



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 555 OF 2014

MUTUA MULONZYA.....CLAIMANT/RESPONDENT

-VERSUS-

FELLOWSHIP OF CHRISTIAN COUNCILS &

CHURCHES IN THE GREAT LAKES AND

HORN OF AFRICA.....RESPONDENT/APPLICANT

RULING

1. On 14.5.2020, Abuodha J. delivered a Judgment in favour of the Respondent. Subsequently, the Applicant filed a Notice of Appeal against the Judgment and a Notice of Motion dated 21.10.2020 seeking the following orders:

- a. THAT this Honourable Court be pleased to stay the execution of the Judgment and Decree of this Honourable Court issued on 14.5.2020 pending the hearing and determination of the application herein.**
- b. THAT this Honourable Court be pleased to stay the execution of the Ruling and Orders of this Honourable Court issued on 14.5.2020 pending the hearing and determination of the Intended Appeal.**
- c. THAT Costs of this Application be provided for.**

2. The application is premised on grounds that:

- a. On 14.5.2020, this Court delivered a Judgment and Decree wherein a sum of Kshs. 1, 840,482 was awarded to the Respondent as salary in lieu of notice and compensation for unfair termination of employment.
- b. The Applicant filed a Notice of Appeal on 25.5.2020 and applied for copies of proceedings which were availed on 1.10.2020 paving way for filing of the substantive appeal.
- c. The intended appeal against the Judgment and Decree of this Court raises several arguable and important issues of law and is not frivolous.
- d. The Respondent has already made an application for issuance of Warrants of Attachment seeking to attach the Respondent's movable assets in execution of the decree.
- e. The Applicant has already made an application for issuance of Warrants of Attachment in this matter seeking to attach the Respondent's movable assets in the execution of the decree.
- f. No costs of have been agreed upon hence the intended execution of the decree by way of attachment of debtor's assets is illegal and unfair.
- g. The Applicant is apprehensive that if the Respondent receives any monies (in enforcement of the decree), it will be unable to recover any sums should it be successful in its appeal.
- h. The Applicant is willing to abide by the conditions and terms as to security as the court may deem fit.

3. The application is supported by the affidavit of Jeannette Uwizeye, the Applicant's Executive Director sworn on 21.10.2020 in which she

reiterated the grounds on the face of the motion.

4. The Respondent opposed the application vide an undated replying Affidavit. He averred that the application is misconceived and in bad faith as it intends to stop him from enjoying the fruits of his judgment; that he is currently employed by the County Government of Makueni as the Director Culture, Music and Arts earning a gross monthly salary of Kshs. 221,310.00 on a permanent and pensionable basis thus he is capable of repaying the decretal sum if the appeal is successful.

5. He contended that the Applicant has not demonstrated that he is not capable of refunding the decretal sum; that the Applicant wishes to benefit from an order of stay of execution but has not demonstrated willingness or capability of depositing any security in court; that the Applicant has not demonstrated what irreparable harm it stands to suffer if the application is not allowed and that the failure to prove loss is reason enough to warrant the dismissal of the application.

6. The Applicant filed a Further Affidavit also sworn by Jeannette Uwizeye on 5.2.2021 in response to the Respondent's Replying Affidavit. She contended that substantial loss will be occasioned on the Applicant because the means of the Respondents are unknown; that the Applicant has clearly indicated that it is willing to abide by the terms and conditions of security; that in balancing the rights of appeal and the decree holder the court does direct that the security be deposited in a joint interest earning account.

7. She contended that the Respondent being a donor drive organisation with limited budgetary allocation is likely to suffer substantial loss.

8. The Application was disposed of by way of written submissions.

Applicant's submissions

9. The Applicant submitted that the Order 42 Rule 6 (2) of the Civil Procedure Rules outlines the 3 critical conditions that an Applicant is required to satisfy for a grant of an order for stay of execution.

10. The Applicant submitted that it shall suffer substantial loss because the Respondent has filed an applications for issuance of warrants of attachments and taxation of costs.

11. It submitted that the Respondent has not demonstrated the financial means or assets that will make good the decretal sum if it's paid out and the appeal succeeds. It further submitted that there is no evidence of his ability to pay the decretal sum therefore he shall not be able to refund the amount.

