



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 48 OF 2019

JAMES MOGAKA.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 18th June 2021 seeking orders of stay of the execution of the Judgment delivered on 2nd June, 2021 and any resultant decree therefrom be stayed pending the filing, hearing and determination of the Applicant's intended Appeal. The Respondent further sought that the costs of and occasioned by this Application be provided for.

2. The Application is premised on the grounds that the Applicant is aggrieved by the said decision delivered by this Court on 2nd June 2021 and has filed a Notice of Appeal and further requested for typed and certified copies of the proceedings and Judgment to enable it immediately file an appeal. The Respondent asserts that the proposed appeal raises serious arguable points of law and fact with high chances of success and that the Application herein has been filed without unreasonable delay. The Applicant asserts that unless an order of Stay of Execution is granted, it will suffer substantial loss and the intended Appeal will be rendered nugatory as the Claimant is likely to execute the decree from the said Judgment, and make it impossible for it to recover money paid under the decree should its appeal succeed. It further asserts that it is ready and willing to abide by any conditions and terms as the Court may deem fit to impose and that granting the reliefs sought is just and equitable. The Application is supported by the Affidavit sworn by the Respondent/Applicant's Human Resource Head of Employee Relations, Mr. Robley Ngoje who pleads with this Honourable Court to grant the orders sought in the Motion in order to preserve the substratum of the Applicant's intended appeal. The deponent also enumerates in his affidavit how the intended appeal has high chances of success.

3. In response, the Claimant/Respondent swore a Replying Affidavit dated 5th July 2021 averring that there is a valid judgment rendered by a Court of competent jurisdiction and as the successful litigant, he should be allowed to enjoy the fruits of the judgment. He depones that the Applicant has not annexed any draft Memorandum of Appeal and that the grounds enumerated in the Supporting Affidavit do not raise serious arguable points with any chances of success. Further, the arguability of a party's intended appeal is not a consideration for granting of stay pending appeal. He avers that the decree in this matter is a money decree and the success of the appeal would not be rendered nugatory as he would be able to repay the decretal amount plus any interest if the Respondent succeeds in the Court of Appeal. To prove his assertions, the Claimant/Respondent has annexed copies of Certificates of Lease for his properties and valuation reports indicating the value of the parcels of land as at February 2021. He further contends that the Respondent ought to have expressly indicated in its Application that it is ready to deposit in court or in a joint interest earning account the entire decretal sum plus costs as a condition precedent for the grant of stay orders. He asserts that in the absence of this express indication, the Respondent's Application should be dismissed with costs. It is the Claimant/Respondent's prayer that in the event this Court grants the stay of execution, the same be on condition that the Respondent/Applicant deposits the entire decretal sum either in Court or in a joint interest earning bank account in the names of the Advocates on record for the parties herein.

4. The Respondent/Applicant submits that in deciding the Application herein, this Honourable Court should be guided by the principles set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provide as follows:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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. (emphasis theirs)

5. The Respondent/Applicant submits that the intended appeal is arguable and it goes ahead to cite and rely upon several authorities which support its grounds of appeal. Some of the cases are delved to in detail herein below. The Respondent/Applicant submits that despite the Respondent/Applicant providing the certificates of lease as evidence of his ability to refund the decretal amount should the appeal succeed, he is still at liberty to dispose of or transact on the properties before the said appeal is heard and determined. It relies on the Court of Appeal case of **Meteine Ole Kilelu & 10 Others v Moses K. Nailole [2009] eKLR** where the Judges of Appeal held that where there is an appeal against a monetary decree, the appellants needed to show for instance, that the respondent is a man of straw who once the execution takes place and is given the decretal amount, would not be able to refund it when the appeal succeeds. The Respondent/Applicant submits that the Claimant has on his own admission during the trial admitted he is out of gainful employment and has not mentioned any other source of income in his Replying Affidavit. Further, the Claimant has also not undertaken that he will not dispose or charge the said properties pending the determination of the Appeal. The Respondent/Applicant also relies on the case of **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & Another [2017] eKLR** wherein the Court quoted with approval the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2013] eKLR**, where the Judge discussed the issue of substantial loss to entail the execution creating a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. Further, that the Court in the **Sarah Sakwa** case (*supra*) also stated that the appeal should not be rendered nugatory because anything that renders the appeal nugatory impinges on the very right of appeal. It is the Applicant's submission that this Honourable Court should exercise its unlimited discretion and grant the orders sought in the Application in order to preserve the substratum of the Applicant's intended appeal. On the issue of security, the Applicant submits that this Honourable Court has a wide discretion on whether to order security. It reiterates its apprehension that it will not be able to recover any sums back if the decree is enforced and the Appeal is successful because the Claimant is currently unemployed and without a steady income. It relies on the case of **Telkom Kenya Limited v Communication Workers Union [2020] eKLR** where the Court of Appeal in allowing the application, opined that the applicant would suffer substantial loss given the recovery of the decretal sum might prove difficult with the current financial status of the respondent and its members being unknown. The Applicant urges the Court to be persuaded by the decision of the Court of Appeal in **Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited [2000] eKLR** and determine that the balance of convenience overall favours him and consequently allow the application. It also refers the Court to a recent decision in **Stanley Mugweru Muchira & 2 Others v John Muthike Muchira [2020] eKLR** where the Honourable Court of the ELC weighed the claims of both sides and proceeded to grant the applicants unconditional stay. It is the Applicant's submission that if the Court wishes not to grant it unconditional stay, it is ready to alternatively furnish security as a condition for granting stay.

