal. Finally, he averred that the applicant has failed to disclose any reason for grant of the orders sought.

9. In a rejoinder, the Applicant filed a Further Affidavit sworn by John Mwangi, her Human Resources Manager on 21.10.2020 who averred that although the Applicant is entitled to fruits of his judgment the Court is required to balance competing interests in a way that meets the ends of justice. He further averred that the Applicant has a right to appeal and to enjoy the benefits of that right without apprehension of the same being rendered nugatory where she has expressed her willingness to furnish security.

10. He denied there being unreasonable delay in the prosecution of the application as alleged and maintained that the application could not proceed on account of cessation of court operations due to the Covid-19 pandemic and during this period the Court registry communicated that registry staff would be working from home and that only matters under certificate would be addressed. Additionally, that a notice was issued to the effect that matters listed between 16<sup>th</sup> and 19<sup>th</sup> March, 2020 would be mentioned from 20<sup>th</sup> to 24<sup>th</sup> April 2020 before the Deputy Registrar.

11. He contended that this matter was not listed before the Deputy registrar during the said period and the online judiciary system officially commenced its operations on 1.7.2020. He averred that the Applicant wrote to the Court on 3.8.2020 requesting for a date for directions on the instant application and the registry responded via email on 31.8.2020 communicating that a hearing date was fixed for 12.10.2020. He averred that the Applicant should not be prejudiced on account of factors beyond her control.

12. He averred that the Respondent has not filed an affidavit of means or otherwise demonstrated that he has the means to repay the decretal sum in the event the Applicant succeeds on appeal. He further averred that the Respondent has not disclosed his financial records, audited statements of accounts, assets or any source of income to demonstrate his financial standing and/or his ability to repay the decretal sum, hence exposing the Applicant to pronounced risk of loss.

13. He reiterated that the Applicant is ready and willing to provide security which is a sign of good faith that the application is not meant to deny the Respondent the fruits of his judgment but to pave way for expeditious determination of the intended appeal.

#### **Applicant's submissions**

14. The Applicant submitted that for a party to be entitled to stay of execution pending appeal, it should meet the requirements in **Antoine Ndiaye v African Virtual University [2015] eKLR**, namely:

- (a) Whether the applicant has an arguable appeal;
- (b) Whether the applicant will suffer substantial loss if stay is not granted;
- (c) Whether the applicant has expressed its intent to furnish security; and
- (d) Whether the application has been brought without unreasonable delay.

15. It submitted that it has an arguable appeal as has been set out in the draft Memorandum of Appeal, which in its view raises triable issues of fact and law. It argued that even a single triable point is sufficient to warrant an audience with the Appellate Court and relied on **Total Kenya Limited v Kenya Revenue Authority [2013] eKLR** to fortify that view.

16. It submitted that, arguable appeal need not be one that must succeed and urged that it is not the function of the Court hearing a stay application to make final determinations on merits of an appeal. It invoked this Court's discretion to grant the orders sought and protect her right of appeal. It relied on **John Mwangi Ndiritu v Joseph Ndiritu Wamathai [2016] eKLR** where the Court cited the decision in **Butt v Rent Restriction Tribunal [1982] KLR 417** that discretion should be exercised in a way not to prevent an appeal.

17. It submitted that the Court of Appeal in the **Antoine Ndiaye Case** stated that substantial loss refers to any loss that is of real worth or value as distinguished from a loss without value or loss that is merely nominal. It argued that in the absence of stay orders there is imminent risk that the Respondent will seek to tax his costs and proceed to recover substantial amounts.

18. It argued that there is no guarantee that the Respondent would be in a position to refund if the appeal succeeds. She submitted that in **Mutuma Mugambi v Kenya Methodist University [2016] eKLR** the Court granted an application for stay of execution citing the large decretal sums involved and risks of substantial loss in the event the Respondent was unable to refund the same.

19. It argued that once the Respondent's financial ability is called into question, the burden of proving such ability shifts to him. It submitted that the Respondent has not demonstrated that he has means to repay the decretal sum should the appeal succeed and that his mere statement that he is a reputable doctor is irrelevant and baseless.

