



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 125 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2020)

RUTH ADHIAMBO APINDI.....CLAIMANT

VERSUS

UNILEVER KENYA LIMITEDRESPONDENT

RULING

1. Pending for determination before me is the Respondent's Notice of Motion Application dated 23rd, June, 2020 filed pursuant to the provisions of Section 12 (3) (viii) of the Employment and Labour Relations Court Act, 2011, Rule 17 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 42 Rule 6 of the Civil Procedure Rules, 2010. The Application is filed under Certificate of Urgency and seeks the following Orders that:-

1. *Service of this application be dispensed with and this application be certified as urgent and the same be heard ex parte, in the first instance (Spent).*
2. *Pending the hearing and determination of this application inter partes, there be a stay of execution of the Judgment of the Honourable Court delivered on 28th May 2020.*
3. *Pending the hearing and determination of the intended appeal, there be a stay of execution of the Judgment of the Honourable Court delivered on 28th May 2020.*
4. *The costs of this application be costs in the cause.*

2. The Application is premised on the grounds that:-

- a) *On 28th May 2020, the Honourable Lady Justice Hellen Wasilwa delivered a Judgment finding inter alia that the Claimant's termination on grounds of gross misconduct was unlawful and awarding Kshs. 674,030.35 as compensation in respect thereof.*
- b) *On the same date, the Applicant requested for and was granted 30 days interim stay of execution, which will lapse on 27th June 2020.*
- c) *The Applicant intends to appeal against part of the judgment and has lodged its Notice of Appeal.*
- d) *If a stay of execution pending the hearing and determination of the Appeal is not granted, the Applicant's intended appeal, if successful, will be rendered nugatory.*
- e) *The Claimant's residential addresses and/or assets are unknown to the Applicant and there is an imminent risk that the Applicant will not recover the substantial decretal amount of the sum of Kshs. 674,030.35 together with costs in the event that its intended Appeal is successful. The Applicant is likely to suffer substantial loss.*
- f) *The Applicant has an arguable appeal and seeks to challenge material errors of law and fact by the Honourable Court.*
- g) *In the absence of orders staying execution of the Judgment, there is an imminent risk that the Respondent will take action to execute for recovery of the substantial judgment amount before the intended appeal is heard and determined. The intended appeal would consequently be rendered nugatory occasioning a grave injustice to the Applicant in the event that its intended*

appeal is successful.

h) The Applicant is ready and willing to furnish such security on such terms as the Honourable Court may deem just.

i) It is absolutely crucial and in the interests of justice that the Application herein be heard as a matter of urgency and the orders sought herein granted.

3. In response to the Application the Claimant swore a Replying Affidavit on 1st July, 2020 and further filed Grounds of Opposition on 1st July, 2020, in which they aver that the instant Application ought to be dismissed as the same is not filed in the correct forum by dint of Rule 5 (2) (b) of the Court of Appeal Rules.

4. The Claimant further maintains that the Respondent having filed and lodged a Notice of Appeal in this matter rendered this Court functus officio and thereby making the instant Application bad in law and an abuse to the Court processes.

5. She argued that the Applicant has not met the threshold for the granting of the Orders sought therein.

6. She further maintained that the instant Application is only meant to delay her from enjoying the fruits of the Judgment in her favour and therefore urged this Honourable Court to dismiss the Application with costs to the Claimant.

7. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

8. The Respondent/Applicant submits having met the threshold for the grant of the Orders sought in the instant Application and therefore urged this Court to allow the Application as prayed.

9. It is argued that the Applicant has an arguable appeal as has been set out in the draft Memorandum of Appeal annexed to the Supporting Affidavit of Shirley Gulenywa. Further that the Appeal raises triable issues in fact and in law that ought to be canvassed before the Appellate Court.

10. It is further argued that this Court cannot therefore make any determination on the merit of the Appeal. To buttress this argument the Applicant cited the case of **Kenya Airports Authority Vs Mitu-Bell Welfare Society & Another (2014) eKLR** and **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others (2013) eKLR**.

11. The Applicant urged this Court to exercise its discretion and grant the orders sought and protect its right of Appeal. For emphasis the Applicant cited the authority of **John Mwangi Ndiritu Vs Joseph Nderitu Wamathai (2016) eKLR** that referred to the case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417** where it was held that Courts ought to exercise discretion in allowing Applications for stay of execution in a manner in which it will not prevent an appeal.

12. The Applicant argued that its stands to suffer substantial loss if this Court fails to grant the orders sought and thus rendering its appeal nugatory. For emphasis the Applicant relied on the provisions of Order 42 Rule 6 and the Court of Appeal decision in the case of **Antoine Ndiave Vs African Virtual University (2015) eKLR** where the Court held that in a money decree substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. The Court in that matter went on to state that it matter not the amount as long as the Respondent cannot pay back.

13. The Applicant contends that the Claimant has failed to disclose to this Court her assets or any source of income in proof of her ability to settle the decretal sum. It further contended that the Claimant's inability to pay back the amount is further supported by the fact that she remains indebted to it for a sum of Kshs. 1,871,908.35/- as indicated in its counterclaim which amount remains sue and owing to it.

