



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CIVIL APPEAL NO E001 OF 2020

KANAMAI TIMBER & HARDWARE.....APPELLANT

VS

BERNARD KATUTI.....RESPONDENT

RULING

1. By a ruling dated 18th March 2021, I granted the Appellant a conditional stay of execution, pending appeal, in the following terms:
 - a) *The Applicant shall release to the Respondent 50% of the decretal sum within the next thirty (30) days from the date of this ruling;*
 - b) *The remainder of the decretal sum, being 50% thereof, shall be deposited in a joint interest earning account in the names of the parties' Advocates within the next forty-five (45) days from the date of this ruling;*
 - c) *Failure to meet any of the foregoing conditions will lead to an automatic lapse of the stay hereby granted.*
2. The Appellant did not comply with the conditions of stay and instead filed another application dated 14th April 2021, seeking review of the terms set by the Court, to the effect that the entire decretal sum be deposited in a joint interest earning account in the names of the parties' Advocates.
3. The Appellant also sought enlargement of time for effecting the security deposit.
4. The application is supported by an affidavit sworn by the Appellant's Manager, Peter Munene Njoka and is based on the following grounds:
 - a) The Court delivered its ruling on the Appellant's application for stay of execution dated 18th November 2020 on 18th March 2021;
 - b) The Court granted a conditional stay of execution requiring the Appellant to release 50% of the decretal sum to the Respondent within 30 days from the date of the ruling and to deposit the other 50% in a joint interest earning account in the names of the parties' Advocates with 45 days from the date of the ruling;
 - c) The Appellant is ready and willing to abide by the conditions set by the Court but is apprehensive that should it remit 50% of the decretal sum to the Respondent, the said sum might not be recoverable if the appeal succeeds;
 - d) The Appellant is ready and willing to deposit the entire decretal sum in a joint interest earning account in the names of the parties' Advocates;
 - e) The Appellant has made reasonable steps and has exhibited willingness to comply with the orders of the Court;
 - f) If the Court does not enlarge the time within which to deposit the decretal sum, execution will issue and the Appellant will suffer irreparable loss;
 - g) The Court has inherent power to recall its ruling and review its orders, to give effect to its manifest intention and to facilitate the just, expeditious, proportionate and affordable resolution of appeals;
 - h) The Appellant asks the Court to review the ruling delivered on 18th March 2021 and allow the Appellant to deposit the entire

decretal sum in a joint interest earning account;

i) The Appellant undertakes to abide by the terms/ conditions set by the Court.

5. In response to the Appellant's application, the Respondent filed Grounds of Opposition dated 30th April 2021 by which he states:

a) That the application is frivolous, vexatious, incompetent, bad in law and an abuse of the court process, since the Appellant has failed to show any reasonable steps taken to comply with the orders of the Court issued on 18th March 2021;

b) That the application is an afterthought, only intended to deprive the Respondent of the fruits of his judgment, without a just cause;

c) That extension of time is not a right reserved for a party but an equitable remedy that is only available to a deserving party, at the discretion of the Court;

d) That no explanation for non-compliance with the orders of the Court issued on 18th March 2021 has been given; any excuse cannot be used to validate non-compliance with orders of the Court, which are binding;

e) That the Appellant does not qualify for grant of any of the orders sought as there are no new and novel issues that have been discovered;

f) That the application is an attempt by the Appellant to delay the Respondent in enjoying his fruits of litigation;

g) That the application has no merit and ought to be dismissed with costs.

6. On 10th May 2021, the Appellant's Manager, Peter Munene Njoka filed a further affidavit, by which he states that due to the COVID-19 Pandemic, the Appellant's business had been affected, which had in turn affected its cash- flow.

7. Based on this, Njoka not only seeks enlargement of time for depositing of security but also asks that the Appellant be allowed to make the deposit in instalments.

8. The power of this Court to review its own decisions is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules.

9. Rule 33(1) of the Procedure Rules provides the following:

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-

(a) if there is discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

10. Miss Nyagah, Counsel for the Appellant told the Court that in bringing the present application, the Appellant was relying on the provision on 'any other sufficient reason'.

11. Since the days of ***Butt v Rent Restriction Tribunal [1979] eKLR***, it has been affirmed that the power to grant or deny stay of execution is discretionary power, to be exercised in favour of a deserving party. Stay of execution is therefore not an absolute right and a party pursuing this relief must demonstrate to the Court that they merit it.

12. In ***Tabro Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR***, the High Court (**Gikonyo J**) stated thus:

“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. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. Then the court is faced with a novel task of balancing the two competing rights to an almost constitutional symmetrical bound.”

13. The Appellant came to this Court and obtained a conditional stay of execution but appears not to have liked the conditions attached to the stay. The Appellant therefore made no attempt to comply with the conditions set by the Court and the stay granted thereby lapsed.

14. When a party approaches the Court for discretionary orders, it is not for that party to dictate the terms of the orders to be granted. Having

considered the Appellant's application for stay of execution pending appeal on merit, I rendered myself and I find no reason to review or vary my orders.

15. For the foregoing reasons, the Appellant's application dated 14th April 2021 is disallowed with costs to the Respondent.

16. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Nyaga for the Appellant

Mr. Kitti for the Respondent