6. The Claimant/Respondent submits that this Court should to disregard the Respondent's submissions as they were filed out of time and without leave of the Court. He further submits that the filing of the stay application by the Respondent was premature and ought to await the determination of the Claimant's Party and Party bill of costs so that the Taxing master can determine how much should be paid to the Claimant as costs for the Cause. He relies on the case of **Doris Awino Abira v M I Wafula & Co. Advocates [2021] eKLR**, where Justice Fred Ochieng held:

"49. Before it is known that the Applicant would be required to pay a particular amount it would also be speculative for the court to specify the amount that would constitute the appropriate security for the due performance of the decree.

50. This is further affirmation that the Applicant has prematurely moved the court for orders of stay of execution.

51. Prior to taxation, or other ascertainment of the quantum of costs payable by the Law Firm to the Respondent, execution cannot be undertaken."

7. He submits that execution cannot therefore be undertaken prior to taxation of his Party and Party bill of costs, or other ascertainment of the quantum of costs payable to him by the Respondent and that the Respondent/Applicant has also not demonstrated any eminent risk of execution by the Claimant. In urging this Court not to grant stay pending appeal, the Claimant/Respondent cites the case of **RWW v EKW [2019] eKLR** where the Court observed that in seeking to preserve the subject matter in dispute so that the rights of the appellant are safeguarded and the appeal if successful, is not rendered nugatory, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court in the **RWW** case (*supra*) further stated that the court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. The Claimant/Respondent submits that the general rule as can be gleaned from Order 42 Rule 6 is that stay ought not to be granted and that granting of a stay order is the exception to the rule. That from the said provision, an Applicant seeking stay pending Appeal must satisfy 3 conditions: demonstrate that substantial loss may result if stay is not granted; demonstrate that the Application has been made without unreasonable delay; and furnish security for costs. The Claimant/Respondent concedes that the stay Application was filed timeously and without any unreasonable delay. On the issue of 'substantial loss', the Claimant submits that once the Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shifted to the Respondent to show what resources he has **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another** discussed in the Court of Appeal case of **Swapan Sodhan Bose v Ketan Surendra Somaia & 3 Others [2006] eKLR**. The Claimant/Respondent also relied on the authorities of **ABN Amro Bank N.V. v Le Mond Foods Limited and NCBA Bank Kenya Limited (formerly NIC Bank Limited) v Peter Warui Njoki & Another [2021] eKLR**. It is the Claimant's submission that he has discharged both the legal and evidential burden of proof cast by the law upon him and specifically pleaded with proof that his properties can sufficiently repay the decretal sum if the Respondent/Applicant succeeds on Appeal. He further submits that the Respondent/Applicant has not annexed a draft Memorandum of Appeal in its Application so that this Court can on a cursory reading gauge the probability of its success. That in the absence of a draft Memorandum of Appeal in the Respondent's Application, this Court is handicapped in determining whether or not the Respondent has a meritorious Appeal. He further submits that since it is trite law that costs follow events, he prays he be awarded costs of the Application dated 18th June 2021 as the successful litigant.

8. The Respondent/Applicant seeks stay of execution of the judgment and decree of this Court. The Court in determining the motion seeking stay must consider various factors and for an application of stay of execution pending appeal to succeed, an applicant must demonstrate that

the intended appeal is arguable and would be rendered nugatory if the stay is not granted. The Respondent/Applicant asserts it has an arguable appeal which it has preferred to the Court of Appeal. However, no memorandum of such an appeal was availed as proof. In the absence of the proposed or actual memorandum of appeal this Court is handicapped in determining whether there is indeed an appeal being preferred. A mere notice of appeal is insufficient for purposes of grant of stay pending appeal as there should to be some arguable grounds upon which the intended appeal is premised. As none have been proffered the Application seeking stay fails and is dismissed with costs to the Claimant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE