



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1378 OF 2015**

**PETER MBAKA OMWERU & 15 OTHERS.....CLAIMANTS/RESPONDENTS**

VERSUS

**CROWN INDUSTRIES LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The applicants in the Notice of Motion application dated 7<sup>th</sup> December, 2020 seeks an order in the following terms:-

1. Spent

2. Spent

3. That there be a stay of Execution of the judgment delivered on 11<sup>th</sup> November, 2020 and all other consequential orders pending the hearing and final determination of the Respondent's intended Appeal at the Court of Appeal.

2. The application is premised on the grounds set out on the face of the application numbered (a) to (i); the Supporting Affidavit of **Chetan Sanghrajka** and in the written submissions of the applicant the nub of which is that the Court rendered a judgment on 11/11/2020. The applicant dissatisfied with the judgment noted an Appeal on 16/11/2020 as per Rule 82(1) of the Court of Appeal Rules and a letter bespeaking proceedings of even date was e-filed on 17/11/2020.

3. That the application has been brought without undue delay.

4. The judgment sum is Kshs. 2,051,083 exclusive of costs and interest and the applicant suffers the risk of possible execution by the respondent unless stay of the judgment is granted.

5. That this would render the Appeal nugatory. That the applicant is willing to give security pending hearing and determination of the appeal.

6. That the applicant will suffer substantial loss if the stay is not granted and the appeal is eventually successful.

7. That the application be granted with costs.

8. The application is opposed vide a replying affidavit of Counsel **Upendo Allan Ignacious** sworn on 8<sup>th</sup> February, 2021 and submissions filed on 10<sup>th</sup> February, 2021.

9. The Claimants/Respondents state that stay pending appeal is provided under Order 41, Rule 6 of the Civil Procedure Rules, 2010 which states:-

“No appeal shall operate as stay of execution of judgment and decree but an application for stay may be considered and the Court to make such Order as may to it seen just and a person aggrieved by such an order made may appeal to have the same set aside.

10. Order 42, Rule 2 provides:-

***“No order of 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.

11. In **Kenya Shell Limited –vs- Benjamin Karuga Kibiru and Another [1986] eKLR**, it was held :-

“for the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention.”

12. The application is supported by an affidavit of **Chetan Sanghrajka** sworn on 8/12/2020 in which he states that the claimants were declared redundant in the year 2013 amongst other employees due to financial constraints suffered by the applicant. The deponent deposes at paragraph 12 of the Supporting affidavit thus:-

“12 That the Respondent/Applicant is reasonably and justifiably apprehensive that unless this matter is dealt with urgently and stay orders issued, it stand the risk of suffering substantial loss as execution will proceed against it despite the fact that there are substantive and meritorious grounds of appeal.”

13. The grounds of appeal are set out in paragraph 11(a) to (d) of the replying affidavit.

14. The deponent did not adduce evidence regarding financial status of the Claimants/Respondents and why in his opinion the claimants would be unable to refund the decretal sum if paid to them and the appeal is eventually successful.

15. The claimants have on the other hand submitted that the onus is on the applicant to demonstrate that he is likely to suffer substantial loss and has failed to adduce evidence to prove that on a balance of probabilities.

16. The claimants submitted further that the application is a gimmick intended to unlawfully prolong the execution process since the application is devoid of merit and does not meet the required threshold under Order 42, Rule 6 of Civil Procedure Rules.

17. The respondent cited the case of **Butt –vs- Rent Restriction Tribunal [1982] eKLR 417** in its submissions and stating that the power of the Court to grant stay of execution is:-

(i) discretionary;

(ii) there is no hinderance to the Court to grant the stay order to avoid the appeal being rendered nugatory;

(iii) the Court should not refuse stay merely because in the opinion of the Court a better remedy may become available to the applicant at the end of the proceedings;

and

(iv) The Court may order provision of security for judgment and decree pending hearing and determination of the appeal.

18. In the present application, the applicant though brought the application timeously did not attempt at all to adduce evidence in the supporting affidavit to demonstrate why and how it is likely to suffer substantial loss if the order of stay is not granted. The applicant made a bare general statement that it is likely to suffer substantial loss. This in the Court’s view and finding does not suffice to satisfy this key requirement in Order 42, Rule 6 of the Civil Procedure Rules.

19. This consideration is coupled by the fact that the suit was filed in the year 2015 and the claimants/respondents have waited a long time to get judgment in this matter which judgment was finally rendered on 11th November, 2020.

20. It is not lost to the Court that no draft memorandum of appeal was attached to the application to demonstrate that the

appeal is arguable. Mere reference to the intended grounds of appeal in the supporting affidavit is not sufficient in the Court's view.

21. The Court finds that the balance of convenience is in favour of letting the Claimants/Respondents enjoy the fruits of judgment pending the hearing and determination of the intended Appeal.

22. Accordingly, the application is dismissed for lack of merit with costs.

**DATED AND DELIVERED AT NAIROBI THIS 21TH DAY OF JUNE, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Makori for Applicant/Respondent

Mr. Upendo for claimant/respondent

Ekale – Court Assistant