



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

APPEAL NO. E042 OF 2021

SEYANI BROTHERS & CO. (K) LIMITED.....APPLICANT

VERSUS

JEREMIAH CHAHENZA MULOMA.....RESPONDENT

RULING

1. The Appellant/Applicant filed a Notice of Motion Application dated 4<sup>th</sup> May 2021 seeking for Orders that there be an interim stay of execution of the decree of the lower Court in **Milimani CMCC No. 4437 of 2017** pending the hearing and determination of this Application *inter partes* and that further, there be a stay of execution of the decree herein pending the hearing and determination of the Appeal filed against the judgment and order of the Honourable Magistrate passed against the Appellant/Applicant herein and that costs of the application be provided for. The Application is premised on the grounds that the Applicant's instructing client who is its Insurer has filed a memorandum of appeal against the judgment of the lower Court asserting that the lower Court had no jurisdiction on the matter. It further asserts that the Respondent may execute the decree any time and the Appellant/Applicant will suffer substantial loss, injustice and be highly prejudiced if stay of execution is not granted. It is asserted that further, the appeal will be rendered nugatory as the Applicant's appeal raises serious arguable issues with high chances of success as shown in the filed memorandum. It asserted that the Applicant is ready to make an undertaking on security and abide by any conditions set by the Court pending hearing and determination of the intended Appeal. It is the Applicant's assertion that the Respondent may not be able to refund the decretal amount if the intended appeal is successful and will further not suffer any prejudice, injustice or loss if Orders are granted.

2. The Application is supported by the Affidavit sworn by Linda Chorio from the Applicant's insurer (APA Insurance Co. Ltd). She depones that they instructed their Advocates on record, Wangari Muchemi & Company Advocates, to appeal against the judgment delivered since they felt the award on quantum of damages was excessive and the Court had no jurisdiction to deal with work injury claims. She avers that their advocates have applied for copies of the proceedings and the judgment to enable them compile the appeal record and which are not ready. She is apprehensive that the Applicant's goods are likely to be attached and sold by public auction if the decree is executed and avers that the Insurance Company is also willing to pay after the appeal is heard and determined. She contends that the Respondent will not be prejudiced as he will have security of the decretal sum in case the appeal is not successful and will enjoy the fruits of his judgment as the money will accrue interest.

3. The Respondent filed a Replying Affidavit sworn on 25<sup>th</sup> May 2021 by Jeremiah Chahenza Muloma the Respondent herein. He depones that parties herein recorded consent on liability in the ratio of 70:30 meaning the Applicant admitted his claim. He avers that the Applicant cannot thus depone that the trial court lacked jurisdiction to hear and determine the claim and has further not set out any plausible ground to justify the setting aside of the consent on liability. That the Applicant has also not laid any basis and tenable grounds for the averments made in its application herein and denies that execution has been threatened. He further avers that since the Applicant is not disputing liability, it is only fair and just that half of the amount totaling Kshs. 225,000/- be released so as to at least cater for his medical expenses. That if the Court is inclined to grant stay, he prays for the release of half of the decretal sum and a deposit of the balance in a joint interest earning account awaiting the conclusion of the appeal. He further prays that the Court dismisses the Application herein with costs.

4. The Motion was disposed of by way of Written Submissions. The Appellant/Applicant submits that the Respondent has not indicated in his Replying Affidavit, the prejudice he shall suffer if any of the stay orders are granted and that if any, the same can be compensated by an award of costs as the decretal sum shall still be secure and be available to him if the appeal is dismissed. It relies on the authorities of **Mohammed Abbas M. Somji v James Japheth Otieno [2009] eKLR** and **Nairobi HCCC No.559 of 2014, Devki Steel Mills v Robert Aputo Amariati [2014] eKLR**.

5. The Respondent submits that a party entering consent submits itself to the court's jurisdiction and since the filed consent is yet to be set aside, this Honourable Court cannot interfere in a consent entered freely by willing parties. That the Supreme Court clearly pronounced itself on this issue by issuing direction that the principle of legitimate expectation of the matters already filed in court overrides the issue of jurisdiction and cited the case of **Law Society of Kenya v The Attorney General & Another [2019] eKLR Petition No. 4 of 2019**. He further submits that the Appellant/Applicant did not raise a preliminary objection and in fact fully participated in the proceedings by consent

to liability and filing of submissions and that this Court can only exercise Appellate jurisdiction on matters filed at the court with acknowledged jurisdiction. That any appeal on the issue of jurisdiction if any, should be filed from the lower Court to the High Court and not to the ELRC. The Respondent submits that the Applicant in the present case has not satisfied any of the conditions set out in the Civil Procedure Act to warrant a stay of execution and that the Applicant is required to provide information to the Court that the Respondent is impecunious. He further submits that the Application herein is untenable in law because the Appellant/Applicant disputes the lower court's jurisdiction whereas it consented to file a judgment on liability filed on 16<sup>TH</sup> November 2020. The Respondent asserts that the present application should have set aside the consent order filed in the trial court before challenging the said Court's jurisdiction at this level and that it is clear the Appeal has no chance of success.

6. The question of jurisdiction of this Court to entertain the motion was raised by the Respondent. By way of a short answer, the Respondent is referred to the case of **Republic v Karisa Chengo & 2 Others [2017] eKLR** where the Supreme Court settled the matter. It is therefore incorrect for anyone to take employment and labour matters to the High Court as has been happening resulting in dubious judgments from the High Court since they are without jurisdiction in matters under Article 162(2) of the Constitution. As such, the attack that the issue of jurisdiction should have been objected to at the High Court is fallacious and without any constitutional anchor.

7. Now back to the application by the Applicant/Appellant, the matter before the Subordinate Court was one relating to work injury and was filed as CMCC 4437 of 2017. As a question has been posed in the intended appeal on the jurisdiction of the Magistrate's Court to hear and determine the dispute that was before him, the Court must determine whether the stay sought herein can be granted. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

*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.*

8. The Applicant herein has indicated that it would suffer substantial loss if the stay is not granted. Courts have determined that substantial loss is relative. In **Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 (unreported)** Kimaru J. held as follows:-

*“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”*

9. In this case, the Appellant asserts the intended appeal has overwhelming chances of success and that the Respondent may be unable to refund the sums due if the appeal is successful. In the premises, granted that the Respondent is in the judgment seat and seeks to enjoy the fruits of the judgment in the Subordinate Court, the balance that is to be struck is that the Applicant/Appellant should deposit the entire decretal sum in an interest earning joint account in the names of the lawyers of the parties within 21 days of today's date. The costs of this motion shall abide the outcome in the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2021**

**Nzioki wa Makau**

**JUDGE**