



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1437 OF 2017**

**BERNARD OGARI.....CLAIMANT/RESPONDENT**

**VERSUS**

**FREIGHT IN TIME LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion Application dated 17<sup>th</sup> February 2021 seeking to be heard for Orders that

- i. there be a stay of execution of the Award and or Judgment made by this Honourable Court and delivered on 20<sup>th</sup> January 2021 pending the hearing and determination of this Application.
- ii. the Award/Judgment entered in favour of the Claimant be set aside and the Applicant be allowed to defend the suit and file Defence and/or Counter Claim out of time
- iii. the costs of the Application to be borne by the Respondent.

2. The Application is premised on the grounds that the Applicant is desirous to file and prosecute an Appeal which will be rendered nugatory. The Applicant asserts it stands to suffer substantial loss should the execution proceed and that the Applicant is able and willing to give such security as the Court may order for the due performance of the decree or any other order of the Court. The Applicant asserts that it is however justifiably apprehensive that if it makes payments to the Claimant/Respondent and is thereafter successful in its Appeal, the Claimant/Respondent will not be able to refund the sums paid. That the Application has been made diligently and without undue delay and further meets the criteria for the grant of stay pending Appeal. The Applicant asserts that no notice was served on the it and it only became aware of the award upon receiving Judgment via its advocates' email on 3<sup>rd</sup> February 2021 and that it subsequently perused the court file to get a copy of the same and promptly moved the court. Further, that the Respondent/Applicants Advocates were not served with the Hearing Notice for 26<sup>th</sup> September 2019 and 7<sup>th</sup> December 2020 despite being on record, even for purposes of cross-examination of the Claimant. That the learned Judge erred in fact and in law in several of his findings made in the Judgment, as pleaded in ground 1 of the Application. The Application is supported by the affidavit of the Applicant's Group Financial Controller, Jignesh Ghelabhai Desai. He annexes in his affidavit a bundle marked **JGD2** being documents the Counsel on record had prepared and assessed but which were inadvertently not filed and misplaced by the court clerk, who also did not inform Counsel. He avers that the learned Judge erred in Law and fact in proceeding to take evidence during trial despite the Applicant's Application dated 12<sup>th</sup> November 2020 pending before court and which is yet to be determined to date. He further avers that the Applicant shall stand prejudiced since they have never been heard according to the rules of natural justice and the Claimant has threatened to execute and that he prays the orders sought in the Application be granted as prayed.

3. The Claimant/Respondent filed a Replying Affidavit sworn on 15<sup>th</sup> March 2021 by his advocate, Bosire Kennedy Mark who avers that the Respondent/Applicant has not specified under which provisions of law the Application herein is brought. He avers that the Application is further ambiguous as on one hand it seeks to set aside the proceedings while in the other it intends to appeal the Judgement herein. That the matter had proceeded *ex-parte* for formal proof after the Applicant/Respondent failed to file any response and this Honourable Court determined the issue in response to the Respondent's Application dated 12<sup>th</sup> November 2020. He further asserts that the award is in monetary terms which can be refunded should the Applicant succeed in making an Appeal and that the Applicant has not demonstrated and/or attached any proof that the Claimant will be unable to refund the decretal sum. The Claimant/Respondent asserts that the Judgement of this Honourable Court in the matter was fair, just and reasonable and that the Applicant is trying to review the Judgment through backdoor. He contends that the Respondent/Applicant's Application does not have legs to stand on and is only fit for dismissal with cost to the Claimant.

4. In a rejoinder, the Respondent/Applicant filed a Further Affidavit sworn on 22<sup>nd</sup> March 2021 by Jignesh Ghelabhai Desai who avers that the Applicant has filed and served a Notice of Appeal dated 8<sup>th</sup> February 2021 and the Memorandum of Appeal dated 3<sup>rd</sup> March 2021 for **Appeal No. E097 of 2021**. That the Claimant/Respondent has conceded that the Application dated 12<sup>th</sup> November 2020 is still pending

determination and which is unprocedural because the matter proceeded *ex parte*. He further avers that execution by the Claimant will also lead to eventual shut down and closure of the Applicant's operations and that the Respondent/Applicant is apprehensive that the Claimant will lose interest in the Appeal in the event any payment is made. That the Applicant has an arguable Appeal with a real chance of success and that the Claimant/Respondent shall not be prejudiced in any way and can be compensated by way of damages on a balance of convenience. Further, that it is easier to maintain the current status quo as it stands until this application and the Appeal are heard and determined.

