



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 942 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st May, 2020)

TITUS WAMBUA MWENDWA.....CLAIMANT

-VERSUS-

ELSA'S KOPJE LIMITED.....RESPONDENT

RULING

1. Pending for determination before this Court is the Respondent's Notice of Motion Application dated 5th November, 2019. The same is filed under certificate of urgency and is brought under Sections 1A & 1B of the Civil Procedure Act, Order 42 Rule 6 (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. Seeking orders that:-

- 1. For reasons to be recorded the Application herein be certified as urgent and be heard ex-parte in the first instance for purposes of prayer 2 hereof.*
- 2. There be a temporary stay of execution of the judgment/decree herein and the consequential decree pending the hearing and determination of the Application inter-partes.*
- 3. There be a stay of execution of the Judgment/decree herein delivered on 15th October 2019 pending the hearing and determination of the substantive Appeal.*
- 4. The Court be pleased to make such other further order as may be just and expedient in the circumstances to meet the overriding objectives.*
- 5. The costs of this Application abide by the intended Appeal.*

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

- a) The Applicant has filed an Appeal against the Judgment of the Employment and Labour Relations Court made on 15th October, 2019.*
- b) The Application for Stay of execution has been promptly made within unreasonable delay.*
- c) The decretal sum is for Kshs. 238,380.00 with costs and interest.*
- d) The decree holder is a natural person whose means are unknown and with the natural vicissitudes attendant to life for which reason, the Applicant reasonably fear that payment of the decretal sum to him may result in substantial and unrecoverable loss should the Applicant ultimately succeed in the intended Appeal for it will be unable to recover the same.*
- e) The Applicant on the other hand is a big Company in Kenya and will be able to pay the sums ordered should it not succeed in the intended Appeal.*
- f) As further security; the Applicant offers should the Court see fit to remit the sum ordered to be paid for depositing in an interest bearing account in the joint names of its advocates as well as the advocates for the decree holder.*
- g) It is in the interest of the ends of justice and the Applicant be accorded an ample opportunity to exercise their right to Appeal.*

h) The grant of this Application will serve to meet the ends of justice and endure hardship upon the Applicant.

3. The Application further supported by the Affidavit of **MEHDI JANMOHAMED**, a Director with the Respondent/Applicant sworn on 5th November, 2019, in which he reiterates the averments made in the Notice of Motion Application.
4. In response to the Application the Respondent filed a Replying Affidavit deponed by **TITUS WAMBUA MWENDWA**, the Claimant herein on 13th November, 2019, in which he avers that the Applicant has not demonstrated how it will be occasioned substantial loss if execution were to proceed. He maintained that he was in gainful employment earning a monthly salary of Kshs. 70,000/- and hence capable of paying the decretal sum in the event the Appeal was successful.
5. The Claimant further averred that he owned assets and properties valued at over Kshs. 10 million that can also be attached to recover the decretal sum.
6. The Claimant stated that the Appeal herein has very slim chances of success given that this Court's Judgment was well reasoned. He maintained that the instant Application is only meant to delay him from enjoying the fruits of the Judgment delivered in his favour.
7. The Claimant urged this Court to dismiss the instant Application with costs to the Claimant.
8. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

Respondent/Applicant's Submissions

9. In its Submissions the Respondent/Applicant submitted that it has met the threshold for granting of the Orders sought as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010.
10. The Respondent/Applicant further submitted that it has a right to appeal this matter and that if the Orders sought in the Application, the Appeal will be rendered nugatory. To buttress this argument the Applicant cited and relied on the Court of Appeal decision in the case of **Housing Finance Company Limited Vs Sharok Kher Mohamed Ali Hirji & Another (2015) eKLR** where the Court held:-

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”

11. The Applicant further submitted that if the decree is executed the Appeal will be rendered nugatory as it shall not be able to recover the said amount from the Claimant. For emphasis the Applicant relied on the case of **Focin Motorcycle Co. Limited Vs Ann Wambui Wangui & Another (2018) eKLR**.
12. It is further submitted that the Claimant has failed to show his ability to repay the decretal sum should the Appeal succeed. It is further contended that other than the Claimant's averments of financial ability he has not supported the averments made in his Replying Affidavit and therefore this Court cannot ascertain his ability to refund the decretal sum. For emphasis the Respondent/Applicant cited the case of **National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & Another (U R) C.A. 238/2005** where the Court held that:-

“Once an Applicant expresses that 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.”

13. The Applicant further submitted that it is ready to deposit the entire decretal amount in a joint interest earning account held in the names of the parties' Advocates and/or abide by any other order made by this court regarding security pending hearing and determination of the Appeal.
14. In conclusion the Respondent/Applicant urged this Court to allow its application as prayed.

Claimant's Submissions

15. The Claimant on the other hand submitted that the instant application is based on mere suspicion and not supported by any evidence.
16. The Claimant further submitted that the Respondent/Applicant has not satisfied the mandatory requirement for the grant of the Orders sought as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and hence not entitled to the Order of Stay of execution. To buttress this argument the Claimant cited the case of **Macharia T/A Macharia & Co. Advocates Vs East African Standard (No. 2) (2002) KLR 63**.
17. The Claimant further maintained that he is in gainful employment and has assets valued at Kshs. 10 Million and would be able to refund the decretal sum should the appeal succeed. He further maintained that the instant Application is only meant to delay him from enjoying the fruits of his judgment.

18. The Claimant urged this Honourable Court to dismiss the instant Application with costs.

19. I have examined the averments of both Parties. The Applicant seeks stay on grounds that the Claimant/Respondent has no means to pay him back should the appeal filed succeed.

20. In response, the Claimant/Respondent submitted that he is in employment earning 70,000/= per month and owns property in the value of 10 million.

21. The Parties had partially compromised this application by the Claimant insisting that the Claimant be paid 50% of the decretal sum and the other 50% to be deposited in an interest earning account.

22. The main reason that would warrant issuance of stay order is to ensure preservice of the substratum of the appeal so that the appeal is not rendered annulity.

23. In this case, the Respondents are willing to deposit the entire decretal sum in an interest earning account.

24. The Claimant on the other hand has indicated that he is in gainful employment earning 70,000/= per month and also owning property and so he is able to pay the decretal sum if the appeal succeeds.

25. Since the Claimant has submitted he is in gainful employment, this Court expected proof of this through evidence. The same applies to the submissions that he has property worth 10 million. He presented no evidence to prove this.

26. However, this is a discretionary remedy and the decretal sum granted is not exorbitant that may render the appeal nugatory if paid. I therefore allow the application for stay on condition that 50% of the decretal sum be paid to the Claimant/Respondent and the other ½ be deposited 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 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musiti for Claimant – Present

Ombati for Respondent – Present