



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 449 OF 2015

MOHAMED KHAMIS HEMED.....CLAIMANT

-VERSUS-

ALMASI BEVERAGES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2020)

RULING

The claimant filed an application on 27.11.2019 through Muu & Associates. The application was by way of a notice of motion under section 3 and 3A of the Civil Procedure Act and any other enabling provisions of law. The substantive prayers are for orders:

1. That the Court be pleased to lift the stay of execution orders issued on 10.06.2019.
2. That the Court be pleased to order that the sum of Kshs. 13, 550, 000.00 deposited in Court by the decree holder upon issue of the said stay of execution be released to the judgment debtor henceforth.
3. Costs of the application be provided for.

The application is based on the attached supporting affidavit by the claimant and upon the following grounds:

- a. The judgment debtor has been sold off to new shareholders by its previous shareholders, Centum Investment Limited.
- b. Judgment was delivered on 17.05.2019 and a notice of appeal issued on 20.05.2019 and the court granted stay of execution of the judgment on 10.06.2019.
- c. The typed proceedings in the suit have been ready since June 2019 and despite the decree holder bringing that fact to the attention of the judgment debtor, the judgment debtor has taken no steps to advance its appeal thereby frustrating the decree holder from the enjoyment of the fruits of his successful litigation.
- d. The termination of employment then the delay in filing the appeal has placed the claimant in serious pecuniary distress for over 5 years.

The respondent (judgment debtor) opposed the application by filing on 05.03.2020 the replying affidavit by Antony Kilonzo Advocate of the Federation of Kenya Employers. It is urged for the respondent as follows:

- a. On 20.05.2019 the respondent applied for certified copies of proceedings and further wrote a reminder on 31.01.2010.
- b. On 17.02.2020 the respondent paid for certified copies of proceedings. Thereafter the respondent requested for the certificate of delay to enable filing of the record of appeal.
- c. As per holding by the Court of Appeal in **Rodgers Abisai t/a Abisai & Company Advocates –Versus- Wachira Waruru & Another [2014]eKLR** the certified copies of judgment and proceedings are necessary to mount the appeal and the Court registry bears the duty to prepare them and to notify the appellant about their being ready.
- d. Under order 41 rule 6 (1) of the Civil Procedure Rules the jurisdiction to set aside the order of stay pending appeal as granted by

the trial court lies with the Court of Appeal and not the trial court and as the party aggrieved by the order of stay of execution pending appeal may apply.

e. The notice of motion should therefore be dismissed.

The Court has considered the material on record and the parties' respective submissions. The Court finds that if the applicant is dissatisfied with the order of stay of execution pending appeal, then the procedure is to apply to the Court of Appeal as per Order 41 Rule 6 (1) of the Civil Procedure Rules. The Court finds that in view of that provision the Court is clearly *functus officio* and it was misconceived for the applicant to invoke the Court's inherent jurisdiction. It is also clear that the respondent has taken steps towards filing the record of appeal and the application would fail in alleging that the respondent has failed to take such steps.

The Court has considered that the applicant was proactive in notifying the respondent about readiness of the application and with due diligence and co-operation the present application would not have been filed. Accordingly, the Court considers that each party will bear own costs of the application.

In conclusion, the claimant's application filed on 27.11.2019 is hereby dismissed with orders that each party to bear own costs of the application.

Signed, dated and delivered in court at **Nairobi** this **Friday, 5th June, 2020**.

BYRAM ONGAYA

JUDGE