



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2250 OF 2016

*(Before Hon. Lady Justice Hellen S. Wasilwa on 12<sup>th</sup> March, 2020)*

JULIET AKINYI DIMA.....CLAIMANT

VERSUS

HUMAN NEEDS PROJECT (KENYA).....RESPONDENT/APPLICANT

RULING

1. The Applicant filed a Notice of Motion on 1/11/2019 seeking the following orders:-

**1. Spent.**

**2. THAT the Honourable Court be pleased to stay the execution of Judgment delivered by Hon. Lady Justice Hellen Wasilwa on 7<sup>th</sup> October 2019 in Nairobi ELRC No. 2250 of 2016 Juliet Akinyi Dima Vs Human Needs Project (Kenya) and subsequent Decree issued by the Employment and Labour Relations Court at Nairobi pending the inter partes hearing and determination of this application.**

**3. THAT the Honourable Court be pleased to stay th execution of the Judgment delivered by Hon. Lady Justice Hellen Wasilwa on 7<sup>th</sup> October 2019 in Nairobi ELRC No. 2250 of 2016 Juliet Akinyi Dima Vs Human Needs Project (Kenya) and subsequent Decree issued by the Employment and Labour Relations Court at Nairobi pending the hearing and determination of the Intended Appeal**

**4. THAT the cost of this Application be provided for.**

2. The Application is premised on grounds that:

**1. On 7/10/2019, the Court awarded the Respondent damages of USD 32,500/- against the Applicant together with costs of the suit.**

**2. During the delivery of the ruling, the Trial Court granted the Applicant 30 days stay of execution of the decree that was to expire on 7/11/2019.**

**3. The applicant being dissatisfied with the Judgment has since filed its Notice of Appeal dated 9/10/2019 and vide a letter dated even date has requested for the certified copy of the Judgement and proceedings to enable it put together the Record of Appeal.**

**4. Since the stay of execution was to lapse on 7/11/2019, the Respondent may proceed with the attachment of the Applicant's assets to satisfy the judgment award of USD 32, 500.00 plus costs of the suit.**

**5. Its intended Appeal has a high chance of success as the Court erred in law and in fact by finding that the respondent was terminated unlawfully and disregarded the existence of formal disciplinary process and in awarding her a total sum of USD 32,500.**

**6. The Applicant, an NGO based in Kibera, relies on donor funding hence stands to suffer irreparably if compelled to pay the colossal sums. In addition, it may never recover the sum from decretal sum from the Respondent if the appeal is successful.**

3. The Application is supported by the affidavit of Felix Osumo the Respondent's Finance Manager sworn on 31/10/2019. He reiterates the grounds set out in the application and further avers that the Respondent has no means of income thus lacks a known mode of repaying the

decretal sum should the appeal prove successful.

4. The Respondent filed a Replying Affidavit sworn on 13/11/2019. She avers that the grounds in the draft memorandum of appeal are not meritorious as they are fraught falsities and give no probable or sufficient reasons as to why the Court ought to grant a stay of execution.

5. She avers that the application is purely based on the fact that the Applicant has shown intentions to file and appeal and no other reason has been espoused in the application. She avers that the Applicant has not met the threshold for grant of stay pending appeal under Order 42 Rule 6 (1) of the Civil Procedure Rules.

6. She contends that the Applicant was granted a 30 day stay of execution which it did not seek to extend but sought to file another application for stay of execution and the same was unilaterally extended on 12/11/2019 despite her protest.

7. She avers that in the event this Court considers the application, the applicant should be ordered to deposit the decretal sum in a joint interest earning account in the names of counsel on record.

#### **Applicant's submissions**

8. The Applicant submits that stay of execution pending appeal is governed by Order 42 rule 6 of the Civil Procedure Rules and the power to grant stay is discretionary as held in **Butt v Rent Restriction Tribunal (1982) KLR 417**. It submits that it has a right of appeal in the matter as the sum of USD 32,500 is quite substantial and there is no other overwhelming reason why stay should not be granted.

