



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

CAUSE NO. 296 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

TRANSPORT AND ALLIED WORKERS UNION....CLAIMANT

VERSUS

GLORY DRIVING SCHOOLRESPONDENT

RULING

1. Before me, for determination is the notice of motion application dated 26th November, 2020 by the Respondent/Applicant. It seeks the following orders **THAT**:

i. Spent

ii. Spent

iii. That the court be pleased to grant stay of execution orders against the judgement delivered on 9th October 2020 by Onyango J. pending the hearing and determination of the Respondent's intended appeal to the Court of Appeal.

iv. The costs of this application be in the cause.

2. This Application is premised on the grounds **THAT**:

i. That the Applicant is aggrieved by the judgment delivered on 9th October 2020 by Onyango J and has since lodged a Notice of Appeal.

ii. The right to appeal is a fundamental Constitutional Right protected under our Constitution.

iii. The 30 days stay of execution period granted by the court has lapsed and the Claimant is at liberty to execute.

iv. The total amount awarded to the grievants is quite substantial.

v. The Applicant is reasonably apprehensive that execution herein shall occasion it substantial loss and render its appeal nugatory.

vi. The Application is filed without undue delay.

vii. That it is only fair and in the interest of justice that the application herein be allowed.

3. The Application is further supported by the Affidavit of **JOHNSON MATAARA**, a Legal Officer of the Applicant sworn on 26th November, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application and further avers that should execution issue and the appeal succeeds it will be difficult for the Respondent to trace the whereabouts of some of the grievants as only one namely Charles Odhiambo Ongili testified in court on behalf of all the other grievants.

4. In response to the application the Respondent through **JACKSON MBUTHIA** filed a replying affidavit sworn on the 28th January, 2021 having authority to swear the same on his behalf and that of the co-grievants, in which he contends that the Application does not meet the

threshold for grant of the Orders sought in the Application.

5. The Affiant maintains that the Application is pre-mature as no decree has been extracted nor the costs awarded assessed and therefore there is no threat of execution.

6. He further contends that the Respondent/Applicant has not discharged the burden placed upon it to demonstrate that the grievants lack capacity to refund the proceeds of judgment should the appeal succeed.

7. He further states that the application being served seven weeks after filing is a demonstration of the lax attitude with which the Applicant treats the matter.

8. The affiant urges the court to decline the invitation for stay of execution and in the alternative prays that the grievants be paid 50% of the award and the balance be held in an interest earning account in the joint names of the advocates representing the parties.

Rejoinder

9. In rejoinder the Applicants filed an undated further affidavit sworn by **JOHNSON MATARA** in which he reiterated the contents of the supporting affidavit dated 26th November 2020.

Submissions by the Parties

10. The Applicant submits that should the orders of stay of execution not be granted, it would suffer substantial loss as the decretal sum is substantial. That the appeal would be rendered nugatory since it would not be in a position to recover the same as it has no knowledge of the grievants' physical address, source of income, assets owned or how they would repay the said sums should the appeal succeed. It relies on the decision in **Kenya Orient Insurance Co. Ltd v Mohamed Dulo Dilma Alias Moh'd Omar Dima & 2 Others (2013) eKLR** where Kasango J. cited with approval the case of **NRB Civil Application 238 of 2005 (Uir 144/2005) National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another** where the Court of Appeal held:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge - see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

11 The Applicant also relies in the case of **Directline Assurance Company Ltd v Michael Njima Muchiri & Another (2020)eKLR** where Njuguna J. held;

“While it is true that every person is entitled to enjoy the fruits of his or her lawful judgment, it is trite law that upon an Applicant raising issue with the financial capabilities of a Respondent to refund a decretal sum, the evidential burden then shifts to the Respondent to show the means/resources he or she has.”

12. The Applicant further submits that it filed the instant application less than two months after the judgment but lodged the notice of appeal within time. That it has since requested for proceedings to compile the record of appeal and as such there is no inordinate delay on the part of the Respondent.

13. For emphasis it relied on the decision in the case of **Directline Assurance Company Ltd v Michael Njima Muchiri & Another (2020) eKLR** where the court cited with approval the case of **Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Company Limited & 10 Others [2014] eKLR** in which the court rendered itself thus:

“...There is no precise measure of what amounts to inordinate delay, as what amounts to inordinate delay will differ from case to case depending on the circumstances of each case. But, care should be taken not to apply the word “inordinate” in its dictionary meaning; but rather in the sense of excessive as compared to normality. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads to an inescapable conclusion that it is inordinate and therefore, inexcusable.”

14. The Applicant has further submitted that it is willing to offer security by way of a bank guarantee for the due performance of the decree herein and relied on the case of **Patrick Kanaka Munyao v Cementers Ltd (2017) eKLR** where the court held that:

“The defendant has proposed to provide an insurance bond as security for the due performance of the decree. The plaintiff opposed this proposal alleging that due to the turbulent times in the insurance industry the suggested security may not guarantee due performance of the decree. There is no *doubt that the court is given unfettered discretion to determine the kind of security to be given. I think the response the plaintiff gave in answer to the defendant's offer on security in my view is too general and cannot be used to diminish an insurance bond as form of security.*”

15. The Claimant did not file submissions.

Analysis and Determination

16. The issues for determination are whether the Applicant has met the threshold for grant of the orders sought and whether it is entitled to the orders sought.

What is the threshold for grant of orders of stay pending appeal applications?

17. **Order 42 Rule 6(2)** of the Civil Procedure Rules bars this Court from ordering stay of execution pending appeal unless –

1. The Application is brought without inordinate delay.
2. The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and
3. The Applicant is willing to give security as the Court may deems fit to order.

18. The requirements for grant of stay of execution pending appeal were set out in **Butt v Rent Restriction Tribunal [1982] KLR 417**, wherein the Court of Appeal held that:

1. 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.
2. 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.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order 42 rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will *cause the order for stay of execution to lapse.*"

Inordinate Delay

19. Judgment in this cause was delivered on 9th October, 2020. The Applicants being dissatisfied with the judgment, filed notice of appeal on 23rd October 2020. The application herein was filed on 2nd December 2020, although it is dated 26th November 2020. This was 7 weeks after the judgment. I thus find it was brought without inordinate delay.

Substantial Loss

20. The right to Appeal is enshrined in the right to a fair hearing. A party has the right to seek justice to the highest court of the land.

21. In the instant application, the Claimant has not demonstrated that it will be able to refund the decretal sum should the appeal succeed and this would mean the Applicant risks losing substantial sums of money with respect to the individual grievants together with costs and interest and secondly its appeal shall be rendered nugatory and be reduced to an academic exercise.

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

- 1. The Respondent/Applicant do deposit the entire decretal sum in a joint interest earning account in the names of the Advocates for both parties within 30 days from the date hereof.**
- 2. The Respondent/Applicant is hereby directed to file his Appeal within 30 days from the date hereof in view of the fact that the typed proceedings are ready.**
- 3. Failure to meet conditions (1) and (2), the orders stand vacated and the Claimant will be at liberty to execute.**
- 4. Costs of this application shall be in the appeal.**

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