5. The Respondent/Applicant submits that the circumstances depicting abuse of court process are varied and can be depicted from the steps taken by parties and sometimes on the extrinsic evidence only. That the Applicant has therefore not abused the court process as alleged by the Claimant but has exercised its constitutional right to challenge the decision of a trial court before an appellate court. The Applicant submits that Order 50 Rule 6 of the Civil Procedure Rules grants the courts powers to enlarge time where a limited time has been fixed for doing any act and that further, the legal basis for grant of stay pending appeal is Order 42 Rule 6 of the Civil Procedure Rules, 2010. That it is basically required to demonstrate that: substantial loss may result unless the order is made; the application has been made without unreasonable delay; and it has given such security as the court orders for the due performance of the decree. On the issue of substantial loss, the Applicant submits that execution of the judgment herein shall cause it substantial loss since the judgment does not reflect the evidence on the court record. Further, that the Claimant/Respondent has not demonstrated his means to this Court so as to allow the Court assess his financial capabilities and that he may therefore not be in a position to refund the said decretal sum if the Applicant's appeal succeeds. As to whether the application was made without unreasonable delay, the Applicant submits that the stay of execution of 30 days had not lapsed as at the time of filing the present application and that it has given sufficient reasons for the delay which is not inordinate. Lastly on the issue of security, the Applicant submits that it has deposited in the supporting affidavit of its willingness to offer such security as the court may deem fit, proper and just in the circumstances, including depositing the decretal sum in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal. That since it has unequivocally accepted to offer security on terms imposed by Court, it should on the same breadth be accorded similar protection or security by granting the orders of stay pending appeal for it to be able to recover its money should its appeal succeed. That henceforth, the rights of both parties shall be protected. The Respondent/Applicant submits that the question of stay pending appeal has been canvassed in various authorities, such as in the Court of Appeal decision in **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others eKLR** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:

“....The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated”

6. It further invites this Court to uphold the decision in **Mohammed Salim T/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR** where the court upheld the decision of **M/S Portreitz Maternity v James Karanga Kabia, Civil Appeal No. 3 of 1997** and stated that the right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour and there must be a just cause for depriving the Plaintiff of that right. The Respondent submits that the statement of reply, list of issues and other relevant documents which were duly prepared, assessed by court but were inadvertently not filed be deemed as filed. It further submits that since the judgement was entered without the hearing of the Respondent's Application and its input in the hearing, the suit did not proceed for formal proof as required in law in respect to unliquidated claims, the said ex-parte judgement is a nullity. It prays they be given time to be heard so that justice can be served.

7. The Claimant/Respondent submits that the Respondent/Applicant was aware of the orders issued on 5<sup>th</sup> December 2018 but did not move this Honourable Court to set aside the said orders until the matter proceeded for formal proof. That the inordinately filed Notice of Motion allegedly dated 12<sup>th</sup> November 2020 was served upon the Claimant after hearing of the matter herein and that the issues raised in the said application are *res-judicata* in the absence of any appeal and/or review to set aside the said orders. That it is not true that the Respondent's Response misplaced by the clerk was prepared on 12<sup>th</sup> June 2018 because by then the matter had already been confirmed for hearing on 14<sup>th</sup> May 2018. The Claimant/Respondent submits that the present application is fatally defective as it does not capture under which provision of the Law it is premised and ought to thus be dismissed. Further, that this Honourable Court cannot issue orders to set aside the award when there is no Notice of Appeal lodged as required by the Appellate Jurisdiction Rules and which renders the intended Appeal non-existent. The Claimant/Respondent also submits that the application before Court is for stay and/or set aside proceedings and not to enlarge time as per Order 50 of the Civil Procedure Rules 2010. That the Notice of Appeal dated 8<sup>th</sup> February 2021 and filed on 11<sup>th</sup> February 2021 was lodged out of time and with inordinate delay and that Appeal does not therefore exist. Further, that the Applicant has not sought leave to lodge the Notice of Appeal out of time and as such left this Court without jurisdiction to intervene in this matter. That the Notice of Appeal was lodged 22 days after delivery of Award/Judgment contrary to Section 75(2) of the Appellate Jurisdiction Rules which states that every such notice shall be so lodged within fourteen days of the date of the decision against which it is desired to appeal, subject to Rule 84 and 97. The Claimant/Respondent urges this Court to thus find that there is no appeal on record, there is no evidence that if the sum claimed is paid the same cannot be recovered and that the Respondent's Application is an afterthought and intended to delay the matter and deny the Claimant the fruits of his Judgment. He further urges the Honourable Court to dismiss the application with costs to him and be persuaded by the authority in **Nairobi Miscellaneous Application No. 194 of 2018, Blue Nile E.A. Limited & Another v Mabati Rolling Mills Limited**.

8. The Respondent/Applicant is waxing or blowing both hot and cold. On one hand the Respondent seeks to set aside the decision of this Court and on the other had asserts that it has filed a notice of appeal and that it intends to appeal against the decision. A party before the Court must choose what course to follow. Granted the Respondent seeks to pursue the matter in the Court of Appeal, no purpose would be served in this Court re-opening the suit which would be subject of the intended Appeal before the Court of Appeal. In the premises the motion by the Respondent is devoid of merit and is dismissed with costs to the Claimant.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JUNE 2021**

**NZIOKI WA MAKAU**

**JUDGE**