



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2080 OF 2015

JUDY WACERA NJAU.....CLAIMANT

VERSUS

BELLADONNA PHARMACY LTD.....RESPONDENT

RULING

Introduction

1. On 31st May, 2019, Onyango J delivered judgment dated 27th May 2019 on behalf Ndolo J. The judgment was in favour of the Claimant whereby she was awarded kshs.1000,000 as composite damages for unfair termination through discrimination. The respondent was aggrieved by the said decision and filed a Notice of Appeal on 19.11.2018 challenging the whole judgment. Thereafter she filed the instant Notice of Motion dated 18.7. 2019 seeking the following orders-

a. THAT there be stay of execution of the judgment and the decree herein pending the hearing and determination of this Application.

b. THAT there be stay of execution of the judgment and the decree herein pending the hearing and determination of the intended Appeal.

c. THAT costs of this Application be in the cause.

2. The grounds upon which the application stands are set out in the body of the motion and the supporting affidavit sworn by Mr. Martin Ogang on 16.7.2019. In brief the respondent contended that she has filed a Notice of Appeal challenging the said judgment and applied to the Deputy Registrar for copy of the decree and typed proceedings; that the appeal is arguable and has very high chances of success; that the appeal raises serious issues of great public interest; that the claimant has already obtained the impugned decree and unless the order for stay is granted, the Claimant will proceed with the execution and occasion on her substantial loss; that the appeal will be rendered nugatory because the claimant has no steady source of income and as such recovery of the decreed sum will be difficult if not impossible should the appeal succeed after the execution; and finally, she contended that she is ready to offer security and abide by any conditions as to security that the court imposes on her.

3. She relied on **Butt v Rent Restriction tribunal [1979] KLR** to urge that the power to grant or refuse stay of execution is discretionary and it should not be exercised capriciously but in such a way as not to prevent an appeal. She further relied on **Alhyder Trading Company Limited v Lucy Jepngetich Mibei [2016] e KLR** to urge that whereas the legal burden of proving that the respondent cannot repay the decreed sum remains with the applicant, the evidential burden remains on the respondent to prove that he would be able to refund the decreed sum if the pending appeal succeeds, and the failure to discharge the said burden means that the applicant stands to suffer substantial loss.

4. On the issue of security, she urged that a suitable bank Guarantee is sufficient and relied on **Rosengers Ltd v safe Deposit Centres Ltd [1984] 3 All ER** where the court held that so long as the opposite party is adequately protected, the least disadvantageous security to the party giving the security should be given.

5. The Claimant has opposed the Application vide his Replying Affidavit sworn on 30.10. 2019. In brief he contended that the application lacks merits and as such it should be dismissed with costs. She contended that she is of ample means and can clearly repay the decretal sum; that the application has not disclosed any arguable appeal with likelihood of success; that the proposed appeal does not raise any issue of public interest since it is only a case between two private parties; and that the decree being one of money, stay should not issue. She relied on **Kenya shell limited v Benjamin Karuga & another [1986] e KLR** and **Dr. GN Muema v Miriam Maalim Bishar & another Civil Appeal No.20 of 2016** for emphasis.

Issues for determination and Analysis

6. I have carefully considered the application, affidavits and the submissions filed. The main issues for determination herein is whether the application meets the threshold for granting stay pending appeal. The legal threshold for granting stay pending appeal is set out by Order 42 rule 6 (2) of the Civil Procedure Rules as follows-

“No order for stay of execution shall be made under sub-rule (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.

7. In this case the impugned judgment was delivered on 31.5.2019 and the instant application for stay was made on 18.7.2019. The time taken before making the application was less than two months after the judgment and as such it was not inordinate delay.

8. As regards the issue of substantial loss, the applicant contended that the claimant is without a steady income and as such she will not be able to repay the decreed sum if the appeal succeeds after execution of the decree. On the other hand, the claimant alleged that she is capable of refunding the decreed sum should the appeal succeed. In **ABN Amro Bank N v Lemond Foods Limited Civil Application No.15 of 2002** the Court Appeal held that :

“... the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in bank and so on.”

9. In **Kenya shell limited v Benjamin Karuga & Another [1986] e KLR** the Court Appeal held that:

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

10. The amount involved is a huge sum of kshs.1000,000 and the claimant has not tendered any evidence towards discharging that evidential burden. She should have tendered evidence of steady source of income or at least ownership of some assets which is capable of satisfying the decretal sum should the pending appeal succeed. Consequently, I return that the applicant has established that substantial loss will be occasioned on her and the appeal will be rendered otiose because the claimant has not proved that she will be able to refund the whole sum immediately if the appeal succeeds.

11. As regards the issue of security, I appreciate that granting stay order to protect an appellant should be done upon condition that safeguards the decree-holder’s interest should the appeal fail. Such conditions should ensure that the decreed sum is promptly availed to the decree-holder if the appeal fails. Consequently, I grant stay of execution of the impugned judgment and decree on condition that the whole decretal sum is deposited in a interest earning bank account in the joint names of the Advocates for the two parties herein, within 21 days from the date of this ruling.

12. Each party to bear her own costs.

Dated, Signed and delivered at Nairobi this 2nd day of July, 2020

ONESMUS N. MAKAU

JUDGE