



**REPUBLIC OF KENYA**

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

**CAUSE NO.151 OF 2016**

**DAVID WAMWIRI .....PETITIONER**

**VERSUS**

**BATA SHOE COMPANY (K) LTD .....RESPONDENT**

**RULING**

The respondent, Bata Shoe Company (K) td filed application dated 24<sup>th</sup> November, 2020 under the provisions of section 12(3) of the Employment and Labour Relations Court Act, 2011, Order 22 Rule 22 of the Civil Procedure Rules and seeking for orders that;

- a) *The court be pleased to extend stay of execution herein set to lapse on 24<sup>th</sup> November, 2020 pending hearing and determination of this application and or be pleased to grant stay of execution pending hearing and determination of this application.*
- b) *The court be pleased to extend stay of execution herein set to lapse on 24<sup>th</sup> November 2020 and or grant stay of execution pending hearing and determination of the appeal against the judgement made on 11<sup>th</sup> November 2020.*
- c) *Costs be provided for.*

The application is supported by the affidavit of Priscah Chege, advocate and legal officer of the respondent and on the grounds that following judgement herein on 11<sup>th</sup> November, 2020 the respondent was dissatisfied and has moved to appeal and stands a reasonable chance of success and unless stay is granted the appeal shall be rendered nugatory. Stay of execution is also sought as If not granted there shall be substantial loss occasioned to the respondent as the petitioner may not be able to refund the same upon a successful appeal.

In her affidavit Ms Chege avers that the respondent is ready and willing to abide any conditions given by the court with regard to security on terms issued by the court.

There is a draft appeal attached to the affidavit and which demonstrates that the respondent's appeal has high chances of success. Notice of Appeal has been filed and awaiting for typed proceedings.

In reply, the petitioner filed his Replying Affidavit and avers that the application by the respondent is in abuse of court process. He appeal has no reasonable chance of success, there is a lawful judgement and decree and which should be allowed to proceed to execution. The alleged substantial loss and not been demonstrated as required. It has taken over 6 months to move the court which is inordinate delay.

The petitioner also avers that the award of ksh.2 million is nominal sum and no loss shall be occasioned to the respondent if this is paid to him as he has secured new employment and is able to repay.

Both parties attended and made oral submissions.

The respondent submitted that the Notice of Appeal was filed without delay and immediately judgement was delivered on 16<sup>th</sup> November, 2020 and have paid for typed proceedings to lodge the appeal which has high chances of success and a draft is attached to the affidavit of Ms Chege. The petitioner has not submitted any evidence of new employment to demonstrate that he is able to pay if the judgement sum is paid pending hearing of the appeal. He failed to discharge the burden. There shall be irreparable loss and damage if stay is not allowed.

The respondent relied on the case of **Kenya Airways PLC v Alex Wainaina Mbugua [2018] eKLR; National Environment Management Authority v Benjamin Lagwen [2017] eKLR; and Kayum Khan v International Commercial Company (K) Ltd [2014] eKLR.**

The petitioner submitted that the respondent has based the application under the provisions of Order 22 Rule 22 which deal with stay of execution which has taken place by the court which has issued the decree and the applicable provisions ought to be Order 42 and hence the

application before court is premature.

There is no order to be extended. Under Order 42 the stay granted has since lapsed and has not been extended. Execution can only follow after the bill of costs has been taxed. No decree has been issued and the application is only speculative and no order of extension is due.

The petitioner also submitted that the question of substantial loss does not arise. The petitioner was awarded ksh.2 million which is not substantial. There is no proof that he will not be able to pay such amount.

The petitioner relied on the case of **Justus Kyalo Musyoka v John Kivungo [2019] eKLR; Congress Rental South Africa v Kenyatta International Convention**

**Centre [2016] eKLR.**

Determination

I have carefully read through the Application, the Supporting Affidavit, the Replying Affidavit and the rival submissions by the parties herein and I find that the only issue for determination is whether the order for stay of execution sought should issue.

The instant application is based on the provisions of section 12(3) of the Employment and Labour Relations Court Act, 2011 which outlines the nature of orders the court can issue.

There is also application of Order 22 Rule 22 which provides that a court which a decree has been sent for execution shall stay execution of such decree for a given time to enable a judgement-debtor to apply for stay of execution. The Order requires that;

*22. “(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.*

*(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.*

*(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit*

The respondent in this regard made submissions that the stay of execution sought is to allow the hearing and determination of the appeal and a Notice of Appeal has since been filed and applied to typed proceedings. That unless stay is allowed the appeal will be negated. The petitioner will not be able to refund the judgement sum of ksh.2 million which is substantial and he has no proof of ability to pay.

Such submissions relates to an application made under the provisions of Order 42 Rule 6 which is not the case here. The provisions under which the application is premised do not support the nature of orders sought. even with the best application of the cited authorities as noted above, all relate to an application under the provisions of order 42 and not order 22 Rule 22.

As correctly submitted by the petitioner, the stay of execution sought lapsed on 24<sup>th</sup> November, 2020 and was not extended. There is nothing for extension as this stage.

The application before court is premature and cannot issue as framed even with the best effort to address the application which was filed without delay.

**Accordingly, application dated 24<sup>th</sup> November, 2020 is hereby found without merit and is hereby dismissed. costs to the petitioner.**

Delivered in court at Nairobi this 10<sup>th</sup> day of June, 2021.

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....