



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/36/2018

CITATION: MARTIN THUO VS RIFT VALEY BOTTLERS COMPANY LIMITED

RULING

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 36 OF 2018

MARTIN THUO.....CLAIMANT

VERSUS

RIFT VALLEY BOTTLERS COMPANY LIMITED.....RESPONDENT

RULING

By a Motion dated 8th September, 2020 brought under certificate of urgency the respondent/applicant sought orders among others that the respondent be substituted with Almasi bottlers the interested party herein and upon with substitution there be a stay of execution of the judgment of the Court pending the hearing and determination of the intended appeal to the Court of Appeal.

The application was supported by the affidavit of Timothy Mr. Muthimu who deponed among others that-

I am the Chief Human Resource Manager of Almasi Beverages Limited (hereinafter referred to as "ABL") I am well versed in facts requisite to the deponed in this Affidavit which I make on behalf of the applicant being authorized under seal to swear the same.

The operations of the respondent herein, Rift Valley Bottlers (hereinafter referred to as "RVB") were taken over by Almasi Beverages Limited (hereinafter referred to as "ABL") which is a holding company. I exhibit hereto an except of a relevant Agreement between RVB and ABL.

I am informed by the applicant's advocates that this Honorable court delivered its judgement on 4th August, 2020 which judgement was electronically delivered and emailed to ABL by the respondent's then representatives, namely the Federation of Kenya Employers.

I have read and understood the said judgement, a copy of which is exhibited as ABL -02. By the said judgement this honourable court entered judgement for the respondent as follows; -

KSHS

One month's pay in lieu of notice of termination 54,447.80 10 months' salary as compensation for unfair Termination of service 544,478.00
Costs of the suit

The applicant being aggrieved with the said judgment has lodged a notice of appeal, with a view to appealing against the same - a copy is hereto attached and marked ABL-03.

It is needful that there be a stay of execution of the said judgement so that the applicant's intended appeal is not rendered nugatory.

The appeal shall be rendered nugatory/academic because the respondent being a man of no known means will not be in a position to reconstitute any monies that may be paid to him in satisfaction of the judgment debt, in the very likely event that the applicant's intended appeal succeeds.

The applicant will sustain substantial loss noting that the aggregate award of Kshs. 598,825/= is a colossal amount of money in the current environment of the economic meltdown occasioned by the Covid-19 pandemic which has eroded the purchasing capacity of many consumers of products manufactured by ABL.

Granting a stay of execution will enable both parties to approach the appellate court on equal footing.

The applicant offers to deposit the entire judgment amount in an escrow account in the names of advocates for the parties herein – as security to guarantee satisfaction of the eventual decree.

Depositing the judgment debt in a joint account is reasonable security which will ensure that any eventual decree can be settled. In the premises, no prejudice shall be sustained by the respondent.

The Claimant filed a replying affidavit in opposition to the application in which he stated among others that: -

THAT I am not opposed to the substitution of the respondent with its successor for purposes of this cause as clause 10 of the Transfer of Business Agreement dated 29th March, 2018 vests liabilities of the respondent as a transferee in the applicant as the transferee.

THAT the onus to establish substantial loss is placed upon the respondent who has failed to discharge the same.

THAT the deposition that I am a man of no known means is not proof of substantial loss.

THAT I am a man of means as I own a parcel of land in Bahati within Uasin Gishu County where I live and also have rental houses that I collect rent from the tenants on a monthly basis.

THAT currently the market prices for the said property range in the sum of Kshs. 2,000,000/= in the said area and my monthly rental income collection is Kshs. 15,000/=

THAT the respondent has failed to prove the existence of sufficient cause to warrant the grant of a stay of execution as no draft memorandum of appeal has been exhibited or the grounds of the intended appeal brought to the attention of the court to have a perception of the grievance with the impugned judgment.

In support of the application Mr. Nyamurogi for the respondent submitted that the application was presented without undue delay as the judgment was delivered on 4th August, 2020 and the application filed slightly a month later. Concerning substantial loss, Counsel submitted that the means and ability of the Claimant to make restitution was a relevant consideration when considering whether an applicant will suffer substantial loss. Where a Claimant cannot show that he has the means and ability to make restitution substantial loss will be inferred. According to Counsel, apart from the allegation that the Claimant was not a man of straw and he owned a parcel of land valued at Kshs 2 million on which he had built his home and residential premises earning him Kshs. 15,000/= by way of rental income, there was no acceptable proof by way of tangible evidence.

Regarding security, counsel submitted that the applicant had offered to deposit the decretal sum in a joint interest earning account. This he submitted was a good enough security which would guarantee the performance of the decree passed.

Mr. Kisuya for the Claimant on the other hand submitted that the onus to establish substantial loss was placed upon the respondent who had failed to discharge the same. The deposition that the Claimant was a man of no known means was not proof of substantial loss.

According to Counsel, the Claimant was a person of means and owned a parcel of land in Bahati within Uasin Gishu County where he lived and also had rental houses that he collected rent from.

Further, the allegation in the affidavit that the judgment sum was colossal was not evidence of proof of substantial loss.

Mr. Kisuya further submitted that the respondent had failed to prove the existence of sufficient cause to warrant the grant of a stay of execution as no draft memorandum of appeal had been exhibited or grounds of the intended appeal brought to the attention of the Court to have a perception of the grievance with the impugned judgment.

There being no contestation regarding substitution of the respondent with the interested party, the prayer will be granted.

Order 42 rule 6 of the Civil Procedure Rules sets conditions which must be met before a court can grant a stay of execution of a judgment or decree. The application must be made without undue delay, the applicant must demonstrate that they will suffer substantial loss unless the order is granted and that 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.

The judgment of the Court was delivered on 4th August, 2020 and the application herein filed on 14th September 2020. -slightly over a month after delivery of judgment. The delay therefore cannot be said to be inordinate.

Regarding substantial loss, the applicant has alleged that the decretal sum is substantial and if paid out to the Claimant may not be recoverable if the intended appeal succeeds because according to the applicant, the Claimant is a man of straw. The Claimant has refuted this claim and stated that he owned a parcel of land in Bahati area in Uasin Gishu County where he has constructed his residential home and those for rentals. This property according to Claimant is valued at about Kshs. 2 million and rental income is Kshs. 15,000/= per month. The Claimant attached pictures of the alleged residence as evidence.

The issue of substantial loss therefore remains hotly contested between the parties. Although the applicant has not attached a draft memorandum of appeal or canvassed grounds upon which it faults the judgement of this Court which it intends to take to the Court of Appeal, considering that the applicant has stated its preparedness to deposit the decretal sum in joint interest earning account, that would be the most appropriate order to make in the circumstances.

It is therefore ordered that there will be a stay of execution of the judgement of the Court conditional upon the deposit of the decretal sum herein in a joint interest earning account in the name of advocates for the parties herein. Such deposit be made within twenty-one (21) days of this ruling. In default, execution shall proceed.

It is ordered.

DATED AT ELDORET THIS 11TH DAY OF JUNE, 2021

DELIVERED THIS 11TH DAY OF JUNE, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-06-11 10:06:21+03