



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1996 OF 2015

JECONIAH OPIYO MAKOUNDE.....CLAIMANT

VERSUS

BUILD AFRICA KENYA..... RESPONDENT

RULING

The respondent, Build Africa Kenya filed application dated 27th October, 2021 under the provisions of Order 22 Rule 22 and Order 42 Rule of the Civil Procedure Rules and seeking for orders that there be a stay of execution of the judgement delivered on 24th September, 2020 and the resultant decree pending the hearing and determination of the appeal filed by the respondent.

The application is supported by the Affidavit of Paul Momanyi Nyaosi and on the grounds that following judgement herein the claimant was awarded Ksh.3, 557,632 and aggrieved the respondent filed a notice of appeal and has lodged Civil Appeal No.E315 of 2020 at the Court of Appeal against the whole of the judgement and seek stay of execution of the judgement pending such determination of the appeal. If stay is not granted, the appeal shall be rendered nugatory and the respondent is willing to furnish security on terms allowed by the court.

In his Affidavit, Nyaosi advocate avers that unless the orders sought for stay of execution are allowed, the claimant shall proceed with execution to the detriment of the respondent.

On 23rd October, 2020 the respondent filed application seeking stay of execution but unfortunately, no hearing date has been allocated. On 20th April, 2021 the application was scheduled for hearing but there was a problem with the links affecting all the ELRC courts coupled with connectivity problems and the court directed all parties to obtain new hearing dates. On 26th April, 2021 by consent the parties agreed on a hearing date but the claimant obtained warrants of attachment and has commenced execution. Such will cause irreparable loss and damage unless an order of stay of execution is allowed pending hearing of the appeal.

That the claimant is a person of little means and if the judgement amount is paid he will not be able to refund once the appeal succeeds.

In reply, the claimant filed the Replying Affidavit of Joseph Gatore Shadrack advocate and who avers that the respondent has concealed material facts in the application and thus misled the court to obtain temporary stay of execution on 28th April, 2021. The court has already issued a Certificate of Taxation and decree on 23rd April, 2021 after a process that included the respondent's submissions dated 2nd December, 2020.

The respondent is obstructing execution by holding onto Civil Appeal seeking to reverse the decision of the court but failed to stay that the appeal was filed out of time which has not been allowed.

The claimant is alleged to be a person of little means but no evidence is submitted and application is without merit and should be dismissed with costs.

Both parties made oral submissions.

Determination

The court has considered the application, affidavits and oral submissions.

On 24th November, 2020 the court addressed the respondent's application dated 23rd November, 2020 and certified it urgent and directed

hearing on 17th December, 2020. On the due date the court directed parties to exchange pleadings and mention on 21st December, 2020 when the matter was then rescheduled and taxation proceeded and ruling delivered on 9th April, 2021.

The respondent then filed the instant application and on 28th April, 2021 the court temporary stay of execution of the decree and directed hearing on 20th May, 2021.

Nothing substantive is done on the earlier application dated 23rd November, 2020. To file a new application seeking similar orders and without recognition that the court is seized of similar facts is in abuse of court process.

Judgement herein was delivered on 30th September, 2019.

The grant of Stay of execution of the judgement and decree is a discretion order upon the court being satisfied that there exists an appeal which is likely to be negated if stay is not allowed, the special circumstances of the case and that the subject matter is preserved.

Therefore the object of Order 42 Rule 6(2) is that;

- (2) No order for stay of execution shall be made under subrule (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.

An applicant must satisfy the court that there shall be substantial loss if the order of stay is not granted and hence must move the court without undue delay. even where the application is keen to make a security deposit, the condition of substantial loss and delay is imperative.

As noted above, judgement was delivered on 24th September, 2019. Nothing was done to secure the subject suit until application dated 23rd November, 2020, which has not been prosecuted.

There are no submissions with regard to the substantive loss to be suffered by the respondent. The averment that the claimant is of little means and shall not be able to refund the judgement sum is left bare. Indigence on its own is not sufficient material that a person is incapable of refunding the judgement sum.

The claimant has a valid judgement of the court and should be allowed to enjoy it.

The claimant in the Replying Affidavit sworn by Mr Gatore has averred that **Civil Appeal No.E24 of 2020 – Build Africa Kenya v Jaconiah Opiyo Makoude** relates to an application seeking to appeal out of time. Such matter was not addressed by the respondent as the applicant.

The obvious delay to file the instant application to secure the subject matter and the appeal relating to an application to file appeal out of time, to grant stay of execution herein would be aiding an indolent party. Justice covers both parties. The claimant should enjoy the fruits of his judgement

The court finds no reasonable cause to grant orders of stay of execution of the decree herein as analysed above.

Accordingly, application dated 27th April, 2021 is found without merit and is hereby dismissed. costs to the claimant.

DELIVERED IN COURT AT NAIROBI THIS 10TH DAY OF JUNE, 2021

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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