



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 25 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa On 29<sup>th</sup> October, 2020)**

**STEPHEN CHASE KISAKA.....CLAIMANT**

**VERSUS**

**EMIRATES AIRLINE LIMITED.....RESPONDENT**

**RULING**

1. The Applicant/Respondent, Emirates Airline Limited, filed a Notice of Motion dated 25<sup>th</sup> September 2020 brought under *Sections 3, 12(i), (ii) and (viii) and 13 of the Employment & Labour Relations Court Act, 2011 and Order 42, rule 6 of the Civil Procedure Rules, 2010*. It seeks for Orders that pending the hearing and determination of this application and the appeal, there be a stay of execution of the judgment of this Honourable Court delivered on 21<sup>st</sup> May 2020 and for costs of the application to be provided for.

2. The Application is founded on the grounds: That this Honourable Court delivered judgment in favour of the Claimant for Kshs. 6,650,695 plus USD 27,000 together with costs and interest on the judgment sum against the Respondent. That the Respondent being aggrieved by the judgment intends to appeal to the Court of Appeal and has thus filed a Notice of Appeal and requested for typed proceedings. That the appeal has reasonable prospects of success and that the Respondent is unlikely to recover the awarded substantial sum should the Claimant whose means and assets are unknown to the Respondent proceed to execution. That the Respondent will suffer substantial loss and its intended appeal will be rendered nugatory unless an order of stay of execution is granted.

3. Further, that the Respondent is ready and willing to abide by the terms of the court with respect to security for the judgment sum that the court may consider necessary for grant of stay of execution. That it is in the interest of justice that there be a stay of execution pending hearing and determination of the appeal filed herein.

4. The Application is supported by the Affidavit sworn by the Respondent/Applicant's Financial Controller, Jatinder S Phull who attaches copies of the notice of appeal together, the letter requesting for proceedings, the draft memorandum of appeal in his affidavit. He avers that by a letter dated 23/07/2020, the Respondent proposed an agreement as to costs in response to the Claimant's bill of costs and proposed placing the judgment sum in a joint account as security for the decree pending the intended appeal. That however, the Claimant's advocates did not respond to the said letter and instead served their advocates with a Taxation Notice dated 27/08/2020 to the effect that the Claimant's bill of costs is scheduled for taxation on 02/10/2020. He contends that the Respondent is apprehensive that the Claimant will proceed to issue execution against the Respondent once his bill of costs is taxed and he believes that the Claimant will suffer no prejudice if the orders sought are granted. He further produced exhibit marked **JSP-1**.

5. The Claimant filed a Replying Affidavit sworn on 8<sup>th</sup> October 2020 wherein he avers that the Respondent/Applicant's 5 months delay in filing the application herein is unreasonable and inordinate and that it has also not given any plausible reason for the said inordinate delay. That the Respondent/Applicant has further not demonstrated it will suffer any substantial loss if the orders sought are not granted. It is his averment that he is in a good financial position to pay the decretal sum if the Respondent/Applicant is to succeed on its appeal, as he is a property owner and the Chief Operating Officer at Ocean Airlines Ltd. He further avers that the application herein does not meet the threshold for grant of stay orders as sought and is a ploy to delay his enjoying the fruits of the judgment.

6. It is the Claimant's averment that if this Honourable Court is inclined to grant the orders sought, the Respondent/Applicant be ordered to release half of the decretal sum to him and the other half be deposited in a joint interest earning account in the joint names of his advocates and the Respondent/Applicant's advocate. He urges the Court to dismiss the Application dated 25/09/2020 with costs.

7. The Application was dispensed with by way of written submissions.

**Applicant/Respondent's Submissions**

8. The Applicant/Respondent submits that it has met the threshold to warrant the court exercising its discretion to grant a stay of execution pending the hearing and determination of the appeal as under **Order 46 Rule 6(2)**. It relies on the case of **Butt v Rent Restriction Tribunal [1979] eKLR** where the Court of Appeal held that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory. It submits that the present case does not warrant a departure from the general rule that a stay ought to be granted where there is no overwhelming reason to deny it.

9. With regards to substantial loss, it cites the Court of Appeal case of **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR** and submits that the Claimant has not demonstrated in his replying affidavit, his ability to refund the said substantial award should it succeed on appeal. That it is not enough for the Claimant to state he is a property owner or that he is in employment and that evidence of these facts is required. Further, that in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**, the court held that once an Applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since it is a matter which is peculiarly within his knowledge. It also relies on the Court of Appeal decision in **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** in submitting that the judgment being for a money decree does not take away the Court's discretion to grant a stay and does not obviate the danger of substantial loss.

