



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.439 OF 2017**

**CAROLINE WANJIRU KARORI.....CLAIMANT**

**VERSUS**

**THE BOARD OF TRUSTEES, NATIONAL**

**SOCIAL SECURITY FUND (NSSF).....RESPONDENT**

**RULING**

The respondent, The Board of Trustees, National Social Security Fund (NSSF) filed application and Notice of Motion dated 14<sup>th</sup> November, 2019 and seeking for orders that there be stay of execution pending the determination of the intended appeal.

The application is supported by the affidavit of Grace Kanyiri the advocate for the respondent and on the grounds that the judgement was delivered herein on 24<sup>th</sup> October, 2019 in favour of the claimant for the payment of Ksh.6, 391,532.91 and the respondent being aggrieved wishes to file an appeal and has since filed a Notice of Appeal dated 24<sup>th</sup> October, 2019. There was also application for certified copies of the proceedings which have not been supplied.

If the claimant is not restrained by an order of stay of execution, the judgement may be executed and expose the respondent to the risk of having its intended appeal rendered nugatory. The judgement sum is substantial and there is apprehension if the claimant is paid she may not be able to refund the same upon a successful appeal.

The respondent is willing to comply with the directions of the court in so far as securing the decretal sum by depositing the same in court for in a joint account of the parties.

In her affidavit, Ms Kanyiri avers that she is the advocate for the respondent as conversant with the matters herein and thus her supporting affidavit seeking for orders of stay of execution pending the hearing of the intended appeal.

In reply the claimant filed here affidavit and on the grounds that there is no record of appeal filed as stated and if the respondent wishes to avoid the process of execution they should settle the decretal amount. That there is no basis laid out for the claims that if paid the decretal sum the claimant shall fail to repay back.

The claimant also avers that there is no demonstration of what loss the respondent shall suffer if the orders sought are not allowed. The respondent as a public entity has immense wealth and as such the payment of Ksh.6, 391,532.91 will not in any way affect its operations.

The claimant also avers that she was employed as a regional manager earning Ksh.491, 684.07 per month and thus able to repay back any amounts if the intended appeal is successful. The allegation that such is a colossal sum and that the claimant has no means to pay is not correct.

That the respondent has not satisfied the conditions for the grant of stay of execution and the application should be dismissed with costs.

Both parties made oral submissions in court.

The question of stay of execution pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in **Chris Munga N Bichage versus Richard Nyagaka Tongi & 2 Others eKLR** where the principles to be applied in considering an application for stay of execution were stated as follows;

*....The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is*

*arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated*

Further, **Order 42 rule 6 of the Civil Procedure Rules, 2010** prescribes that An applicant must satisfy court that the intended appeal is arguable thus not frivolous; and An applicant must satisfy court that unless the order for stay is granted, the intended appeal, if successful, would be rendered nugatory.

Has the respondent satisfied the conditions for the grant of stay of execution pending the hearing and determination of the intended appeal?

Save for the Notice of Appeal dated 24<sup>th</sup> October, 2019 and the application seeking for typed proceedings being filed, the intentions have remained at that. In the affidavit of Ms Kanyiri she avers that if the orders of stay of execution are not allowed there shall be irreparable loss and damage and the right of appeal shall be negated and that the respondent is willing to deposit security to for the due performance of the judgement. However, there are no set issue(s) outlined as forming the basis of any matter that is challenged with regard to the judgement of the court. though a security deposit is offered, the basis ought to be premised on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

At paragraph 11 of Ms Kanyiri's affidavit she avers that the copy of judgement was only available on 11<sup>th</sup> November, 2019 whereas the Notice of Appeal was filed instant on 24<sup>th</sup> October, 2019 upon the reading of judgement. What was the basis of such Notice of Appeal? There is no matter set out in this regard.

The first limb of having an appeal which is likely to be rendered nugatory is lost. The intended appeal is thus not actualised in any material way. See in the case of **G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home versus Miriam Maalim Bishar & another [2018] eKLR** it was held that;

*It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.*

Where the intention to file the intended appeal is put in motion, the respondent fails to demonstrate what loss shall be suffered or the prejudice which shall follow if stay of execution is not allowed. Whether the claimant is able to repay the decretal sum or not is a matter totally ignored by the respondent as the applicant.

In the end the court finds no matter to justify the application before it to warrant and or justify the grant of the orders sought. This is aptly captured in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited versus Aquinas Francis Wasike & another (UR)**;

*This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 lack of them. Once an applicant expresses 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.*

**Accordingly, the application dated 14th November, 2019 is hereby dismissed.**

**Costs in the cause.**

**Delivered at Nakuru this 6<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....

.....