9. It relies on Order 42 of the Civil Procedure Rules and submits that it has demonstrated that the Application was brought without unreasonable delay and sufficiently explained the grounds before the expiry of the 30 days leave that had been granted.

10. It submits that it has demonstrated that it is ready and willing to deposit at least half of the decretal amount in court as security for payment, pending the hearing and determination of the appeal.

11. It submits that in the absence of an affidavit of means from the Respondent showing the ability to repay the amount if execution is granted the application should be allowed.

12. It relies on the case of **Superior Homes (Kenya) Limited v Musango Kithome [2018] eKLR** where the Court held:-

*“The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”*

13. It submits that it has demonstrated, in its annexed draft Memorandum of Appeal, that there exists valid and sufficient grounds of appeal to warrant grant of stay of execution. It relies on the case of **Socfinaf Ltd (Ruera Estate) v Abisagi Igoki [2018] eKLR** where the Court held that a contestation of findings of fact on a first appeal can constitute points of law and to earn stay of execution one is not required to persuade the appellate Court that its appeal has a high probability of success.

14. It is therefore its submission that the grounds of appeal are not only plausible but merited. In conclusion, it urges the Court to exercise discretion in its favour and grant the orders sought.

#### **Respondent's submissions**

15. The Respondent submits that the Court should be guided by courts of a similar jurisdiction where it has been held that a successful litigant should not be deprived of the fruits of a judgment in their favour without cause. In support of her submission, she relies on the case of **Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema [2012] eKLR** where the Court held that it is not sufficient to merely state that the decretal sum is a lot of money and that the applicant would suffer loss. The Applicant should show the damages it would suffer if the order for stay is not granted.

16. She submits that under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the law is clear that an appeal whether in the first appeal or a second appeal cannot operate as stay of execution and is not a sufficient reason for the Court to grant stay of execution of its judgment.

17. She submits that while the Applicant is willing to deposit at least half of the decretal sum in court, she urges the Court to order the Applicant deposit the full decretal sum in a joint interest earning account.

18. She submits that the Applicant is an NGO with its operations and headquarters in the united States of America and relies on donor funding thus it cannot be said with certainty that their presence in the country can be guaranteed. She submits that should the Applicant relocate, she stands to suffer loss thus the balance on the interest of justice leans towards the Respondent.

19. She urges the Court to order the Applicant to pay half of the decretal sums and they proceed to deposit the other half in a joint interest earning account. She relies on the case of **Samuel Kimutai Koror (suing as personal and legal representative of estate of Chelangat Silevia) v Nyamchwa Adventist Secondary School & Nyamchwa Adventist College [2017] eKLR** where the Court granted the applicant

prayer for stay of execution on condition it pays half the decretal sum.

20. She submits that being an Advocate of the High Court of Kenya running her own practice, she is able to recover any amounts of monies paid out in the event the appeal is successful. She submits that the onus lies in the Applicant to demonstrate that the Respondent would fail to repay the decretal amount in the event the intended appeal succeeds.

21. She submits that she should not be denied the fruits of her judgment as the applicant has failed to demonstrate the justification for denial and does not merit to be granted stay orders sought. In conclusion, she submits that the Applicant has failed to meet the threshold for granting a stay of execution under Order 46 rule 6 of the Civil Procedure Rules.

22. I have examined all the averments and submissions of the Parties. The Applicant seeks stay pending appeal and aver that they are ready to deposit the decretal sum in a joint interest earning account.

23. Given that the Applicant has filed a Notice of Appeal and is willing to deposit security for the decree, I find that the Applicant meets the requirements provided for under Order 42 rule 6(2) which states 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”.*

24. I therefore find the application merited. I allow the application for stay pending appeal on the condition that the entire decretal sum is deposited in a joint interest earning account held in joint names of Counsel on record within 30 days. In default execution to proceed.

**Dated and delivered in open Court this 12<sup>th</sup> day of March, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ogada holding brief Attika for Respondent – Present

Claimant – Absent