



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 109 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th June, 2020)

ROSE WAMBUI KARANJA.....CLAIMANT/RESPONDENT

VERSUS

ABERDARE ENGINEERING LIMITED.....RESPONDENT/APPLICANT

RULING

1. Pending before me for determination is the Applicant's Notice of Motion dated 12/5/2020 seeking Orders that:

1. Spent.

2. THAT this Honourable Court be pleased to grant an order for stay of execution of the Judgment delivered on 29/1/2020 pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to grant an order for stay of execution of the judgment delivered on 29/1/2020 pending the hearing and determination of the Appeal of at the Court of Appeal.

4. That the costs of this application be on the cause.

2. The application is premised on grounds that:

1. Judgment was entered for the Respondent/Claimant against the Applicant/Respondent on 29/1/2020 and the Respondent has threatened to proceed with execution.

2. The Applicant is willing to deposit the decretal sum in a joint interest bearing account in the names of he advocates of the parties herein or in the alternative the decretal sum be deposited as may be directed by this Honourable Court.

3. In view of the security offered, the Applicant should be given a chance to pursue his right of appeal. The appeal has high chances of success.

4. It is only fair and just that execution herein await the outcome of the appeal.

3. The application is supported by the affidavit of Engineer John Njaaga Wango the Applicant's Managing Director sworn on 12/5/2020 in which he reiterates the grounds of the application.

4. In response to the application, the Respondent filed a Replying Affidavit sworn by Victor Kariuki, an Advocate of the High Court on 19/5/2020. He avers that the application herein is res judicata as the Applicant on 29/1/2020 sought stay of execution of the Judgment for 30 days.

5. He avers that the Applicant has not placed any evidence of its Memorandum containing grounds of appeal in support of its contention that an appeal exists. He further avers that for an order of deposit of security to issue, the Applicant must demonstrate before the proper forum that its appeal has a high probability of success among other things which this Honourable Court has no jurisdiction to determine having become *functus officio*.

6. He contends that the application is premature as no decree has been extracted and no execution proceedings have been taken out. He further contends that the Applicant is guilty of laches because the application has been filed 3 ½ months since judgment.

Applicant's submission

7. The Applicant submitted that it is not for this Court to determine whether the appeal has merit or not as this Court would be sitting on appeal of its own judgment. It submitted that it has met all the conditions for grant of an order of stay and that the Respondent has not shown the loss that she will suffer as the entire decretal sum has already been deposited in Court.

8. It argued that it will not recover the sums paid to the Respondent should the appeal succeed. Further, the Respondent has not adduced any evidence to show that she will refund the entire decretal sum. It relied on the decision in **S Mehta & Sons v Stephen Ndungu Mwaura & another [2007] eKLR** where the Court held that the burden of proving that the Respondent is a man of straw rests with the Applicant but it is within the Respondent's knowledge what assets he has that would be sufficient to cover the decretal amount. It urged the Court to grant the orders sought.

9. I have examined the averments of the Parties herein. It is true that the Applicants on 29/1/2020 were granted 30 days stay. Since then, the Applicants filed a Notice of Appeal on 29.1.2020 and are now seeking further stay.

10. They aver that they are ready to deposit the decretal sum in a joint interest earning account in the names of counsels on record.

11. Under Order 42 rule 6(2) 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”.

12. In view of the fact that the Applicant has already filed an Appeal and is ready to deposit the decretal sum in an interest earning account held in joint names of counsels on record is a valid reason to allow the Application.

13. I therefore allow the application for stay and order that the Applicant/Respondent deposit the decretal sum in an interest earning account held in the joint names of counsels on record within 30 days. In default execution to proceed.

14. Costs in the cause.

Dated and delivered in Chambers via zoom this 25th day of June, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ondabu for Respondent – Present

Kariuki for Claimant – Present