



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 864 OF 2014**

**(Before Hon. Lady Justice Maureen Onyango)**

**BANKING INSURANCE AND FINANCE UNION (K)...CLAIMANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....RESPONDENT**

**RULING**

Before this court is the Respondent's Application dated 9<sup>th</sup> October 2019 seeking the following orders-

1. Spent.
2. That pending the hearing and determination of this application *inter partes* this Court be pleased to grant an order for stay of execution of the judgment of the Abuodha J. dated 28<sup>th</sup> June 2019.
3. That pending the hearing and determination of intended Appeal this Court be pleased to grant an order of stay of execution of the judgment of the Abuodha J. dated 28<sup>th</sup> June 2019.
4. That pending the hearing and determination of the intended appeal there be a stay of proceedings in this suit.
5. That costs be provided for.

The grounds of the Application are as set out in the motion and the Supporting Affidavit of Florence W. Njuguna sworn on 9<sup>th</sup> October 2019.

The Applicant avers that it has filed a Notice of Appeal challenging the judgment delivered on 28<sup>th</sup> June 2019 where the grievant was awarded the following reliefs-

- a. 1 month's salary in lieu of notice of Kshs.70,044.00.
- b. 10 months' compensation for unfair termination of service amounting to Kshs.700,440.00.
- c. Interest on (a) and (b) above at court rates from the date of judgment but subject to taxes and statutory deduction.

The Applicant avers that it has filed an application with the Deputy Registrar to be issued with a typed and certified copy of proceedings and decree to enable it file a record of appeal. The Applicant has undertaken to lodge the record of appeal once the proceedings and decree are received. The Applicant avers that the Application has been filed without delay.

The Applicant pleads that it has an arguable appeal with reasonable chances of success. It is averred that the Applicant is apprehensive that the Claimant may execute for the sum awarded and put the same beyond the Applicant's reach, rendering the intended appeal nugatory. Further, the Applicant is willing to deposit the judgment sum in an interest earning account to be held by both parties, pending the hearing and determination of the intended appeal.

The application is opposed and was disposed of by way of oral submissions.

Ms. Muthoni, counsel for the Applicant, submitted that the Application was unopposed and as such they should be granted prayers 3, 4 and 5. She further submits that the Applicant has complied with order 42 rule 6 (2) on conditions of stay of execution.

Mr. Mwaura counsel for the Claimant, submitted that the Application is made in bad faith because, since the Claimant was served with a Notice of Appeal, it has not written to the Applicant demanding for payment. It was also submitted that no appeal had been filed and that there is inordinate delay.

In her rejoinder, Ms. Muthoni submitted that there was no proof that had been tendered by the Claimant to the effect that the union was ready to refund the money should the appeal succeed.

### **Analysis and Determination**

I have considered the instant application and the submissions by the parties and find that the issue for determination is whether the Applicant has met the threshold for grant of the orders sought.

Order 42 Rule 6 of the Civil Procedure Rules provides as follows-

**1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal 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.**

The Applicant's counsel submitted that the Applicant will suffer substantial loss and the appeal rendered nugatory if the orders for stay are not granted as they do not know of the Claimant's means and whether the decretal sum will be refunded in the event the intended appeal succeeds. On the other hand, the Claimant's counsel submitted that the Claimant is a well-known institution and will be capable of refunding the decretal sum should the appeal succeed. In the case of *Kenya Hotel Properties Limited -V- Willesden Investments Limited [2007] eKLR* the Court was of the following view –

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the Respondent is not a “man of straw” but is a person who, on success of the appeal would be able to repay the decretal amount plus interest to the Applicant. However, with time it became necessary to put certain riders to that legal position as it became obvious that in certain cases undue hardship would be caused to the Applicants if stay is refused purely on grounds that the decree is a money decree.”

The Applicant has stated that it will be ready to deposit such an amount as ordered by this Court in an interest earning account to be held by both parties, pending the hearing and determination of the intended appeal. Further, the Applicant has explained that the delay in lodging a record of appeal is due to the fact that they have not been issued with a typed and certified copy proceedings and decree to enable them file the same. This is evidenced by the Applicant's letter of 1<sup>st</sup> July 2019 to the deputy registrar requesting for a certified copy of proceedings, judgment and the decree.

I find that there has been no delay in making this Application. I therefore make the following orders –

1. An order for stay of execution of the judgment of the Abuodha J. dated 28<sup>th</sup> June 2019, be and is hereby granted pending the hearing and determination of the intended Appeal.
2. Having considered the judgment, I direct that 50% of the decretal sum be released to the claimant while the other 50% be deposited into an interest earning account in the names of the claimant and counsel for the respondent/applicant.
3. The respondent shall pay the costs of this application in any event.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**