20. It submitted the Court of Appeal decision in **International Laboratory for Research on Animal Diseases v Kinyua [1990] eKLR** held that the onus was on the Respondent to rebut by evidence the claim that the intended appeal if successful would be rendered nugatory on account of his alleged impecuniosity. It also cited the **Kenya Orient Insurance Co. Limited v Paul Mathenge Gichuki & another [2014] eKLR** and **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**.

21. It argued that the donor funds are tied to specific projects which may be prejudiced in the event there is a slight risk of the Applicant being unable to recover the decretal sum. It submitted that it has a constitutional right to pursue her intended appeal which should be safeguarded from being rendered nugatory.

22. It argued that by furnishing of security, the interests of both parties are balanced. It relied on **Focin Motorcycle Ltd v Ann Wangui and another [2018] eKLR** where the Court held that it is sufficient for the applicant to state that he is ready to provide security but it's the discretion of the court to determine the security.

23. It submitted that it would be unjust for the Respondent to benefit from the same judgment he intends to challenge and that the Respondent stands to suffer no prejudice should this Court's judgment be upheld by the Court of Appeal as the decretal sum is secured.

24. It reiterated that there has been no delay in applying for stay as alleged by the Respondent and argued that given the unforeseeable circumstances it acted expeditiously to safeguard its position. She urged the Court to grant the prayers sought in the application.

#### **Respondent's submissions**

25. The Respondent submitted that an applicant seeking orders for stay of execution must satisfy the tests laid out in Order 42 Rule 6 (2) of the Civil Procedure Rules.

26. He argued that the burden of proving the alleged inability to repay the decreed sum in the unlikely event of the appeal succeeding is firmly upon the applicant. He further argued that the reasons cited by the applicant that it will suffer substantial loss do not prove substantial loss based on her submissions and judicial decisions.

27. He argued that the commencement of the execution is not a ground that justifies substantial loss. He relied on **James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR** where the Court held that the fact that the process of execution has been put in motion does not amount to substantial loss because execution is a lawful process.

28. He also cited the **Antoine Ndiaye Case** where the Court held mere financial burden occasioned by a judgment does not constitute substantial loss for purpose of grant of an order of stay of execution. He argued that it is not enough for the applicant to merely state that substantial loss will result and that no averment had been made by the Respondent that he is a man of straw or one with no means. He relied on **Irene Atieno v Henry De'Souza & another [2018] eKLR** where the Court appreciated that the Claimant has lost her employment but it did not mean she had become a pauper who cannot refund the decreed sum if the appeal is successful.

29. He maintained that the burden to prove substantial loss is upon the Applicant and this burden cannot be reserved such that the Respondent is called upon to prove that he has financial ability to repay the decretal sum where the burden has not been discharged.

30. He distinguished the present case with both the **Kenya Orient** and **Focin Motorcycle cases** cited by the Respondent by observing that in the former case the substantial sum was KES 30 million which does not compare to the sum herein. Again he observed that in the said case the applicant established that the Respondent was a man of straw.

31. He argued that because the threshold for substantial loss has not been met by the Respondent there is no need to consider the issue of security as a condition for stay. He cited **Kenya Plantation & Agricultural Workers Union v Larfarge Eco System [2013] eKLR**.

32. He maintained that it is irrelevant that the Applicant has an arguable appeal is irrelevant in the determination of whether there is merit in granting the orders sought in the application because the principles for stay of execution do not include "arguability" of the Applicant's appeal.

33. He argued that if the orders sought in the application are not granted, the Applicant will still be able to prosecute her appeal and the Court's exercise to refuse to grant the orders sought will not have prevented the appeal. Consequently, he urged the Court to dismiss the Applicant's notice of motion dated 10.3.2020.

#### **Issues for determination and analysis**

34. The main issue for determination is whether the applicant has met the legal threshold for granting stay of execution pending appeal as set out under Order 42 rule 6 (2) of the Civil Procedure Rules, which provides, thus –

***“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.”***

#### **Undue delay**

35. The Respondent contended that the Applicant is guilty of unreasonable delay in the prosecution of the application because interim stay of execution was granted on 11.3.2020, the orders lapsed on 18.3.2020 and despite resumption of the court activities she failed to have the application fixed for hearing. The applicant on her part argued that the application did not proceed on 18.3.2020 account of cessation of court operations due to the Covid-19 pandemic and that upon her request the registry communicated that a hearing date had been fixed for 12.10.2020.

36. In my view, the unreasonable delay referred to in Order 42 Rule 6 (2) (a) is the delay in the period between the date of delivery Judgment or a Ruling and the filing of an application for stay of execution but not the delay in prosecuting the application. From the Court record, this Court delivered the impugned Judgment on 7.2.2020 and the instant application was filed on 10.3.2020 before taxation and determination of the party and party costs .Consequently, there was no unreasonable delay in approaching the Court as the application was made 25 days after delivery of Judgement and before execution of the judgement could be put in motion.

37. With respect to the delay in prosecuting the matter, the Applicant has adequately explained the reasons for the delay. It is undeniable that the Covid-19 pandemic disrupted the operations of the Court which resulted to the scaling down of these operations as evidenced by the notice of the Deputy Registrar dated 16.3.2020.

38. These events were beyond the Applicant’s control however it did take steps, vide her letter dated 3.8.2020, to have the application fixed for hearing. I therefore find that the Applicant has demonstrated that it did not contribute to the failure to have its application heard promptly.

#### **Substantial loss**

39. The Applicant averred that it will not recover the substantial decretal amount in the event the appeal is successful as it has no information relating to the Respondent’s assets or his whereabouts. It also averred that it relies on donor funding to carry out her humanitarian activities and that this might jeopardise its projects and relationship with its donors should it not recover the substantial decretal sum, if the appeal is successful.

40. The Respondent’s case is that the applicant has not discharged the burden of proving substantial loss and maintained that the Applicant has not shown that he is a man of straw. The Respondent also averred that dependence on donor funding places the Applicant’s position to pay the decretal sum into serious doubt since it will have used all its funds in implementing projects.

41. Having considered the material presented by the parties, it is common ground that the Respondent has a right to enjoy the fruits of his judgment and that this Court should not be an obstacle to that. However, the Court has discretion to grant an order for stay of execution while balancing the interests of the parties if it is demonstrated that there is no proof that the decree holder will be able to repay the decretal sum should the appeal succeed after execution of the impugned decree.

42. In my view, the Applicant herein has adequately demonstrated that it may suffer substantial loss should the stay of execution be denied. The reasons that she relies on donor funding to carry out her activities, and does not have information relating to the Respondent’s assets are sufficient grounds evidencing that it may not recover the decretal sum, should the appeal succeed, and thereby stall its operations.

43. It is not enough for the Respondent to state that he is in a position to refund the amount because he is a reputable doctor with over 32 years of experience. He only stated that he can refund the decretal sum but did not prove such ability to refund the US\$ 149,052. The emerging jurisprudence from this Court and the Court of Appeal is that it would be a daunting task to expect the Applicant to prove whether or not the Respondent is a man of means since such information and evidence is only within the Respondent’s knowledge.

44. Iin **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** held:

***“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 the lack of them. Once an applicant expresses a reasonable fear that 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 — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”***

45. Having found that the respondent has not rebutted the allegation that he is not capable of refunding the decretal sum, I must hold that the Applicant has proved it may suffer substantial loss if the stay order sought is not granted.

## **Security**

46. The Applicant stated it she is willing to furnish such security as ordered by the Court. As it submitted and was held in the **Focin Motorcycle case**, providing security is a mark of good faith and does not deny the Respondent the fruits of his judgment. Additionally, this balances the interest of both parties as neither of them will suffer prejudice upon determination of the appeal.

47. It has not escaped my attention also that the respondent has also indicated that he was dissatisfied with part of the same judgment he does not want stayed! and he intends to file a cross appeal. Such intention to appeal by the respondent, in my view, should be seen as a good reason to have the impugned decree kept securely for the successful party in the appeal and the cross appeal.

48. In conclusion, I have found that the applicant has met the threshold for granting stay of execution pending appeal by proving all the aforesaid requirements. Consequently, I allow the application dated 10.3.2020 by granting stay of execution of this court's judgment delivered on 7.2.2020 on condition that the whole decretal sum is, within 21 days hereof, deposited in an interest earning Bank Account to be opened in joint names of the advocates on record for the two parties. Costs of the application shall follow the outcome of the intended appeal.

**Dated and delivered in Nairobi this 15<sup>th</sup> day of April, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**In the presence of**

Ndungu holding brief for Kenyo Advocate for the Claimant, and

Onyango holding brief for Wetende Advocate for the respondent

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**