



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1443 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

LINDA NDENENGO MWAKUGU.....CLAIMANT/DECREE HOLDER

VERSUS

OPEN SOCIETY INSTITUTE COMPANY LIMITED.....RESPONDENT/APPLICANT

RULING

1. Before me for determination is an application dated 17th November 2020 filed by the Respondent/Applicant. The Applicant seeks orders THAT:

(i) Spent

(ii) This Court be pleased to stay the execution of the Judgment issued on 3 July 2020 pending the inter partes hearing and determination of this Application.

(iii) This Application be fixed for inter partes hearing on such a date as this Court shall order.

(iv) This Court be pleased to grant and/or extend stay of the execution of Judgment issued on 3 July 2020 pending the hearing and determination of the intended Appeal at the Court of Appeal.

(v) The costs of this Application be provided for.

2. The application is supported by the affidavit of JOYCE MANDALA-KITUYI the Applicant's Human Resource Manager and the following grounds:

a. The Judgment in this matter was delivered by the Onyango J. on 3rd July 2020 (the Judgment).

b. The Judge dismissed the Respondent's prayer for unfair termination compensation at Kenya Shilling (KES) 3,816,000 being twelve (12) months' salary. According to the Court, the Respondent was not terminated unfairly. The Judge also dismissed the Respondent's prayer for a declaration that her fixed term contract of employment had been constructively renewed for a further term of three (3) years and her claim for payment of KES 11,448,000 being the equivalent of three (3) years gross' salary. According to the Court, the Respondent's contract of employment had lapsed.

c. The Court held that the Applicant had breached the Respondent's legitimate expectation that her fixed term contract of employment would be renewed and ordered the Applicant to pay the Respondent three (3) months' salary in the sum of KES 954,000 being compensation for the breach together with legal costs and interest.

d. The Applicant filed its Notice of Appeal on 16 July 2020 wherein it indicated its intention to appeal the Judgment. The Respondent also filed her Notice of Appeal.

e. The Applicant instructed its advocates to reach out to the Respondent's advocates with a view to reaching an amicable settlement on the withdrawal of the parties' respective appeals, the Respondent's Bill of Costs served on the Applicant on 21 August 2020 and the settlement amount.

f. The parties had several exchanges and virtual meetings to discuss an amicable settlement of the matter and the withdrawal by the parties of their respective appeals.

g. Despite good faith negotiations, the settlement negotiations between the parties broke down on 3rd November 2020.

h. The Applicant did not initially apply for stay of execution of the Judgment in the hope that the parties would settle this matter and avoid a protracted appeal process during the Covid-19 Pandemic period particularly since the Applicant had initially offered to pay the Respondent the Judgment sum together with the legal costs indicated in the Respondent's

Bill of Costs.

i. The Applicant believes that it has an arguable and meritorious appeal with a high likelihood of success. However, the appeal will be rendered nugatory unless this Court grants the Applicant orders for stay of execution pending the hearing and determination of this Application as well as the Appeal.

j. The Applicant wishes to apply for orders of stay of execution as this is the only way of preserving the subject matter in this matter and safeguarding the rights of the Applicant who is exercising its legal right to appeal.

k. The Applicant stands to suffer substantial losses if the orders for stay of execution are not issued. The Applicant is reasonably apprehensive that, should it be successful in its appeal, it may not recover the decretal sum together with the legal costs it will pay to the Respondent which it estimates to exceed KES 1,400,000.

l. The Applicant is willing to deposit such sum as this Court may deem fit, proper and just in the circumstances into an interest earning account jointly held by the parties' advocates as security for the due performance of such orders that may be issued against it.

m. The deposit of the security by the Applicant will be for the benefit of both parties and there will be no prejudice caused to the Respondent if this Application is allowed.

n. This Application has been filed without unreasonable delay.

o. It is in the interest of justice that the prayers sought herein are granted.

3. The Claimant/Decree Holder filed grounds of opposition opposing the Application as follows:

i. The stay of execution granted by the court on 3rd July 2020 lapsed over 3 months ago thus the same cannot be extended as sought at prayer 4 of the application;

ii. The application by the Respondent has been filed in court over four months after the judgment no explanation has been provided for the inordinate delay thus underserving of the exercise of the courts discretion;

iii. The Respondent cannot argue the perceived merits of its intended appeal before this court, this places the court in an inexorable paradox of second guessing its own decision;

iv. The Respondent cannot claim (approve) to stand to suffer substantial loss yet in the supporting affidavit state on oath (paragraphs 9 and 13) state (reprobate) it offered to pay the entire judgment sum and costs to the claimant in compliance with the judgment of the court.

4. The Claimant also swore a Replying Affidavit on 1st December 2020 stating that the attempted amicable settlement initiated by the Respondent and the outcome thereof has no relevance to an application for stay as it does not demonstrate fulfilment of any of the requirements for a stay. That the payment of a decretal sum ordered by a court is not to be cloaked as a proposal for settlement by the Respondent which is obligated to honor the decree.