12. It relied on **Heifer Project International v Forest City Export Services Limited & another [2017] eKLR** where the Court cited **James Wangalwa & ano v Agnes Naliaka Cheseto [2012] eKLR** that substantial loss is a factors which would affect or negate the core of the Applicant as the successful party in the appeal.

13. It further relied on **Kapa Oil Refineries Limited v Harrison Kimotho Kamau & another [2018] eKLR** that when an applicant is apprehensive about the Respondent's ability to refund the decretal amount, the evidential burden of proof shifts to the respondent.

14. It also relied on **John Muriithi & 8 Others v Registered Trustees of the Sisters of Mercy (Kenya) t/a "the Mater Misericordia Hospital" [2020] eKLR** where the Court found that the application was merited because the Respondents did not demonstrate they had the ability to pay the decretal sum.

15. It argued that Respondent has failed to discharge the burden under sections 107 and 109 of the Evidence Act. It further argued that it is ready and willing to abide by the conditions and terms of security issued by the Court. It relied on **Francis Mutuku Wambua v Nairobi Women's Hospital [2019] eKLR** where the Court held that the applicant had met the threshold for stay of execution because she had offered to provide security for the performance of the decree .

16. It submitted that in balancing the right of appeal and the decree holder such security as the whole decretal sum be deposited in a joint interest earning account in the names of the parties' advocates.

17. It relied on the **Heifer Project Case (supra)** and **Kapa Oil Refineries Limited v Harrison Kimotho Kamau & another [2018] eKLR** where the Courts ordered that the decretal sums be deposited in joint interest earning accounts.

18. It submitted that she has met the threshold for grant of stay of execution under Order 42 Rule 6 (2) of the Civil Procedure Rules and urged the Court to find merit in its application.

Respondent's submissions

19. The Respondent submitted that he is capable of repaying the decretal sum because he had informed the Court that he is in gainful employment earning a gross monthly salary of Kshs. 221,310.00.

20. He argued that the Applicant is a faith based organisation that depends on donor funding thus it cannot be considered as a reliable source of income and there is no guarantee that they will be in a position to pay the Respondent.

21. He submitted that since there is no guarantee that the Applicant is capable of paying the decretal sum, he proposed that half of the decretal sum be paid to him and the other half be deposited in a joint interest earning account.

22. He further submitted that he is a highly qualified professional and is capable of refunding the sum of Kshs. 920,241.00. He argued that the practice adopted by the Court in balancing the right of the Applicant and the right of the decree was set out in **Catherine Wambui Karuno v Trocaire [2016] eKLR** where the Court allowed stay on condition that half of the decretal sum would be released to the Claimant.

23. He also relied on **Cause No. 200 of 2011 Wilberforce Ojiambo Oundo v Regent Management and Meru Civil Appeal No. 154 of 2019 Consolidated Bank of Kenya Ltd v Ken Muriuki & Peter Kirimi Mbogo T/A Mbogo Muriuki Advocates** where the Courts ordered that ½ of the decretal sum be paid to the Claimant/Respondent.

24. It was therefore his final submission that it would be in the best interest of justice if half the decretal sum is paid to him and the other deposited in the joint interest earning account.

Issues for determination

25. The main issues for determination herein is whether the application meets the threshold for granting stay of execution pending appeal. The legal threshold for granting stay pending appeal is set out by Order 42 rule 6 (2) of the Civil Procedure Rules as follows-

“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.”

26. Neither of the parties addressed the Court on whether there has been an unreasonable delay in filing of the application. The record shows that the application was filed on 22.10.2020, 5 months after the delivery of judgment on 14.5.2020. Such delay without any explanation would be unreasonable. However, the costs of the suit had not been determined before the filing of the application and as such the delay is excusable. I gather support from **Eldoret Grains Limited vs. National Cereals Produce Board [2014] eKLR** where Fred Ochieng J held that: -

“In my considered view, the period to be taken into account when determining whether or not there had been inordinate delay is the period from when the Defendant became aware of the Ruling on taxation.

The reason for that is that although the Judgment was delivered on 8th May, 2012, execution could not issue immediately thereafter. Execution of a decree can only proceed after the Bill of costs had been taxed or after the Decree-Holder has obtained the leave of the court to proceed with execution prior to taxation.

