



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. E066 OF 2020

UNIVERSITY OF NAIROBI.....APPELLANT

VERSUS

MARY M. CORNELIUSRESPONDENT

RULING

1. The applicant in the application dated 11/2/2021 prays for orders of stay of execution of the Judgment and decree delivered on 29/1/2020. Interim orders were issued ex parte.
2. The application is supported on grounds set out in the Notice of Motion to wit that the magistrate Court delivered a judgment in Nairobi CMCC Case No. 1431 of 2019. That the applicant filed an appeal on 15/10/2020 against the judgment and decree. The application is buttressed by the Affidavit of Donald B. Kipkorir, advocate for the applicant stating that Appellant's properties were proclaimed on 18/1/2021. That the Appellant shall offer security in the event stay of execution is granted as directed by the Court.
3. That the claimant/respondent has no means to refund the decretal sum if stay is not granted and the Appeal is successful.
4. That the application has been made timeously and without undue delay.
5. The application is opposed vide a replying affidavit of Mary M. Cornelius, the claimant who deposes *inter alia* that stay of execution is not automatic upon noting of an appeal in terms of Order 42, Rule 6 of the Civil Procedure Rules. That order of stay is to be made if the Court is satisfied that substantial loss shall be occasioned the applicant unless the order is granted; That the application has been made without unreasonable delay and security for the due performance of the decree is provided.
6. That the applicant has not demonstrated the above perquisites. That the application lacks merit and it be dismissed with costs.
7. Both parties filed written submissions and the Court has considered the depositions and submissions by the parties and has taken into account the authorities submitted by the parties including: -
 - (i) James Wangalwe & Another –vs- Agnes Cheseto [2012]eKLR.
 - (ii) RWW –vs- EKW [2019] eKLR,
 - (iii) Absalom Dova –vs- Tarbo Transporters [2013] eKLR
 - (iv) Mwaura Karuga t/a Limit Enterprises –vs- Kenya Bus Services Ltd. & 4 Others [2015] eKLR.
 - (v) Butt –vs- Rent Restriction Tribunal {1979} eKLR – Eldoret SteelMills Ltd –vs- Elijah Mosota [2007] eKLR.
 - (vi) Kenya Hotel Properties Limited –vs- Willesden Investments Limited (2007) eKLR.
 - (vii) Gitahi and Another –vs- Warugongo 1988 [KLR] 621.
 - (ix) Edward Muchiri Ituma –vs- Beatrice Wangigi & 9 Others [2019] eKLR,

(xi) Kamlesh M.A. Pattni –vs- Nasir Ibrahim Ali & 2 Others – CA 354/2004 and

(xii) Delphis Bank Limited-vs- Channan Singh Chatthe & 5 Others [2014] eKLR and has come to the following conclusions of law and fact in this application.

8. That the power to grant or refuse stay of execution pending appeal is discretionary and should be exercised in such a way as not to prevent an appeal and or render it nugatory.

9. That if a person of straw were to be paid substantial decretal sum before the appeal is heard and determined, that is likely to render the appeal nugatory and cause irreparable harm to a successful appellant.

10. That an applicant must demonstrate that they have an arguable appeal and that they are ready and willing to place adequate security for the decretal sum pending appeal.

11. That an advocate ought not to depose to facts that are not in his personal knowledge on behalf of the applicant since an advocate is not representative of the parties.

12. In the circumstances of this case, the decretal sum is Kshs. 2,282, 137. The judgment relates to payment of terminal dues adjudged to be due and owing to the claimant by virtue of long service to the Respondent/Applicant. Indeed, the substantive judgment is for payment of Kshs. 1,855,697.37 being gratuity payable to the claimant/respondent by virtue of the Collective Bargaining Agreement applicable at the University of Nairobi.

13. The judgment was delivered on 29/9/2020 and the application was filed on 27th January, 2021. It cannot be said that there was inordinate delay in bringing the application. The applicant has offered to place security for the performance of the judgment and decree as may be directed by the Court.

14. The applicant however did not demonstrate the potency of the appeal in the affidavit by Donald B. Kipkorir, the advocate for the applicant nor was a Memorandum of Appeal attached to the application to demonstrate the ground sought to be argued before this Court.

15. The Court has considered all these factors and finds the justice of the case dictates that the claimant/respondent partly enjoy the fruits of her judgment pending the hearing and determination of the Appeal.

16. Accordingly, the Court makes the following orders: -

(i) The applicant to pay to the respondent half of the decretal sum forthwith.

(ii) Half of the decretal sum be placed in a joint interest earning account in the names of the advocates of the parties.

(iii) In the event conditions (i) and (ii) above are not fulfilled by default of the applicant within the next 30 days, stay of execution in respect of the half amount to lapse and the claimant/applicant to execute forthwith.

(iv) Each party to bear their costs of the application.

Dated and delivered at Nairobi this 17th 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 15th 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

Donald B. Kipkorir, Advocate for the respondent/applicant

Omongo Gatune & Co. Advocates for claimant/respondent

Ekale – Court clerk