



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC APPEAL NO. 8 OF 2018

JOHN NYAUMA OMBATI....APPELLANT/RESPONDENT

VERSUS

SOTIK TEA CO. LTD.....RESPONDENT/APPLICANT

RULING

1. This ruling is in respect of the Respondent/applicant's application dated 16th June, 2021 filed under certificate of urgency on 22nd June, 2021 and seeking the following orders;

1. Spent.

2. That there be stay of execution of the judgment and Decree of this Honourable Court dated 27th May, 2021 pending the hearing and the determination of the Appeal.

3. That there be stay of execution of the judgment and decree of this Honourable court dated 27th May, 2021 pending hearing and determination of this Application

4. That the necessary directions be given.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Respondent/Applicants legal officer, **Doreen Kituku** on 16th June, 2021 and based on the following grounds: -

a. That the Respondent is dissatisfied with the entire judgment and decree delivered by this Court on 28th May, 2021 and had filed a Notice of Appeal on the 8th June, 2021 and annexed it as DK-1.

b. That the basis of the Appeal is that the Respondent/Appellant is now claiming Kshs. 786,720/- which money is way more than the Kshs.69,455 that was indicated in the decree issued on 9th March, 2011. And annexed the said demand letter as Annexure DK-2 and the decree as DK-3.

c. That the Appeal is arguable and also indicated that it is willing to deposit security in a joint interest earning account.

d. It is stated that the Appellant/ Respondent is a man of straws who is unable to refund the decretal sum if the Appeal succeeds.

3. In opposing the application, the Appellant/Respondent, **John Nyauma Ombati**, swore a replying affidavit dated 26th June, 2021 and filed in this Court on 3rd July, 2021 on the following grounds;

a. That the application has not met the conditions for granting of the Orders sought by the Applicant.

b. He contends that he is not a man of straws as alleged and prayed that the decretal sum be paid to him and incase the Appeal success he is willing to refunds the same.

c. He denied that he is asking for Kshs. 786,720 as claimed by the Applicant rather that he is claiming Kshs. 69,455/- as outstanding

decretal sum in the lower court matter and Kshs. 391, 641/- being the costs of this Appeal awarded by this Court.

d. The Respondent urged this court to disallow the application as he will be greatly prejudiced by the said Orders.

4. The parties herein disposed of the application by way of written submissions with the applicant filing on 22nd July, 2021 and the Respondent on 28th July, 2021.

Applicant's submissions

5. The applicant submitted that the sums of money claimed by the Respondent as per his annexure DK-2 is Kshs.391, 641/- which if paid to the Respondent Will render their Appeal nugatory if it succeeds.

6. It was argued that when the applicant stated that the Respondent was a man of straws the burden of proving that the Respondent is in a position to refund the decretal sum lied with him and not with the Applicant. In this they cited the case of **National Industrial credit Bank Limited –v- Aquinas Francis Wasike & Another [2006] eklr** where the Court held that;

“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.”

7. Accordingly, it was submitted that the Respondent's financial means is unascertainable and urged this Court to find as such.

8. The Applicant submitted further that it has undertaken to furnish this Court with security for due performance of the decree as provided for under Order 42 Rule 6 of the Civil Procedure Rules 2010 and cited the case of **David Kihara Murage –v- Jacinta Karuana Nyangi and another [2015] eklr**.

9. The Applicant in conclusion submitted that it has met all the condition precedent of issuance of stay orders under Order 42 Rule 6(2) and prayed for the application to be allowed.

Respondent's Submissions.

10. The Respondent submitted from the onset that the Applicant has filed this application in abuse of Court Process and in the bid to delay the Respondent from enjoying his fruits of judgment.

11. It was submitted that the Appeal herein emanated from failure of the Applicant herein to finish payment of the decretal sum issued by the trial Court which is now 10 years Old. He argued that the Applicant is now seeking for stay of execution pending Appeal which Appeal is yet to be filed or attached herein for this Court's consideration.

12. It was submitted that the applicant has not demonstrated the substantial loss it is likely to incur if stay is not granted. Further that the sums of monies the Respondents seek to recover is a paltry sum of Kshs. 392,641/- and not Kshs. 786,720/- as alleged by the Applicant. In this he cited the case of **James Wangalwa & another-v- Agnes Naliaka Cheseto [2012] eklr** where the Court with regard to substantial loss held that; -

“...No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.”

13. The Respondent in conclusion submitted that if this Court allows the application herein then the Court directs the Applicant to deposit the entire sum of money in a joint interest earning account failure to which the application to stand dismissed with costs to the Respondent.

14. I have examined the averments of the parties herein. From the pleadings herein the applicant has already filed a Notice of Appeal and thus contends that the appeal will be rendered nugatory if the prayers sought are not allowed.

15. Given that the notice was filed timeously and given that the applicants are ready to adhere to the orders on security, I will allow the stay on condition that the applicants deposit the entire decretal sum in an interest earning account held in joint names of the counsels on record within 30 days. In default execution to proceed.

16. Costs in the cause.

DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mboga for respondent – present

Appellant – absent

Court

Assistant

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Fred