5. She avers that it is untrue that she will be unable to pay the decretal sum should the Respondent succeed in its appeal given that there is no evidence supplied by the Applicant to prove that. On the contrary she states that she is gainfully employed by USAID in addition to material properties and that she has cash in bank that is well in excess of the decretal sum.

6. The affiant avers that the Respondent has not showed that it has done anything toward the preparation of the appeal and that no record of appeal has been filed by the Respondent.

7. Additionally, she avers that the Applicant had applied for a stay of execution for 14 days after the judgment was read on 3rd July 2020. That there has been no explanation to the court what it has done since then and why the application for stay is presented 4 months later.

8. The affiant avers that the application is a belated ploy by the Applicant to continue frustrating her on a case that has been in court since 2016. She urges this court to dismiss the application with costs.

Applicant's Submissions

9. The Applicant submitted that it is well established in case law that the Court's decision on whether to grant a stay of execution of judgment is a matter of judicial discretion. However, in exercising that discretion, Courts are guided by the principles set out in Order 42 rule 6(2) of the Civil Procedure Rules.

10. Relying on the case of **RWW v EKW [2019] eKLR** the Applicant submitted that it stood to suffer substantial loss unless stay is granted as it is reasonably apprehensive that should it be successful in its appeal, it may not recover the Judgment sum together with the legal costs paid to the Claimant/Decree Holder should she proceed with the execution of the Judgment.

11. While relying on the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR** where the Judges were of the opinion that a Respondent has the evidential burden to show that he has the requisite resources to pay back the decretal sum since this is a matter which would be within a Respondent's knowledge., the Applicant argued that the Claimant has failed to satisfactorily discharge this burden. This is despite attaching copies of bank statements from NCBA Bank to her Replying Affidavit, which the Applicant argued do not meet the tests under Sections 65, 68, 78A and 106B of the Evidence Act.

12. The Applicant submitted that the bank statements therefore have no probative and evidentiary value in this matter. It relied on the case of **Lucy Nyambura Marubu v Republic [2016] eKLR** where the Court held that the failure to certify bank statements in accordance with Section 65(8) of the Evidence

Act renders the same inadmissible as evidence.

13. On the argument of ownership of properties, the Applicant submitted that the Respondent had failed to tender any title documents in evidence or prove her ownership of the alleged properties. As such, the Applicant argued that the Respondent had therefore failed to comply with the established rule of evidence set out in Sections 107 and 109 of the Evidence Act that a litigant who alleges certain facts must prove that those facts exist.

14. The Applicant submitted that the Respondent does not undertake that she will maintain her account to enable her to pay any sums owed to the Applicant following the determination of the appeal. It stated that its appeal will be rendered nugatory unless this Court grants the orders sought in the application.

15. On the issue of timing, the Applicant submitted that the Application has been made without unreasonable delay. It added that it should not be penalised for considering alternative forms of dispute resolution to settle its dispute with the Respondent and prayed that this Court, being cognisant of Article 159(2)(d) of the Constitution of Kenya, be pleased to exercise its discretion and grant the Applicant the prayers sought in the application.

16. The Applicant submitted that there is no set timeline within which a party is required to file its application for stay and that whether there is unreasonable delay is a matter to be determined by the Court considering the circumstances of the case. It relied on the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** where the court held that a delay of four months from the date of judgment to the filing date of the application was not unreasonable.

17. On deposit of security the Applicant relied on the **Focin Motorcycle Case (supra)** where the Court stated that it is sufficient for an Applicant to state that it is ready to provide security once called upon to do so and that such a proposal "*...is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgment.*" Based on this, it stated that it had agreed to deposit such amount as this Court deemed fit, proper and just into an interest earning account jointly held by the parties as security. The Applicant argued that it has therefore satisfied this ground for stay.

18. On whether this Court has power to exercise its discretion and grant the orders prayed for by the Applicant, the Applicant submitted that the Court has an unfettered discretion in determining whether to exercise its discretion to issue orders for stay of execution save that the discretion should be exercised judiciously and in the interests of justice. It relied on the Court of Appeal case of **Butt v Rent Restriction Tribunal [1979] eKLR** where the Court set out the factors to be considered in determining whether to exercise the discretion to grant stay of execution pending appeal.

19. In conclusion, the Applicant submitted that the circumstances of this case warrant the exercise of this Court's discretion to grant stay of execution of judgment. Further, that it would be in the interest of justice for this Court to allow the Application and grant the orders prayed for thereby protecting the Applicant's interest in the appeal and preventing the appeal from being rendered nugatory.

Respondent's Submissions

20. The Respondent submitted that the Applicant's submissions focus on a technical argument that the bank statements presented by the claimant are not certified demonstrates abject unawareness of Section 20 of the Employment and Labour Relations Act.

21. The Respondent further stated that the substantial loss the Applicant alleges it will incur does not amount to actual substantial loss as determined by courts. To justify this argument, the Respondent defined substantial loss as per the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**. Counsel argued that it is disingenuous and contradictory to argue that the Applicant will incur substantial loss by paying an amount that was decreed paid and which it was ready to pay and willingly expressed an intention of doing so.

