



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 498 OF 2016

JOSEPH AYORA OMWENA.....CLAIMANT

VERSUS

MULTISCOPE CONSULTING ENGINEERING LIMITED..... RESPONDENT

RULING

1. Serving before Court is an application dated 12th February, 2021 seeking stay of execution of the judgment of Hon. Wasilwa J. delivered on 26th January, 2021 and the decree thereof pending the hearing and determination of the intended appeal and costs of the application.
2. The application is premised on grounds set out on the face of the Notice of Motion numbered 1 to 5 the nub of which is that the judgment is in the sum of Kshs.2,979,234.40 subject to statutory deductions which is a large amount and the claimant may be unable to refund the sum if paid and the appeal is successful.
3. That the appeal has high chances of success for reasons set out in Paragraph 4(a) to (k) on the notice of motion.
4. That the respondent shall suffer substantial loss if stay is not granted especially during the COVID-19 period when the respondent is experiencing economic hardships.
5. That the respondent does not know any physical or financial means of the claimant and is apprehensive that the sum if paid the claimant has no ability to refund same.
6. That the appeal will be rendered nugatory if stay is not granted.
7. That the respondent is ready and willing to furnish security by way of guarantee or as the Court may deem fit. The grounds are buttressed in a supporting affidavit of Engineer Samuel W. Maungo the Managing Director of the respondent.
8. The application is opposed vide a replying affidavit of the claimant dated 4th March, 2021 in which he states that the appeal is not arguable and has no chance of success. That the application for stay is frivolous and a mere pretext to delay the claimant's right to enjoy the fruits of his sound judgment.
9. That there is no evidence that the claimant shall be unable to refund the decretal sum if the appeal is successful, which is denied as the same is devoid of merit. That the Court has discretion which should be exercised in claimant's favour as he has waited for conclusion of the case since 2016.
10. That the application be dismissed with costs.
11. Both parties filed written submissions which the Court has duly considered.
12. The Court is of the considered view and finding that the respondent bears the onus to demonstrate on a balance of probabilities that it has an arguable appeal; that the appeal shall be rendered nugatory if stay is not granted and therefore the applicant is likely to suffer substantial loss if stay is not granted and that the applicant is ready and willing to furnish the Court with security to satisfy the decretal sum if the appeal is not successful.
13. The Court has considered the case of **Butt-vs Rent Restriction Tribunal (1982) eKLR** where the Court held that:-

“.....the general principle in granting or refusing a stay is that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed.

14. That as was decided in Lily Yeko Ngwenye –vs- World Vision Kenya [2020] eKLR

“An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42, Rule 6(2), namely, (a) that substantial loss may result to the applicant unless the order is made (b) that the application has been made without unreasonable delay and (c) that such security as the Court orders for the due performance of such decree or order has been given.”

15. In consideration of the aforesaid principles taking into account that the claimant has waited for conclusion of the suit since 2016, and that there is no tangible evidence that the claimant is a person of straw and would be unable to refund the decree sum should the appeal be successful, while following the decision in Employment and Labour Relations Court Cause No. 213 of 2015, Banking Insurance and Finance Union (Kenya) –vs- Co-operative Bank of Kenya Limited (2017) eKLR, the Court finds that it is in the interest of equity and justice, that the Court balances the fortunes of the parties and makes the following orders:-

(a) That an Order for stay of execution of the judgment delivered on 26th January, 2021 and decree thereof is granted on condition that the respondent/applicant pays 50% of the decretal amount within 30 days of this ruling.

(b) 50% of the decretal sum be placed in an interest earning joint account in the name of the advocates for the claimant and that for the Respondent within 30 days of this ruling.

(c) In the event the respondent/applicant does not comply with orders (a) and (b) above, the stay orders shall automatically lapse

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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, this 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 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Wekesa and Simiyu Advocates for the Respondent/Applicant

Winfred Babu & Co. Advocates for the Claimant/Respondent.

Ekale – Court Assistant