



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2465 OF 2017

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

THIERRY POUSSARD.....CLAIMANT

-VERSUS-

BRADLEY LIMITED.....RESPONDENT

RULING

1. Pending before me for determination is the Notice of Motion Application dated 11th November, 2019 filed under Certificate of urgency. The same is brought under Rule 13 of the Employment and Labour Relations Rules, Order 43 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking Orders that:-

- 1. This application be certified urgent and be heard ex parte in the first instance (Spent).***
- 2. This Honourable Court be pleased grant an interim order of stay of the judgment and decree of this court made on the 28th October 2019 pending the hearing and determination of this application.***
- 3. This Honourable Court be pleased grant of stay of the judgment and decree of this court made on the 28th October 2019 pending the hearing and determination of the intended appeal therefrom.***
- 4. Costs of this Application be provided.***

2. The Application is premised on the grounds that:-

- a) The Respondent/Applicant is aggrieved by the judgment and decree of the court made on the 28th October 2019 and has filed a Notice of Appeal therefrom to the Court of Appeal.***
- b) The said judgment was made in total disregard of the respondent/applicant's documents, evidence and submissions on record and is thereby clearly erroneous.***
- c) Unless stay of the said judgment and order is granted in the first instance, the claimant shall execute as against the respondent/applicant and to its prejudice and loss including disruption of operations.***
- d) The Applicant herein is apprehensive that the claimant herein who is a foreigner with no fixed abode or known employment would not be available or able to reimburse any amount paid under the decree in the event of success of the intended appeal herein.***
- e) The intended appeal has good chances of success for reason that the claimant herein absconded duty and was thereby liable for summary dismissal and further had no capacity to contract the employment contract in the first instance for want of a valid work permit allowing him to work within the Republic of Kenya.***
- f) It is in the interest of justice that the present application be allowed.***

3. The Application is further supported by the Affidavit of ROBERT MACHARIA sworn on 11th November, 2019, in which he reiterates the averments made in the Notice of Motion Application.

4. The Application was later fixed for inter partes hearing on 5/12/2019, when the Claimant sought leave to file a Response to the instant Application. Parties further agreed to dispose off the Application by way of written submissions.

5. Despite leave to file a Response being granted to the Claimant none has been filed. Parties however filed their submissions to the Application.

Submissions by the Parties

Respondent/Applicant's Submissions

6. The Applicant submitted that it has satisfied the requirements for grant of the Orders sought in the instant Application as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and therefore urged this Honourable Court to allow the Application as prayed.

7. The Respondent/Applicant maintains that it is likely to suffer substantial loss if the stay orders sought are not granted as the Claimant is likely to levy execution against it leading to loss. To fortify this argument the Applicant cited and relied on several Judicial decisions among them is the case of **James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR**.

8. The Applicant maintained that the Claimant being a foreigner with no known fixed abode or known employment will not be able to reimburse the decretal sum thus rendering the intended Appeal nugatory in the event of success. For emphasis the Applicant cited the Authority of **Fina Bank Limited Vs Anil Mohanlal Chandarana & Another (2006)** in which matter the Plaintiff argued that the Defendants were not of a fixed abode, that it was not clear whether they lived in Kenya or that there was no evidence that they owned assets which could make restitution if the appeal succeeded. The Court in that matter went on to grant the stay orders sought on that basis.

9. The Applicant further relied on the case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417** and maintained that it has met the threshold for grant of the Orders sought in the instant Application.

10. The Applicant submitted that it is ready to procure a Bank guarantee for the said sum in favour of the Claimant which shall be enforceable upon the resolution of the intended Appeal as security. It maintained that a Bank guarantee is a recognized and objective form of security, which has been applied by several Courts.

11. In conclusion, the Respondent/Applicant urged this Honourable Court to allow its Application in terms of the Orders sought therein.

Claimant's Submissions

12. The Claimant on the other hand submitted that the Applicant has not met the criteria for granting of the Orders sought in its Application as provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and therefore urged this Honourable Court to dismiss the Application with costs.

13. The Claimant further submitted that the Applicant in this matter has not demonstrated how substantial loss will be occasioned on it. It merely states that it is likely to suffer substantial loss. The Claimant maintained that it is trite that such loss must be proved. To buttress this argument the Claimant cited the case of **Superior Homes (Kenya) Limited Vs Musango Kithome (2018) eKLR** where the Court in dismissing a similar application was of the view that substantial loss must be proved.

14. The Claimant further submitted that the Applicant has discriminated against him by stating that he is a foreigner with no fixed abode or known employment and would therefore be unable to refund the decretal sum and maintained that he subsequently secured employment in a multinational company and would therefore be in a position to refund the said sums.

15. The Claimant contended that the Application herein was not made in a timely manner the impugned Judgment having been delivered on 24th October, 2019.

16. On the issue of deposit of security for due performance of the decree the Claimant maintained that this Court should direct that the same be deposited in full owing to the nature of business carried out by the Respondent/Applicant and its largest shareholder Pevans Limited/Sportpesa which has been shut down for several months for lack of a trading licence.

17. In conclusion the Claimant submitted that the instant Application is only meant to delay him from enjoying the fruits of the Judgment in his favour, is not merited as it fails to meet the threshold for granting the Orders sought. He therefore urged this Honourable Court to dismiss the same with costs to the Claimant.

18. I have examined all the averments of the Parties herein. The Applicant/Respondent have submitted that they are aggrieved with this Court's judgement and have preferred an appeal. This is not contested by the Claimant who however submitted that he has another job in a multinational company in Kenya hence able to pay the decretal sum if the appeal succeeds.

19. The Claimant however did not give any proof of the said new employment nor did he respond to this application.

20. I therefore find the application has merit, which I allow in order to preserve the substratum of the intended appeal. Thus, I allow stay on condition that the Respondent/Applicant deposits the decretal sum in an interest earning account held in joint names of Counsels on record within 60 days. In default execution may proceed.

Dated and delivered in Chambers via Zoom this 30th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Kivindu for Claimant/Respondent

Njenga for Applicant/Respondent