



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1933 OF 2015**

**EPHANTUS WAMBUA MACHARIA.....CLAIMANT**

**v**

**PRESBYTERIAN CHURCH OF EAST AFRICA...1<sup>st</sup> RESPONDENT**

**PRESBYTERIAN FOUNDATION.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. The initial judgment in this Cause was delivered on 21 June 2019.
2. The Respondents who had failed to attend the hearing despite service of a hearing notice successfully moved the Court to set aside the judgment and re-open the case.
3. After a fresh hearing, the Court delivered judgment on 6 March 2020. The Court found that the termination of the Claimant's employment was unfair and awarded him Kshs 594,958/-.
4. On 21 May 2020, the Respondents moved the Court seeking orders
  1. ...
  2. ...
  3. THAT a stay of execution of the judgment and decree dated 6<sup>th</sup> March, 2020 pending the hearing and determination of an appeal therefrom by the Respondents.
  4. THAT costs of this application be provided for.
5. The Duty Court directed the Respondents on the same day to serve the Claimant ahead of an *inter-partes* hearing on 9 June 2020.
6. The Claimant filed a Replying Affidavit in opposition to the motion on 3 June 2020.
7. On 9 June 2020, the Court directed the parties to file and exchange submissions.
8. The Respondents filed their submissions on 11 June 2020 and the Claimant filed his submissions on or around 17 June 2020.
9. The main grounds/reasons urged by the Respondents in seeking the stay of execution were that they stood to suffer substantial or irreparable loss if stay order was not granted; that they operate a non-profit medical facility and would be occasioned hardship and difficulty if forced to pay the decretal sum; that the Claimant would not be able to refund the decretal sum if paid out to him and that they were ready to provide a bank guarantee.
10. The Respondents also asserted that they had an arguable appeal with high chances of success.
11. In opposing the motion, the Claimant asserted that the intended appeal was not arguable and had no chances of success; the intended appeal was meant to buy time; that the Respondents should have moved the Court through the Review jurisdiction; the Respondents were introducing new evidence and that the Respondents had not demonstrated that he (Claimant) lacked financial ability to make any refunds of the decretal sum were the appeal to succeed

## **Legal principles**

12. The law and legal principles applicable to an application for stay of execution pending appeal are now legion and do not require a rehashing of the authorities.

13. The legal principles are direct derivatives from Order 42 of the Civil Procedure Rules and these are, *that an application is brought without inordinate delay; that substantial loss may be occasioned if a stay is not granted and that security for the due performance of the decree is provided for.*

## **Substantial loss**

14. Odunga J dealt with the issue of substantial loss and rendered himself in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, thus, the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit....it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

15. In urging that substantial loss would be occasioned, the Respondents contended that they would sustain substantial loss because being a non-profit making enterprise, they would be occasioned extreme hardship if forced to pay the decretal sum.

16. Further, it was asserted that the Claimant did not have the wherewithal to refund the decretal sum if paid before determination of the intended appeal.

17. The Court has considered the material placed before it, factual and legal.

18. In the Court's view, the assertion that a litigant is non-profit making entity cannot be a reason to excuse it from fulfilling its contractual obligations and/or meeting those contractual obligations or any legal liabilities found due.

19. Similarly, the fact that a decree-holder may not be able to refund the decretal sum was an appeal to succeed, is not a good enough reason without more for granting a stay of execution pending appeal.

20. In this regard, I would endorse the *dicta* by Emukule J in *Cosmas Kipkoech Sigei v Madrugada Ltd & Ar* (2010) eKLR that a stay will not be made on the ground that the decree-holder is a pauper, and will, therefore, be unable to refund the decretal sum if paid to him....

21. The Claimant testified in examination-in-chief that he operated an eye clinic in Nyeri. The testimony was never rebutted nor controverted.

22. It, therefore, cannot be that the Claimant is a pauper. It was upon the Respondents to demonstrate cogently that the Claimant was a man of straw and would thus not be able to refund the decretal sum thus leading to substantial loss.

23. The Respondents failed to prove this element of the principles and the Court, therefore, finds that despite offering security, the application must fail.

24. The motion is dismissed with costs to the Claimant.

**Delivered through Microsoft teams/email, dated and signed in Nairobi on this 26<sup>th</sup> day of June 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Mr. Warui instructed by Warui & Co. Advocates

For Respondent                      Mr. Amuga instructed by Amuga & Co. Advocates

Court Assistant                      Judy Maina