10. It is the Applicant/Respondent's submission that upon judgment being delivered there was no immediate threat of its enforcement and that the decree has also not yet been issued. That while the Claimant was required to have the costs payable to him assessed and taxed as a matter of law before executing the orders of the Court, he did not obtain any such orders. That it thus filed the present Application in less than a month after being served with the taxation notice and it refers the court to **Absolom Oluchina v Joseph Wagukhu [2016] eKLR** where it was held that there is no undue delay where an application for stay is brought within a month. That this Court should note it filed the notice of appeal on 26/05/2020 soon after delivery of judgment and that considering the Claimant's intention to execute, only then was it necessary to file the instant application.

11. The Applicant/Respondent submits that the terms for security to be described by this Court ought to be in the interests of both parties. It relies on the case of **Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another [2018] eKLR** where the Court held that the applicant proposing to provide security is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. The said Court further held that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. It is thus the Applicant's submission that since it has made the necessary offer for the security of the decree, it should be given a chance to canvas its appeal with the subject of the appeal being preserved. He concludes that the balances of justice recommend themselves to an order to secure the entire judgment sum so as to avoid a likely hardship in the recovery of any sums, should the appeal succeed.

#### **Claimants/ Respondent's Submissions**

12. The Claimants/Respondent submits that that this Court has to be satisfied that the Applicant has met the provisions of **Order 42 Rule 6(2) (a) and (b) of the Civil Procedure Rules, 2010** which is that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and 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. He cites the case of **Kenya National Union of Nurses v Nairobi County Government & 5 others [2016] eKLR** where this Honourable Court relied on the case of **Chris Munga N. Bichange vs. Richard Nyagaka Tongi & Others (2013) eKLR** which discussed the principles governing stay pending appeal that the Court is to entertain.

13. He further relies on the case of **Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR** wherein Justice G.V Odunga analysed the meaning of substantial loss and submits that the Applicant has not adduced any evidence to show that the Respondent will not remain in his job until pensionable age. That the Applicant has therefore not demonstrated any substantial loss it is likely to suffer if the stay order is not granted. As to what constitutes unreasonable delay, the Claimant/Respondent relies on the case of **Charles Nyamwega v Asha Njeri Kimata & another [2017] eKLR** where the court considered that what constitutes unreasonable delay varies from the circumstances of each case. He submits that in the present suit no stay orders were made on judgment and that this Court should not aid an indolent party at the expense of a successful party.

14. The Claimant/Respondent further submits that as he had prayed in his replying affidavit herein, if the Respondent is to be granted the orders sought, he is to be paid half the decretal sum and the balance be deposited in a joint interest earning account within 30 days of your ruling, failure to which execution to proceed. To this end, he relies on this Honourable Court's decision in **Benson Ndwiga Njue & 108 others v Central Glass Industries Limited [2019] eKLR**.

15. He submits that the Applicant has not in any way submitted either in its application or submissions, whether the intended appeal is arguable and will be rendered nugatory if stay order is not granted. Further, that the Memorandum of Appeal annexed to the Supporting Affidavit sworn by Jatinder S Phull is neither filed at the Court of Appeal nor signed by the Applicant herein and is therefore not a pleading to be relied upon by this Court. It is submitted by the Claimant/Respondent that the Applicant should bear the costs of this application as it does not meet the threshold for grant of stay orders pending appeal.

16. I have examined the averments of the Parties herein. In terms of Order 42 rule 6(2) the Applicant certifies the requirement for stay in that the application was filed without delay and that they are willing to adhere by any conditions concerning security as this Court may direct.

17. They aver that the Respondent will not be able to refund them the decretal sum if the appeal succeeds.

18. The onus of proving the issue that he is capable of refunding the decretal sum if the appeal succeeds rests upon the Claimant/Respondent and which the Claimant did not demonstrate.

19. In the circumstances, I find the application for stay is merited. I grant the stay on condition that the Respondent pays the Claimant ½ the

decretal sum and the other ½ be deposited in an interest earning account held in joint names of Counsels on record within 30 days. In default execution to proceed.

**Dated and delivered in Chambers via zoom this 29<sup>th</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kirimi for Respondent/Applicant – Present

Nekesa holding brief Simiyu for Claimant/Respondent - Present