



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 203 OF 2018

JANETH CHEPKEMOI MACHIRA.....1ST CLAIMANT

FREDRICK ODHIAMBO ANGIL.....2ND CLAIMANT

VERSUS

LAIKIPIA UNIVERSITY.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

I PRELIMINARIES

1. In a judgment dated and delivered on 27th July, 2021(Lady Justice Wasilwa) the first Claimant was awarded Kshs.696,690/= and the second Claimant was awarded a sum of Kshs.994,620/=. Both Claimants were also awarded costs of the cause. This award was a culmination of full trial wherein both sides presented oral and documentary evidence.
2. On 9th August, 2021 the Applicant herein filed a Notice of Motion dated 6th August, 2021 under certificate of urgency seeking *inter alia*, stay of execution of the aforesaid judgment pending the hearing of the application inter- partes, and further pending the hearing and determination of the intended appeal.
3. The said Notice of Motion was filed during court vacation and interim ex-parte order for stay was granted (Lady Justice M. Onyango) on 10th August, 2021. That interim order has been extended from time to time pending inter- partes hearing and determination of the said application.
4. The Notice of Motion dated 6th August, 2021 is expressed to be brought under **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act(Cap 21)** and **Order 42 rule 6, Order 51 rule 1** of the **Civil Procedure Rules**, and all other enabling provisions of the law. The application is supported by affidavit of **MUGO MURIITHI** sworn on 6th August 2021 and annexed thereto is a Notice of Appeal dated 22nd July 2021 and a draft Memorandum of Appeal.
5. In opposition to the application, Claimants filed a replying affidavit sworn by the first Claimant on 31st August 2021 on her own behalf and on behalf of the second Claimant.
6. When the matter came up in court for inter-partes hearing of the said application on 22nd September, 2021 it was agreed and directed by the court that the matter proceeds by way of written submissions and both sides filed their submission as confirmed in court on 19th October, 2021.

II. PLEADINGS AND SUBMISSIONS

7. In the supporting affidavit sworn by MUGO MURIITHI, the Applicant argues that the amounts awarded to the Claimants are huge, that the Claimants have not disclosed their current financial status and their ability to refund the decretal sum in case the intended appeal succeeds, that the Applicant has an arguable appeal with a high probability of success, that the Notice of Appeal and the application were filed without delay, and that it is ready to offer and furnish security as may be ordered by this court.
8. The items in Paragraph 7 are further supported by the arguments in the written submissions by counsel for the Applicant dated 28th

September, 2021 and filed in court on 30th September, 2021.

9. On the other hand, the Claimants have taken a diametrically opposed position as expounded in the replying affidavit sworn by the 1st Claimant on 31st August, 2021 and the written submissions by Counsel for the Claimants dated 14th October, 2021 and filed in court on 19th October 2021.

10. The court has gone through the pleadings and are written submissions by both sides in detail. The sole issue for determination is whether the Applicant is entitled to orders for stay sought for, and the issue of costs of the application is axilliary to the above issue.

III. LAW AND PRINCIPLES APPLICABLE

11. **Order 42 Rule 6 of the Civil Procedure Rules** provides as follow;

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 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 an application and to make such order thereon as may to it seem just and any person aggrieved by an order to stay made by the court 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.

12. The above quoted provision indicates to the direction that this court has fettered discretionary judicial powers in granting or refusing an application for stay of execution. Fettered because in exercising that discretion this court is guided by the provisions of the law, including **order 42 rule (6)** above, **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21), Section 3(1) and (2) of the Employment and Labour Relations Court Act No 20 of 2011**, and most importantly the overriding duty to do and dispense justice.

13. The conditions set under **order 42 Rule 6** on which this court may grant a stay of execution are self-explanatory. Without splitting hairs, the said conditions are that:

(i) the court has to be satisfied that substantial loss may be occasioned to the Applicant if the stay order is not granted.

(ii) the Applicant has approached the court without unreasonable delay.

(iii) the court is satisfied that such security as the court orders, for the due performance of the decree, has been supplied by the Applicant.

