



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1446'B' OF 2012

(Before Hon. Justice Hellen S. Wasilwa 30th January, 2020)

PATRICK OMUTIA OTULIA1st CLAIMANT

PETER GACHIE KAROGI as legal representative

of GRACE NZOMO (Deceased).....2ND CLAIMANT

VERSUS

NAIROBI CITY WATER &

SEWERAGE COMPANY LIMITED.....RESPONDEDNT

RULING

1. Before this Court is the Respondent's Application dated 5/06/2018 where the Applicant seeks the following orders:-

i. Spent.

ii. The Application herein be set down for hearing inter partes as a matter of urgency.

iii. There be a temporary stay of execution of the judgment entered on the 22nd May 2018 and the resultant decree pending the hearing and determination of this application inter partes.

iv. This Honourable Court be pleased review (sic) its judgment and decree delivered on 22nd May 2018.

v. The judgment be set aside and substituted with and decree finding that the 2nd Claimant is entitled to payment of Kshs. 1,833,855.00 by the Applicant.

vi. The Honourable Court do vary its judgment delivered on 22nd May 2018 by the Hon. Lady Justice Wasilwa requiring the Applicant to pay the 2nd Claimant Kshs. 4,823,598 and substitute the same with a judgment and decree requiring the Applicant to pay the 2nd Claimant Kshs. 1,833,855.00.

vii. That costs of this Application be awarded to the Applicant.

2. The Application is based on the grounds set out in the motion and the Affidavit of Maureen Thuo, sworn on 5/06/2018. The Applicant avers that the judgment's outcome does not flow from the Court's argument and finding as set out in the body of the judgment.

3. It is the Applicant's position that there is an error apparent on the face of record that should be cured by the Application for review.

4. Further, that this Court while calculating the amount payable to the 2nd Claimant, erroneously mentions that the Applicant already paid the 2nd Claimant Kshs. 6,218,001.50 instead of Kshs. 9,207,745.00 as admitted at page 118 of the Claimant's bundle filed on 22/08/2012 and acknowledged by this Court at paragraph 30 of the judgment.

5. The Applicant urges this Court to review the amount payable to the Claimant in the judgment as Kshs. 1,833,855.00 and not Kshs. 4,823,598.50.

6. The Claimants have opposed the Application vide the 1st Claimant's Replying Affidavit. They contend that the Application is frivolous and incompetent and should be struck out for being an abuse of the Court process.

7. The 1st Claimant, having the authority of the 2nd Claimant to swear the Affidavit on his behalf, contends that the Applicant has failed to demonstrate that the Claimants are men of straws who are not in a position to refund the decretal sum in the event the Application succeeds.

8. The 1st Claimant avers that the Application is an attempt to deny the Claimants the right to enjoy the fruits of their judgment. Further, that the Respondent has not advanced any valid reason to warrant the grant of the orders for stay or the prejudice its stands to suffer should the order sought be denied.

9. The 1st Claimant avers that the Applicant has never communicated its intention of seeking orders for stay, even after it was served with the draft decree for its amendment or approval. He is of the position that reviewing the decree would be unfair to the Claimants who already had the same sealed.

10. The Claimant avers that this Court erroneously considered the employment contract of 19/06/2007 which provided for a monthly salary of Kshs. 425,000.00 inclusive of house allowance of Kshs. 50,000.00, entertainment allowance of Kshs. 25,000.00 and telephone allowance of Kshs. 15,000.00. The allowances were added back, resulting in the erroneous computation.

11. The 1st Claimant avers that their salaries were reviewed to Kshs. 386,953.00 with a house allowance of Kshs. 57,500.00. Further, the review led to the introduction of fuel allowance of Kshs. 85,000.00 for each Claimant, security guard benefit of Kshs. 54,921.35 and Kshs. 5,000.00 to the 1st and 2nd Claimants respectively. As such, the monthly salaries amounted to Kshs. 624,174.35 and Kshs. 574,453.00 for the 1st and 2nd Claimants respectively.

12. It is averred that it will be just and fair to give effect to the appointment letter of 19/1/2010 (Ref: NW/FM/9/450/826/nng) while the affiant is compensated as per clause 5.3 of the HR Manual for performing duties in acting capacity, being 25% of his salary of Kshs. 386,953.00.

13. It is averred that the Applicant has failed to meet the threshold set out in order 45 (1) of the Civil Procedure Rules, to warrant the issuance of the orders sought.

14. The Application was disposed of by way of written submissions.

The Applicant's Submissions

15. In its submissions filed on 24/04/2019, the Applicant submits that an order for stay of execution is granted so as to preserve the subject matter thus enabling a party to appeal or seek review of a decision which would be rendered nugatory if the orders were to be declined.

16. Consequently, the Applicant submits that if the order for stay is not granted then the application will be rendered an academic exercise. The Applicant relies on **House Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR**.

17. The Applicant submits that a litigant seeking the orders for stay of execution only needs to demonstrate the hardship they will suffer in recovering the decretal sum should an appeal or review succeed, and relies on the case of **G.N. Muema P/A (sic) Mt. View Maternity & Nursing Home vs. Miriam Maalim Bishar & Another [2018] eKLR** and the Court of Appeal decision of **Bolpak Trading Company Limited vs. George Otieno Nyamwaya [2019] eKLR**. The Applicant also submits that it has demonstrated good faith by paying the undisputed judgment amount.

18. Though the Claimants' submissions filed on 2/05/2019 indicate that the same also relate to the Respondent's Application of 5/06/2018, the submissions made therein relate to the Claimants' Application for review dated 27/09/2018.

19. I have considered the averments of both Parties. The main contention by the Applicant is that there is an error on the face of record in that the finding of the Court in the judgement does not tally with the body therein.

20. The Applicant points to paragraph 30 of the judgement where the Respondent contended that they paid the 2nd Claimant 9,207,745/= and as admitted at page 118 of Respondent's documents filed in court on 22/8/2012.

21. That was the Respondent's contention but it is not possible that the Respondents filed documents on 22/8/2012 when this claim was filed on 23/8/2012. This is definitely an error. Infact, the response in this case was filed on 18/10/2012.

22. There is therefore no such document alluded to by the Respondent where there was an admission to paying the 2nd Claimant Kshs.9,207,745/=.

23. The ground upon which the Applicants are relying upon to seek review of this court's judgement is non-existent and I find that there is no error on the record to warrant review of this Court's judgement.

24. As for stay, the Respondent/Applicant do not explain why they seek stay. They do not indicate what the stay is contingent upon. I decline to grant orders sought.

Dated and delivered in open Court this 30th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ogutu for Respondent

Thuo holding brief Mr. Nyabena for Claimant