



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 10 OF 2020

TAMARIND MANAGEMENT LIMITED.....APPELLANT

VS

PETER SOMBO.....1ST RESPONDENT

ANDERSON FEDHEHA BUNI.....2ND RESPONDENT

(Appeal from the judgment of Hon. Lesootia A. Saitabu, PM dated and delivered on 13th February 2020

in Mombasa CMELR Case No 449 of 2018 consolidated with CMELR Case No 450 of 2018)

RULING

1. This ruling relates to the Appellant's Notice of Motion application dated 11th March 2020, seeking stay of execution of the judgment of **Hon. Lesootia A. Saitabu, PM** dated 13th February 2020 and any decrees arising therefrom, pending appeal before this Court.

2. The application which is supported by an affidavit sworn by the Appellant's Head, Human Resources, Support and Benefits, Maureen Namiroi Sunyai, is based on the following grounds:

a) The trial court delivered its judgment in CMELR Case No 449 of 2018 (consolidated with CMELR Case No 450 of 2018) on 13th February 2018 in favour of the Respondents in the sums of Kshs. 1,411,518 and Kshs. 1,346,906 respectively made up of:

i) Unpaid leave days for 7 years at the rate of one month's salary for each year worked;

ii) House allowance for 7 years;

iii) Public holiday pay for 7 years;

iv) Severance pay;

v) 7 months' salary in compensation;

vi) Interest and costs.

b) The Respondents were former employees who worked as musicians earning salaries of Kshs. 38,400 and Kshs. 40,200 respectively, at the time their employment was terminated;

c) On the date of the said judgment, the Appellant sought and was granted stay of execution for thirty (30) days;

d) The said stay of execution was set to lapse on 13th March 2020;

e) The Respondents had since made clear their intention to execute the judgment, by issuing a demand for payment under the threat of execution without any further reference to the Appellant;

- f) A substantial loss will be occasioned to the Appellant unless the orders sought are granted because there is a real threat of execution against the Appellant for the judgment sum of Kshs. 3,272,142, inclusive of costs;
- g) The Appellant will suffer substantial loss because there is unlikelihood that the Respondents will be able to refund the said amount in case the appeal succeeds;
- h) The Appellant is willing to abide with the Court's terms as to security, including depositing an amount to be determined by the Court in a joint interest earning account, pending the hearing and determination of the appeal;
- i) The Appellant has filed an appeal which appeal has a high chance of success;
- j) The application has been brought without delay;
- k) It is in the interest of justice that the application be allowed.

3. In response to the Appellant's application, the Respondents filed a joint replying affidavit on 20th July 2020.

4. The Respondents accuse the Appellant of delaying the prosecution of their claims, by failing to follow through on negotiations for an out of court settlement, filing unnecessary interlocutory motions and filing a Response out of time.

5. The Respondents further accuse the Appellant of failure to inform them of the initiated appeal process.

6. The Respondents state that the Appellant has not satisfied the legal threshold for grant of the order sought.

7. The Respondents point out that the Appellant has failed to demonstrate that the intended appeal is arguable with a reasonable chance of success.

8. They add that the Appellant has not shown that the said appeal will be rendered nugatory if the application is not allowed.

9. The Respondents further state that the present application is a mere afterthought, intended to delay fulfilment of the Appellant's obligation to them.

10. The Appellant's application is brought under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which sets the following conditions for grant of orders of stay of execution pending appeal:

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 performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. On the issue of substantial loss, the Respondents relied on the decision in ***Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR*** where the Court stated the following:

“The substantial loss under Order 42 Rule 6 of the Civil Procedure Rules especially where a money decree is involved lies in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. There must be cogent evidence which shows the inability or financial limitation on the part of the Respondent to refund the decretal sum. And it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent”.

12. On its part, the Appellant submits that that once the ability of the Respondents to refund the decretal sum was questioned, the burden shifted to the Respondents to prove otherwise.

13. The Appellant states that the Respondents may not be in a position to refund the judgment sum as they are currently not in gainful employment.

14. It is an undisputed fact that the Respondents lost their employment with the Appellant.

15. Further, the Respondents did not contradict the Appellant's assertion that they are not currently employed. In fact, they chose not to address the Court on their financial means.

16. In the circumstances of this case, it seems to me that the Appellant's right of appeal may be prejudiced if stay of execution is not granted.

17. In its application, the Appellant states that it is willing to abide with the Court's terms as to security, including depositing an amount to be determined by the Court in a joint interest earning account, pending the hearing and determination of the appeal.

18. In its written submissions however, the Appellant seeks to persuade the Court to accept a cashless undertaking. The Court did not see any justification for this departure.

19. At any rate, if the Appellant is apprehensive that the Respondents may not be able to refund the decretal sum if the appeal succeeds, the Respondents must also be concerned about recouping the fruits of their judgment if the appeal fails. What is good for the goose is equally good for the gander.

20. In the ultimate, I grant an order of stay of execution of the judgment delivered by **Hon. Lesootia A. Saitabu, PM** on 13th February 2020, subject to the condition that the Appellant shall deposit the entire decretal sum in an interest earning account in the joint names of the parties' Advocates within the next thirty (30) days from the date of this ruling.

21. Failure to adhere to the foregoing condition will lead to an automatic lapse of the stay hereby granted.

22. The costs of this application will be costs in the appeal.

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Weru for the Appellant

Miss Mwangi h/b for Mr. Ngonze for the Respondents