14. The filing or pendency of an appeal is clearly not tantamount to an order for stay of execution and an application has to be made to the court appealed from or the court appealed to and an order obtained to stay the execution (see order 42 Rule 6(1) of the Civil Procedure Rules). Further, this discretion in granting or refusing stay of execution is distinguishable from that of the Court of Appeal under Rule 5(b) of that court rules which is unfettered.

15. The path of stay of execution is a highly travelled path- way. Along the way many precedents have been set especially on the interpretation of the law applicable and the principles.

16. Let me now turn to the law as set out above and the circumstances of this cause. In situations where a court has judicial discretion in granting or refusing to grant an order prayed for, each cause has its unique characteristics and circumstances. Each condition shall be examined and applied to this cause and the application before the court with a view of answering the issues identified earlier on, that is, whether the application for stay of execution herein should be granted or denied.

IV. SUBSTANTIAL LOSS

17. In **Butt –vs- Rent Restriction Tribunal (1979)** the Court of Appeal opined that a court should not deny an Applicant stay if there is likelihood that such denial may render the appeal nugatory. An appeal is rendered nugatory if it becomes an exercise in futility or merely academic. If for example the outcome of an appeal reverses the decision of the lower court and the Appellant is not able to retrieve whatever he/she had paid in execution of the decree, then the outcome of the appeal is irrelevant and the same is nugatory. Such a situation would arise if, for example, the money paid out pursuant to a decree is not recoverable or that the *status quo* has shifted so much as to not afford the successful appellant *restitutio integrum*.

18. However, substantial loss must be distinguished from the usual obligation of a judgment debtor to satisfy a lawful decree. That obligation is not a loss as it is a legal obligation lawfully imposed by a court of law in a judgment. Examples of substantial loss is where a successful appellant is unable to recover monies paid in execution of a monetary decree or an execution that substantially alters the nature of a property

in dispute to the foundation through for example demolition (See the holding of Kimaru J in **Century Oil Trading Company LTD VS. Kenya Shell Limited** and Lady Justice H. Omondi in **ANM VS. VN Civil Suit No.22 of 2015(OS) – High Court at Eldoret**).

19. In **Bungoma HC Miscellaneous Application No. 42 of 2011–James Wangilwa and Another VS- Agnes Naliaka Chesoto** the Judge had this to say about substantial loss:-

“The application 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 a successful party in the appeal. This is what substantial loss would entail.”

Also see the sentiments of Gikonyo J in **Winfred Nyawira Maina VS. Peterson Onyiego Gichana (2015) eKLR**.

20. An application for stay of execution brings into collision the interests of a decree holder and those of a judgment debtor who is seeking stay of execution pending an appeal that the appellant fears may be rendered nugatory if the execution proceeds and the appeal succeeds. It is those interests that this court has been called to balance in this application.

21. In paragraph 8 of the supporting affidavit to the application, **MUGO MURIITHI** depones that the claimants are currently unemployed and that their sources of income are unknown to the Applicant. In response to that allegation, **JANETH CHEPKEMOI MACHIRA**, in Paragraph 11 of the replying affidavit depones that the Applicant did not disclose any information of the Claimants sources of income to make the conclusion that they could not be in a position to refund the money if the appeal succeeds.

22. Certainly, it would be unfair to expect the Applicant to know the sources of income for the Claimants. When the Applicant raised the allegation that the Claimants are currently unemployed and hence unlikely to refund the decretal sums if paid, the evidential burden to rebut that allegation shifted to the Claimants. However, instead of disclosing the financial status and ability to refund the decretal sums if paid, the Claimants threw back the ball to the Applicant without disputing the allegation by way of evidence. The ability of a decree holder to refund the decretal sum if the appeal succeeds is certainly a factor to be considered under the limb of substantial loss and that of rendering an appeal nugatory. See the holding of Odunga J in **Victory Construction VS. BM (2019) e KLR** at Page 5 wherein the learned Judge states this in regard to a similar situation:

“The property a man has is a matter so peculiarly within his knowledge that an Applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then in those circumstances, where the Applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

23. Without delving into the merits or demerits of the appeal, the court has perused the annexed draft memorandum of appeal and my considered view is that the same raises triable issues. This is not to say that the appeal must succeed, but this points towards a situation wherein it is fair and just to allow the Applicant to argue the appeal with a safety-net of a stay of execution on such conditions as this court may impose in terms of security.