Therefore, had the Defendant sought an order for stay of execution prior to the issuance of Certificate of Taxation, it could have been premature. In the circumstances, there is no inordinate delay by the Defendant, in seeking the order of stay of execution.”

27. With respect to substantial loss, the Applicant submitted that it will suffer loss because warrants of attachment have been sought and that the Respondent is a person of unknown means. The Respondent argued that he is currently in a gainful employment thus he is capable of refunding the decretal sum. He stated that he earns a monthly salary of Kshs. 221,310.00. Government of Makueni.

28. The legal burden of proving that the decree-holder is a man of straw lies on the applicant while the evidential burden of proving capacity to repay the decreed sum is placed upon on the decree-holder. That position was aptly put by the **National Industrial Credit Bank Limited – V- Aquinas Francis Wasike and Another [2006] e KLR**, the court held 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 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.”

29. Again In **ABN Amro Bank N v Lemond Foods Limited Civil Application No.15 of 2002** the Court Appeal held that :

“... the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on.”

30. In the Further Affidavit sworn on behalf of the Applicant, Jeanette Uwizeye, stated that the Applicant is a donor driven organisation with limited budgetary allocations. On the other hand, the Respondent argued that donor funding is not a reliable source of income therefore there is no guarantee that he would be paid if the appeal fails. He further stated that he is a public officer employed by the County Government of Makueni in the position of a Director and earning a monthly salary of Kshs. 221,310 which renders him capable of refunding the decreed sum should the appeal succeed after execution.

31. I have considered the rival submissions carefully and I am persuaded to find that a public officer employed on permanent and pensionable terms, earning a monthly salary of Kshs, 221,310 is not a man of straw. As early as 18.6.2018 when the respondent gave his evidence during the trial, he told the court that he was an employee of Makueni County and the applicant did not doubt that information. There is no good reason why the applicant should doubt it now. Consequently, I am satisfied that the respondent has demonstrated that he is a person of means capable of meeting his financial obligations, including refunding the decretal sum if the appeal succeeds since he has a gainful employment.

32. Having found that the respondent herein is a person of means, I must proceed to hold that the applicant has failed to satisfy the court that substantial loss may be occasioned to it if stay of execution is denied.

33. In addition to the foregoing, I wish to point out that the purpose of stay pending appeal is to protect the appellant's right to fair hearing so that the appeal is not rendered nugatory by execution of the impugned decree. Notably, the applicant has not demonstrated that since 1.10.2020 when typed proceedings were availed to it by the court, it has filed the appeal in the Appellate Court. Such information could easily have been provided through the Further Affidavit sworn on 5.2.2021 in support of the application. Consequently, as the matters stand now, the applicant's right of appeal in this matter is likely to have lapsed by the operation of the law, and such there is no demonstration of an appeal capable of being rendered nugatory.

34. As regards the issue of security for the due performance of the impugned decree, the Applicant stated that it is willing to abide by the conditions and terms of security as the Court may deem fit. In **Kenya shell limited v Benjamin Karuga & Another [1986] e KLR** the Court Appeal held that:

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

35. This Court has an obligation to balance the interest of the parties by granting conditional stay order where substantial loss has been demonstrated. In this case the applicant has not done so. However, since the Respondent has proposed that a half of the decretal sum be paid to him and the other be deposited in an interest earning account to be opened in the joint names of the advocates on record for both parties as a condition for granting the stay order sought, I proceed to do so. However, the stay will lapse automatically if it is verified that there is no appeal filed.

36. In the end I find that the application has failed to meet the legal threshold for granting stay pending appeal. However for the reasons stated above, I never the less grant stay pending appeal as prayed on the following conditions:

- (a) That a half of the decretal sum be paid to the claimant/respondent within 30 days of this Ruling.
- (b) That the remaining half of the decretal sum be deposited in an interest earning account to be opened jointly by the Advocates on record for the two parties herein within 30 days of this Ruling.
- (c) That the stay order granted herein shall stands vacated if the intended appeal has not yet been filed.
- (d) Subject to (c) above, the stay will lapse automatically after 30 days of this Ruling if the applicants fails to meet both condition (a) and (b) above.
- (e) The respondent is granted costs of the application.

DATED AND DELIVERED IN NAIROBI THIS 6TH DAY OF MAY, 2021.

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online via Google Teams 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