14. The Applicant further contends that the Claimant failed to discharge the burden of proving that she had the ability to settle the decretal sum as was held in the cases of **International Laboratory for Research on Animal Diseases Vs Kinyua (1990) eKLR**, **Kenya Orient Insurance Co. Ltd Vs Paul Mathenge Gichuki & Another (2014) eKLR** and **Focin Motorcycle Co. Limited Vs Ann Wambui Wangui & Another (2018) eKLR** where the Courts held that the evidential burden shifts to a Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him pending appeal and the pending appeal were to succeed.

15. The Applicant maintained that it is ready and willing to provide such security as may be ordered by this Honourable Court and that the Claimant stands to suffer no prejudice in the event the same is ordered. For emphasis the Applicant cited and relied on the authority of **Focin Motorcycle Co. Limited Vs Ann Wambui Wangui & Another (2018) eKLR**.

16. The Applicant further submitted that it filed the instant Application without unreasonable delay and that this Court has jurisdiction to entertain the instant Application and that lodging on the intended Appeal does not necessarily deprive this Court of its jurisdiction to entertain an Application for stay of execution. To fortify this argument the Applicant cited and relied on the case of **Gathara Chuchu & 473 Others Vs Gitiu Coffee Growers Co-operative Society & Another (2008) eKLR** and **Mursal Guleid & 2 Others Vs Daniel Kioko Musau (2016) eKLR**.

17. It further maintained that this Court is not functus officio as alluded to by the Claimant by dint of Order 22 Rule 22 of the Civil Procedure Rules where it clearly states that Applications for stay can be filed in the Court of first instance or appellate court. To buttress this argument the Applicant cited and relied on the cases of **Athanas Bonaventures Wanyama & Another Vs Land Registrar Kiambu District & Another (2014) eKLR** and **Charles Ondieki Matogo Vs Bizone Printing & Another (2018) eKLR**.

18. In conclusion the Respondent/Applicant urged this Court to find merit in its Application dated 23rd June, 2020 and allow it in terms of the reliefs sought therein.

Claimant's Submissions

19. The Claimant on the other hand submitted that the instant Application is filed in the wrong forum as this Court's jurisdiction is limited to oral applications for stay of execution. She further contended that the instant/formal Application ought to be filed at the Court of Appeal. She relied on the provisions of Rule 5 (2) (b) of the Court of Appeal Rules.

20. The Claimant maintains that the Applicant having lodged its Appeal in this matter rendered this Court functus officio and thereby robbing this Court of the jurisdiction to entertain this Application. She further contends that the instant Application offends the rule of finality to litigation.

21. The Claimant further submitted that there is no appeal filed before the Court of Appeal as no record of Appeal has been filed as at yet. She further contended that the instant Application is only meant to deny and/or delay her from enjoying the fruits of the Judgment of this Court entered in her favour as against the Respondent herein. For emphasis, the Claimant cited the case of **Hamida Yaroi Shek Nuri Vs Faith Tumaini Kombe & 2 Others (2019) eKLR** where the Court opined that *filing of a Notice of Appeal is not an affirmation that an appeal must/will be filed. One may lodge a Notice of Appeal but decide not to file an Appeal.*

22. The Claimant maintains that the Applicant has failed to meet the threshold for grant of the Orders sought in its Application and therefore urged this Court to find the same devoid of merit and accordingly dismiss it with costs. For emphasis the Claimant cited several Judicial decisions among them the Supreme Court decision of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR** and the Court of Appeal decision in the case of **Chris Munga N. Bichage Vs Richard Nyagaka Tongi & 2 Others (2013) eKLR** and the provisions of Order 42 Rule (6) of the Civil Procedure Rules as read with Section 75 of the Civil Procedure Act.

23. On the issue of furnishing security, the Claimant submitted that the same ought to be deposited in a joint interest earning account in which both the Applicant and the Judgment Creditor are signatories as a condition should this Court proceed to allow the instant Application.

24. In conclusion, the Claimant urged this Court to set aside the interim orders in place and dismiss the instant Application with costs to the Claimant for lack of merit.

25. I have examined the averments and submissions of both Parties herein. This Court has jurisdiction to hear this application by virtue of Order 42 rule 6 (2) of the Civil Procedure Act which states as follows:-

2) **"No order for stay of execution shall be made under subrule (1) unless:**

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

a) 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".

26. The conditions to be fulfilled by the Applicant are as stated in the Order above. These include filing the application timeously which the Applicant has done. The conditions also include showing that the application has merit and lastly the Applicant is ready to adhere to any conditions on security if granted.

27. The Applicant has indicated that they have filed an appeal in this case and therefore if the appeal succeeds, the same will be rendered nugatory unless the stay is allowed. In my view, this is a good reason to show the application has merit.

28. The Applicant is also ready to abide by any condition on security if granted.

29. I therefore find that this application has merit. I allow the stay on condition that the decretal sum is deposited in an interest earning account held in joint names of the Counsels on record within 60 days. In default execution to proceed.

Dated and delivered in Chambers via zoom this **16th day of September, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wetende for Applicant – Present

Ogadsa for Respondent – Present