24. Clearly, this court is of the considered view that there is a high chance of the appeal being rendered nugatory if the stay is not granted. To that extent the first condition on substantial loss has been met by the applicant.

V. UNREASONABLE DELAY

25. The judgment in this cause was delivered on 27th July, 2021 and the instant application for stay of execution was filed in court on 9th August, 2021. That is less than the proverbial 14 days in legal circles.

26. The Applicant filed the application for stay without delay and hence the second condition is met.

VI. SECURITY

27. The Claimants are lawful decree-holders and their legal entitlement is formally expressed in a decree issued by the court on 26th August, 2021. In the obtaining circumstances, the Claimants are lawfully entitled to the fruits of that Judgment. Their entitlement to those fruits crystallised upon delivery of the judgment and more so upon the issuance of the decree.

28. On the other hand, the Applicant herein is a judgment-debtor who is under a legal obligation, bar the interim orders for stay, to satisfy the decree by paying out and settling the decretal amount.

29. It is in the circumstances expressed in the two foregoing Paragraphs that this court has been called to balance the interests of the parties through exercise of judicial discretion. The Applicant has applied for stay pending the hearing and determination of an appeal which the Applicant in the written submissions has identified as Nakuru E076 of 2021. On the other hand the Claimants argue that they hold a decree that should be satisfied failure to which they should be allowed to execute against the Applicant.

30. This court must ensure that both sides are secured against loss or prejudice whether the appeal succeeds or fails. If the appeal succeeds, the Applicant wants assurance, and rightly so, that it will not lose money that would otherwise have been paid to the Claimants. On the other hand the Claimants want and need assurance that if the appeal fails they will be able to access the decretal sum together with interest thereon – See **Absalom Dova VS. Tarbo Transporters (2013) eKLR**.

31. In the circumstances, the security to be provided by the Applicant should be such that it is adequate for the due performance and discharge of the decretal sum and interest or the benefit that the Claimants would have earned had the decretal sum been paid promptly upon delivery of the judgment.

32. In **Mwaura Karuga t/a Limit Enterprises VS. Kenya Bus Services LTD and 4 Others (2015) eKLR** and **GianFranco Marenti and Another VS. Africa Merchant Assurance Company Ltd (2019) eKLR** it was held that while the security required should not be punitive, it should nonetheless be adequate for due performance of the decree.

33. In Paragraph 7 of the supporting affidavit, the Applicant has undertaken to provide security for due performance of the decretal sum in case the appeal is not successful. This court understands that this undertaking is in good faith, although the Applicant in its written submissions appear to depart from that position by purporting that being a public institution it may as well be exempted. However, under Order 42 Rule 8 of the Civil Procedure Rules, it is only the Government of the Republic that is legally exempted from providing such security.

34. This court shall not speculate on the probability of success or failure of the appeal, as that is completely outside the scope of this court. However, in balancing the interests of both sides, applying the judicial scales provided and discussed above, this court makes the following orders in disposal of this application.

(i) That the Notice of Motion dated 6th August, 2021 be and is hereby allowed on the following conditions.

(ii) That stay of execution is hereby granted pending the hearing and determination of the appeal.

(iii) That the entire decretal sum be deposited by the Applicant in an interest earning account in a reputable bank to be opened in the joint names of the Advocates for the parties.

(iv) That (iii) above be complied with within 30 days of this ruling failure to which the stay granted herein shall automatically lapse.

(iv) That the costs of this application abide by the outcome of the appeal.

DATED AND DELIVERED VIRTUALLY AT NAKURU

THIS 29TH DAY OF NOVEMBER 2021.

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DAVID NDERITU

JUDGE