



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1970 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 10th March, 2020)

SIMON TITUS YANDI.....CLAIMANT/RESPONDENT

VERSUS

DIRECTLINE ASSURANCE CO LTD.....RESPONDENT

RULING

1. On 27/5/2019, this Court delivered a judgment in favour of the Claimant/Respondent (hereinafter “the Respondent”), where the Respondent/Applicant (hereinafter “the Applicant”) was ordered to pay Kshs. 2,240,000.00 together with costs of the suit and interest at court rates. Aggrieved by the said decision, the Applicant filed the application dated 13/11/2019 seeking the following orders-

a. Spent.

b. THAT this Honourable Court be pleased to order a stay of execution of the judgment and orders of the court dated and delivered at Nairobi on 27/5/2019 pending the hearing and determination of this application.

c. THAT this Honourable Court be pleased to order a stay of execution of the judgment and orders of this Court dated and delivered at Nairobi on 27/5/2019 pending the filing, hearing and determination of an intended appeal from the judgment of the Industrial Court at Nairobi (The Honourable Lady Justice Hellen Wasilwa).

d. THAT this Honourable Court be pleased to grant an early date and/or give directions for the inter partes hearing of this Application.

e. THAT cost of the Application be in the cause.

2. The application is supported by the grounds set out therein and the supporting affidavit of Lilian Ouko sworn on 13/11/2019. The Respondent has opposed the same vide his replying affidavit sworn on 27/11/2019.

Respondent/Applicant’s Case

3. The Applicant avers that it has an arguable appeal which will be rendered nugatory if the orders sought are not granted, as the execution process will be set in motion.

4. The Applicant further averred that the Applicant is prepared to offer security by depositing the sum of Kshs. 2,240,000.00 in an interest earning account held by the parties’ advocates; pending the filing, hearing and determination of the intended appeal.

5. The Applicant is of the position that the Respondent has no known assets within the jurisdiction of this Court which can be recouped in the event the appeal succeeds. The Applicant deposes that the application has been brought without undue delay and is not an attempt to delay justice.

6. Similarly, the affiant avers that on 27/5/2019, the Applicant’s advocates made an oral application for stay of execution but the same was declined. Further, that the Respondent’s advocates in their letter of 1/11/2019, informed the Applicant’s advocates that execution would commence within 7 days.

7. The affiant also avers that the Respondent's advocates timeously applied for certified copies of typed proceedings to facilitate the filing of the appeal.

Claimant/Respondent's Case

8. The Respondent avers that the application is an afterthought having been filed 6 months after the delivery of the judgment. Further, no reason has been given to justify the delay yet the Applicant had knowledge that judgment had been delivered.

9. It is the Respondent's position that the appeal lacks merit, as such, the application is an attempt to delay his enjoyment of the award.

10. The Respondent contends that the Applicant's oral application for stay of execution was denied and its advocates were directed to make a formal application regarding the same.

11. It is his case that the Applicant has failed to demonstrate the substantial loss that it will suffer in the event the orders sought are not granted. He urges that this is a critical issue that ought to have been adequately addressed.

12. The Respondent further avers that the Applicant has not demonstrated his inability to refund the judgment amount in the event the appeal succeeds. Further, that in itself should not deny him the right to enjoy the award as it would occasion him a grave injustice.

13. The application was disposed of by way of written submissions with the Applicant filing its submissions on 6/1/2020 and the Respondent on 17/1/2020.

Respondent/Applicant's Submissions

14. The Applicant submits that the Application was filed without undue delay. It is submitted that the delay in pursuing the appeal was as a result of the delay in obtaining a certified copy of the typed proceedings and a decree which were obtained on 26/9/2019 and 29/10/2019 respectively.

15. The Applicant is of the position that the appeal has chances of success as the Respondent was awarded salary for the unexpired term and relies on the cases of **Gabriel Kariuki Chomba vs. Top Image Limited [2014] eKLR** and **Robert Kennedy Moi vs. Attorney General & Another [2014] eKLR** where the Court declined to award salary for the unexpired period of contract.

16. Consequently, it is submitted that the appeal will be rendered nugatory if the orders sought are not granted as the Respondent does not have any known assets, which can be recouped if the appeal succeeds. The Applicant has relied on the Court of Appeal case of **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another (UR)** where the Court was of the opinion that the Respondent had the burden of proving what resources they have once the issue was raised.

17. The Applicant urges this Court to grant the orders sought as it has demonstrated its willingness to furnish security and has cited the case of **Amal Hauliers Limited vs. Abdulnasir Abukar Hassan [2017] eKLR** where orders for stay were granted due to the Applicant's readiness to furnish security. Further, the application should be allowed to alleviate the hardship the Applicant is likely to suffer if the orders are not granted.

Claimant/Respondent's Submissions

18. The Respondent submits that the conditions for granting stay of execution under order 42 rule 6 (2) of the Civil Procedure Rules 2010 have not been satisfied. The Application was made 6 months after judgment had been delivered and without giving a plausible explanation. The Respondent relies on the case of **Beatrice Mghamba Onyonka vs. Samuel Onsarigo Ooga [2019] eKLR** where the Court was of the view that filing the application 7 months after the ruling was delivered was an inexcusable delay.

19. It is submitted that the Applicant has failed to demonstrate the substantial loss it stands to suffer if the orders sought are not granted. He is of the position that for this Court to make a determination on whether this fact has been proved, there has to be evidence before it which is assessed and evaluated. He relies on the case of **Beatrice Mghamba Onyonka vs. Samuel Onsarigo Ooga [SUPRA]** where the Court held that an applicant has to prove the existence of other factors, which will irreparably negate their position as the successful party in the appeal.

20. On the issue of the security offered by the Applicant, the Respondent submits that this Court ought not to issue the orders sought, as the Applicant has not satisfied all the required conditions. In his opinion, the conditions should be fulfilled simultaneously and not alternatively as was held in the case of **Beatrice Mghamba Onyonka vs. Samuel Onsarigo Ooga [SUPRA]**.

21. It is submitted that the grounds of appeal in the draft memorandum of appeal lack merit as all the issues being challenged were determined by the Court after evaluating all the evidence that was presented by the parties.

22. Further, Courts have awarded Claimants salary for the unexpired term of the contract where it has been proved. He has cited the case of **Dennis Kipngetich Koech vs. MKPPA Kenya Limited [2018] eKLR** where the Court awarded the same.

23. I have examined all the averments and submissions of both Parties. I note that judgment in this case was delivered on 27/5/2019 in the presence of both Parties.

24. This application seeks stay of execution of the Court's judgment of 21/5/2019 on the ground that they intend to file an appeal against the

judgment of this Court.

25. The Respondent indicate that they filed a Notice of Appeal on 7/6/2019 and filed in in Court on 10/6/2019.

26. Order 42 rule 6(2) of the Civil Procedure Rules 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”.

27. Concerning this application, I note that the Applicants filed this application almost 6 months after the delivery of this Court’s judgment. They were in my view inordinately late in filing this application.

28. They have however indicated that they have an arguable appeal, which will be rendered nugatory if the orders sought are not granted. They are willing to deposit the decretal amount in a joint account held in the names of the Counsels on record.

29. Concerning the offer to deposit the decretal sum in a joint interest earning account and the fact that the Applicants have already filed a notice of appeal, I find the Claimants will not be prejudiced in any way save for some delay.

30. I exercise my discretion and allow the stay on condition that the Respondent/Applicant deposits the entire decretal sum in a joint interest earning account held in joint names of Counsels on record within 30 days. In default execution to proceed.

Dated and delivered in open Court this **10th day of March, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Onyiego holding brief Mambori for Respondent/Applicant

Claimants – Absent