



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 366 OF 2015

JOSHUA GITAU WACHIRA.....CLAIMANT

VERSUS

PROFESSIONAL CLEAN CARE LTD.....RESPONDENT

RULING

1. This ruling is in respect of the Respondents/applicants' application dated 9th July, 2021, filed under certificate of urgency on 12th July, 2021 via the firm of Kagucia and Associates advocates pursuant to Order 51 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil procedure Act and all other enabling provisions seeking the following orders;

1) **Spent.**

2) **Spent.**

3) **That this Honourable Court do grant a stay of execution of the judgment and the Decree passed on the 17th June, 2021, pending the hearing and determination of the Respondent's intended Appeal.**

4) **That costs of this Application be provided for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 9th July, 2021 by **Loice Wairimu Kagucia**, the Advocate who has the conduct of this suit and based on the following grounds: -

(a) That, judgment in this matter was delivered on 17th June, 2021 in favour of the claimant as against the Respondent.

(b) That the Respondents were dissatisfied with the judgment thereto and filed a Notice of Appeal on 1st July, 2020 and requested for proceedings in order to prepare a Memorandum of Appeal and a Record thereof.

(c) That the stay of execution granted by this Court on the 17th June, 2021 lapsed on the 2nd July, 2021 therefore the Respondent is exposed to execution proceedings.

(d) That they have a strong arguable Appeal with high chances of success.

(e) That they are apprehensive of paying the claimant the decretal sum as he would not be in a position to refund the same if the Appeal succeeds.

(f) That the application herein has been brought in a timely manner. Further that they are willing to furnish this Court with security for due performance of the Decree.

3. In opposing the application, the claimant, **Joshua Gitau Wachira**, swore a replying affidavit dated 22nd July, 2021 based on the following grounds;

a) That the application herein has no merit as the Appeal will not be rendered nugatory if the application is declined.

b) He stated that, he is not a man of straws and that no evidence had been table before this Court to indicate that he cannot refund the decretal sum if paid to him. He further stated that he is willing and able to refund the money if later ordered by the Court.

c) The claimant then prayed for the application to be dismissed in the alternative, the Court to order the Respondent to pay him half of the decretal sum together with costs and the other half be deposited in an interest earning account in the joint names of the advocates on record.

4. The Application herein was disposed of by way of written submission with the Applicant filing on the 18th August, 2021 while the Respondent filed on the 16th August, 2021.

Applicants Submissions.

5. The Applicants submitted that it has satisfied the condition pre-requisite for grant of stay of execution provided for under Order 42 Rule 6 of the Civil Procedure Act. It argued that there is eminent danger that the claimant/ Respondent herein is likely to execute the decree and if the decree is executed then they are likely to suffer substantial loss as the Claimant financial worth is unknown and therefore may not be able to refund the Decretal sum if the appeal succeeds. In this they cited the case of **Supa Hauliers Limited V David Masinde Musungu [2015] eKLR** where the Court while citing the Court of Appeal's decision in *National Industrial Credit Bank Ltd v. Aquinas Francis Wasike* Civil Application No. 238 of 2005 held as follows:-

"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the 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."

6. Accordingly, it was submitted that the Respondent was the one who ought to have demonstrated his ability to refund the Decretal sum if the Appeal succeeds and not the other way round.

7. On security, it was submitted that the Applicant is willing to furnish this Court with any security it deems fit.

8. On whether there is any delay in bringing this Application, it was submitted that, judgment was delivered on 17.6.2021, while this Application was filed on 12.7.2021, therefore there was no significant delay.

Respondent's Submissions.

9. The Respondent on the other hand submitted that, for stay to be granted all the 3 conditions of stay stated under Order 42 Rule 6 of the Civil Procedure Rules must be satisfied. He reinforced his argument by citing the case of **Trust Bank Limited V Ajay Shah & 3 others [2012] eKLR**.

10. The Respondent then conceded that the Application herein was filed in a timeous manner but contended that the Applicant has not adduced any evidence in support of his submissions that he would suffer loss if stay is not granted.

11. It was argued that mere allegation that a certain sum of money is significant is not sufficient but one has to give details of the loss to be suffered. In this he cited the cases of **Kenya Shell Limited V Benjamin Karuga & Another [1986] eKLR** and the case of **Peter Ndungu Ngae & 2 Others V John Mugane Karomo [2015] Eklr**.

12. Accordingly, it was submitted that the Applicant has failed to demonstrate the substantial loss it will suffer. Further that even if the claimant as proved the other two conditions that is filing the Application in timeous manner and willingness to furnish security the fact that substantial loss has not been established should persuade this Court to disallow the Application.

13. I have examined the averments and submissions of the parties herein. It is indeed evident that the applicant filed this application for stay timeously.

14. The applicants have also filed an appeal as evidenced from the notice of appeal exhibited.

15. The applicants are apprehensive that the respondent claimant may not be in a position to refund the decretal sum if the appeal succeeds.

16. It is indeed the position that the onus of proof that he can refund the decretal sum rests upon the claimant respondent. The claimant has however failed to discharge this proof. Since there is an appeal filed and the applicants are ready to provide security if directed by court.

17. I will allow this application for stay on condition that the applicant deposits the entire decretal sum in an interest earning account held in joint names of counsels on record within 30 days. In default execution may proceed.

18. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 18TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Ondande holding brief for Mburu for Respondent/Applicant – present

Mbiyu for Claimant

Court Assistant - Fred