22. On the submission of amicable settlement, the Respondent argued that Article 159(2)(d) of the Constitution, 2010 cannot be weaponized against the claimant under the guise that the Applicant was considerate in offering amicably settle a debt that had already been adjudicated on by the court by paying what the court decreed be paid. Counsel submitted that there was absolutely no difficulty in the Respondent filing an application soon after the judgment then initiating the ill-fated attempt to settle the amount decreed by court to be paid.

23. The Respondent argued that the pledge for security that the law anticipates in relation to an application for stay ought to fully be available to satisfy the decree and that the pledge made by the Respondent is vague. Counsel relied on the case of **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR** where the court observed:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words "ultimately be binding" are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 Rule 6(2)(b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

24. The Respondent in conclusion stated that the court’s discretion should not be invoked by the Applicant as a means to perpetuate oppression of the claimant by seeking to prolong the litigation and keep the claimant off the award that has been assessed by the court. They urged the court to dismiss the application with costs.

Analysis and Determination

25. I have considered the application and grounds and affidavit in support thereof. I have further considered the affidavits filed by the Respondent and the rival submissions by both parties.

26. The issues for determination are:

- (i). Whether the application is merited
- (ii). Whether the Applicant meets the criteria for grant of the orders sought.

30. Order 42 Rule 6(2) of the Civil Procedure Rules provide as follows:

(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.

31. The principles governing the grant of stay of execution pending appeal were set out by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal (1979) eKLR** as follows: -

i. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.

iv. The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement.”

32. The same position was echoed in the case of **Global Tours & Travel Limited v Five Continents Travel Limited [2015] eKLR** where the court held that:-

“... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

33. In the case of **Elena Doudoladova Korir v Kenyatta University [2014] eKLR** Nzioki Wa Makau J. had this to say:-

*“the application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & another –vs-***

Thornton & Turpin Ltd where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that –

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - sufficient cause, Substantial loss would ensue from a refusal to grant stay; the Applicant must furnish security; the application must be made without unreasonable delay.”

34. From the foregoing, it is clear that the court has wide discretion in granting stay of execution but such discretion is to be exercised judiciously, after considering the specific circumstances of the particular matter.

35. In the present case, the judgement delivered by this court on 3rd July 2020 was for the sum of Kshs.954,000.

36. The Applicant has stated that both parties had filed Notices of Appeal against the Judgement owing to their dissatisfaction with the same. Thereafter, both parties engaged in discussions with a view to reaching a settlement and an agreement on the withdrawal of their respective appeals.

37. I have perused the evidence presented before this court and especially the letter from the Applicant’s counsel to the Respondent’s counsel dated 10th September 2020 where there was a proposal of settlement on the following terms:

- a) *our client will pay your client the Judgment sum of KES. 954,000;*
- b) *our client will also pay your client the sum of KES. 467,405 as calculated in the Bill of Costs; and*
- c) *the payment of the above amounts shall be to an agreement:*
 - (i) *by your client to waive any and all claims against our client in relation to her employment; and*
 - (ii) *by the parties to withdraw their respective appeals against the judgement.*

The above settlement terms are proposed on the basis that it is in the mutual interest of both parties to resolve their dispute and to finally put this matter to bed.”

38. The circumstances of this case are special in that both parties filed notices of appeal against the decision of this court and thereafter engaged in negotiations in the hope of reaching an amicable resolution. For this reason, the Applicant cannot be blamed for inordinate delay, having filed the instant application just 14 days after the negotiations broke down. I find that there was no inordinate or unreasonable delay in filing the application that is unexplained.

39. On substantial loss, I do not think the Respondent would expect to execute partially for the decree in this case and then execute again should her appeal succeed. I thus find that in view of the appeal by the Respondent herself, the issue of substantial loss does not arise as she is not expected to execute the decree until after the appeal against the decision of this Court has been determined.

Security

40. The Applicant has stated that it is willing to deposit such sums as the court may deem fit into an interest earning account jointly held by the parties’ advocates as security for the due performance of such orders that may be issued. The Respondent has however prayed that half the decretal sum together with the costs be deposited in a joint account held by respective counsels and the balance be paid out to the claimant. I do not think that in the circumstances of this case, as I have pointed out above, the Respondent would be justified in seeking partial payment of the decretal sum.

41. In the interest of justice, I will allow the instant application. Stay of execution of judgment and decree be and is hereby granted pending appeal on conditions that:

- (1) The decretal sums be deposited within 30 days from the date of delivery of this ruling into an interest earning account jointly held by the parties’ advocates as security**
- (2) The intended Appeal be filed within 60 days from the date of delivery of this ruling.**
- (3) Failure by the Respondent/Applicant to meet conditions (1) and (2) above, the Claimant/Decree Holder shall be at liberty to execute.**
- (4) Costs shall be in the appeal.**

46. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations

due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE