



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 872'B' OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH OLANDO OLOO.....CLAIMANT

VERSUS

UNGA LIMITED..... RESPONDENT

RULING

Before this Court, is the Respondent's Application dated 4th July 2019 seeking the following orders-

- a. Spent.
- b. The Court be pleased to stay execution of the Decree issued herein on 12th March 2019 (together with any and or all subsequent proceedings in the Cause herein including the intended taxation of the Claimant's Party and Party Costs (sic) scheduled for 29th July 2019 and/or on any other subsequent dates) pending the hearing *inter partes* and final determination of this Application upon such reasonable term(s) and/or condition(s) (if any) that the Court herein may deem just and necessary.
- c. The Court be pleased to stay the execution of the Decree issued herein on 12th March 2019 (together with any and or all subsequent proceedings in the cause herein) pending an Appeal therefrom to the Court of Appeal upon such reasonable term(s) and condition(s) (if any) that the Court herein may deem just and necessary.
- d. The Court be pleased to make and/or grant such other and/or further order(s) as it may in the interests of justice deem expedient and/or necessary.
- e. That the costs of this Application be provided for.

The Application is supported by the grounds set out in the motion and the supporting affidavit of Lynda Banja sworn on 4th July 2019. They are that the Claimant filed a Party & Party Bill of Costs which had been scheduled for taxation on 29th July 2019 despite the Respondent filing a Notice of Appeal on 23rd August 2018, challenging the decision of Justice Nduma Nderi delivered on 10th August 2018 by Onyango J. where the Claimant was awarded Kshs.3,208,275.25 together with interest.

The Applicant avers that it has made every effort to obtain certified copies of the decree and typed proceedings which are yet to be issued and avers that the Application has been made without unreasonable delay

The Applicant states that the judgment sum is a substantial amount of money and it is reasonably apprehensive that it will not recover the same if paid out to the Claimant, in the event the appeal succeeds, thus suffering a substantial and irrecoverable loss. The Applicant further avers that it is ready and willing to provide security within such time and under such conditions as the Court may direct.

As such, it is in the interests of justice that the orders sought be granted or the appeal will be rendered nugatory.

The Claimant has opposed the Application vide his Replying Affidavit filed on 23rd July 2019. He avers that the Applicant failed to extract the decree and that the Bill of Costs filed on his behalf relates to the costs of the suit and the award itself.

The Claimant avers that the Respondent has failed to demonstrate sufficient cause to move this Court's discretion as it has failed to lodge a

meritorious appeal despite being in possession of the relevant judgment.

The Claimant avers that the Application has been ordinally delayed having been filed almost a year after the delivery of the judgment. As such, the same is filed in an attempt to deny him the enjoyment of the award.

He concludes by deposing that the Application is devoid of merit and should be dismissed with costs.

The Applicant filed a Supplementary Affidavit on 14th October 2019 where it contends that the Claimant has not demonstrated that he has the financial ability/capacity to refund the sum of Kshs.3,208,275 in the event of a successful appeal.

It is averred that the notice of appeal constitutes an appeal. The Applicant further avers that the proposed memorandum of appeal contains serious grounds of appeal and maintains that its Advocates have acted with full speed.

The Application was disposed of by way of written submissions.

The Applicant's Submissions

In its submissions filed on 25th July 2019, the Applicant urges this Court to grant the orders sought pending the hearing and determination of the appeal upon such terms as the Court may direct.

The Applicant has cited various cases to show instances when the Court granted orders for stay, which circumstances in the Applicant's opinion, resemble the ones before this Court. The cases are **Hellen Wasaka vs. Middle East Bank Limited [2019]**, **Alfred Nathan Mvuko vs. Hakika Transport Services Limited [2019]** eKLR, **Anthony Wachira Wairimu & Another (Suing as the Legal Representatives and Administrators of the Estate of Joseph Kurl Mwangi-Deceased) Zhongmei engineering (K) Group Limited [2019]**, **Kennedy Omondi vs. Charles New Nyamote [2018]** eKLR and **Justin Mutunga David vs. China Road & Bridge Corporation (K) Limited [2019]** eKLR.

In his submissions filed on 21st November 2019, the Claimant submits that the conditions for grant of an order for stay outlined in order 42 rule 6 (2) of the Civil Procedure Rules, go hand in hand as was observed in the case of **Hassan Guyo Wakalo vs. Straman EA Limited [2013]** eKLR. Consequently, since there was delay in making the Application, the orders sought should be denied as there is no justification for the delay.

The Claimant submits that the said conditions must be met before an Application is made and it is not up to the Court to reach and ensure the conditions are met. The Claimant further submits that the Applicant has not discharged its evidentiary burden to prove that he will not refund the decretal sum in the event of a successful appeal and relies on the cases of **Joseph Gachie T/A Joska Metal Works vs. Simon Ndeti Muema [2012]** eKLR and **Equity Bank Limited vs. Taiga Adams Company Limited [2006]** eKLR.

The Claimant urges that should the Court find merit in the application, then the Applicant should be directed to deposit the full decretal sum awarded.

Determination

I have considered the Application, the Affidavits, the annexures thereto and the written submissions filed by parties, and find that the issue before this Court for determination is whether the Applicant is entitled to the orders sought.

Order 42 Rule 6(2) provides as follows –

(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 has demonstrated that he stands to suffer a substantial loss if the order for stay is not granted as there is a Party to Party Bill of Costs pending taxation as evidenced in the notice served upon the Applicant on 16th May 2019 and an extracted Decree which can be executed at any time.

From Claimant's letters to the Deputy Registrar of 13th August 2018, the Applicant sought to have a typed copy of the judgment, a certified copy of the resultant decree and of typed proceedings of the entire Court respectively. This was 3 days after the delivery of the judgment. I therefore agree with the Applicant that this Application could not have been made without first obtaining a decree as it could have been premature since the same was only issued on 12th March 2019.

Further, from the correspondence between the Applicant and the Claimant, it is evident that the Applicant is keen on pursuing the appeal. For instance, in the Applicant's advocates' letter of 11th March 2019 to the Claimant's advocates, they requested for a certified copy of the decree once it was issued to the Claimant by the deputy registrar.

The Applicant has stated that it will be ready to deposit such an amount as ordered by this Court, pending the hearing and determination of the intended appeal. Further, the delay in lodging the record of appeal is attributed to the fact that the Applicant has not been issued with a typed and certified copy proceedings and a certified copy of the decree to enable it file the same. As such, the Applicant cannot be held liable for the same.

I note from the notice of appeal that the applicant intends to appeal against the judgment in respect of only “the part of the decision/decreed awarding the sum of 3,208,375.25 plus interest at court rates from date of filing suit till payment in full”. In essence it does not intend to appeal against the finding of the court that the

redundancy was unfair. What the respondent was unhappy with is the award and interest payable from date of filing suit. I therefore make the following orders –

1. An order for stay of execution of the of the Decree issued herein on 12th March 2019 (together with any and or all subsequent proceedings in the Cause herein including the intended taxation of the Claimant’s Party and Party Bill of Costs, is hereby granted pending the hearing and determination of the intended Appeal.
2. I direct that out of the decretal sum, a sum of **Kshs.1.5 million** be released to the claimant and the balance of the decretal sum be deposited into an interest earning account in the names of the Claimant and counsel for the Respondent/Applicant within 30 days from the date of this Ruling.
3. The Respondent shall pay the costs of this application in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE