



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 735 OF 2017

JARED NYAMWEYA MATUNA.....CLAIMANT

V

KABANSORA MILLERS LTD.....RESPONDENT

RULING NO. 2

1. On 22 May 2020, the Court dismissed an application by Kabansora Millers Ltd (Respondent) in which it sought orders staying execution and setting aside of the Judgment delivered on 17 January 2020, and grant of leave to defend.

2. Undeterred, the Respondent filed another motion dated 4 June 2020 seeking orders

1. ...

2. **THAT** there be a stay of execution of the ex-parte judgment and decree dated 17th January 2020 pending the hearing and determination of this application.

3. **THAT** there be a stay of execution of the ex-parte judgment and decree dated 17th January 2020 pending the hearing and determination of an appeal by the Respondent against this Court's Ruling dated 22nd May 2020 dismissing the Respondent's application to set aside the ex-parte judgment.

4. **THAT** costs of this application be provided for.

3. The grounds relied on by the Respondent in support of the application were that the Intended Appeal had good chances of success; the Respondent had been shut out of the hearing of the Cause due to a mistake of its advocate who failed to file a Response or attend the hearing; the Claimant was a person of unknown means and would not be able to refund the decretal sum if execution proceeded and eventually the Intended Appeal succeeded; the Respondent stood to suffer a substantial loss if a stay was not granted and that the Respondent was ready to provide security.

4. The Claimant filed a replying affidavit sworn on 17 June 2020 in opposition to the motion, and submissions on 23 July 2020.

5. Opposing the application, the Claimant asserted that the Respondent had been served but failed to file Response and/or attend the hearing; that a previous application seeking a stay of execution and setting aside of the judgment had been dismissed; the Intended Appeal was not meritorious; that there was no evidence that the Respondent would suffer a substantial loss if the stay was not granted; that there was no demonstration that he was not a person of means and that there was no imminent danger of execution as costs had not been taxed.

6. The Court has considered the motion, affidavits and submissions.

7. The legal principles applicable to an application for stay of execution and/or setting aside an *ex parte* judgment are now legion (see for instance *Kanji Naran v Velji Ramji* (1954) 21 EACA 20); *Pithon Waweru Maina v Thuka Mugiria* (1983) eKLR and *Patel v EA Cargo Handling Services Ltd* [1974] EA 75).

Man of straw

8. Apart from asserting that the Claimant would not be able to refund the decretal sum if stay order was not granted, the Respondent did not provide any iota of evidence on the Claimant's means.

9. 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.

10. In this respect, the Court would endorse the dicta by the Court 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....

Substantial loss

11. What constitutes substantial loss has been explained in several decisions by the High Court.

12. The High Court in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR held and which I endorse that 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.....

13. The Respondent did not demonstrate that it would suffer a substantial loss if the orders sought were not allowed.

14. The Court finds that the Respondent failed to meet the requisite test for the granting of the orders it sought.

15. Further, this is the second attempt by the Respondent to secure a stay of execution/setting aside of the judgment of 17 January 2020. It is only the reasons advanced to secure the order which has mutated.

16. In that regard, the Court finds the application an abuse of the court process.

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

Delivered through Microsoft teams, dated and signed in Nairobi on this 25th day of September 2020.

Radido Stephen

Judge

Appearances

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

Respondent Mr. Amuga instructed by Amuga & Co. Advocates

Court Assistant Judy Maina