



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CIVIL APPEAL NO 5 OF 2019

[INITIALLY MOMBASA HIGH COURT CIVIL APPEAL NO 282 OF 2018]

MANUCHAR KENYA LIMITED.....APPELLANT

VS

DENNIS ODHIAMBO OLWETE.....RESPONDENT

RULING

1. By his Notice of Motion application dated 27th August 2020 and filed in court on 28th August 2020, the Respondent seeks stay of execution of the order made by this Court on 30th July 2020, directing that any assets, including money, held on account of the judgment of the lower court be released to the Appellant.
2. The application is supported by the affidavit of Richard Mbuya, Advocate and is based on the following grounds:
 - a. That pursuant to the judgment delivered by this Court on 30th July 2020, the firm of Kinyua Muyaa & Company Advocates had written to Sidian Bank on 18th August 2020, asking for release of monies held in a joint interest earning account;
 - b. That the release of the aforementioned monies being Kshs. 391,890 would be detrimental to the Respondent who has appealed against the judgment aforementioned by lodging a notice of appeal dated 12th August 2020;
 - c. That it is only prudent that the subject monies be held in the joint interest earning account of the parties since this matter is subject to a further appeal whose outcome would by and large affect the directions and/or orders given by the superior special court requiring the aforementioned monies to be released;
 - d. That the appeal by the Respondent is of much significance given that it affects the status of all WIBA matters and subsequent directions taken by various courts across the Republic;
 - e. That if the Respondent is not granted the order of sought, the appeal shall be rendered nugatory;
 - f. That if a stay of execution of the order made by the Court on 30th July 2020 that any assets, including money held on account of the judgment of the lower court be released to the Appellant is not granted, the Respondent would be greatly prejudiced;
 - g. That the application has been brought without undue and/or unreasonable delay;
 - h. That the Appellant will not suffer any prejudice if the order sought is granted;
 - i. That the Respondent's appeal has a high chance of success and execution of the aforementioned order of the Court would render the appeal nugatory;
 - j. That it is in the interest of justice, fairness and equity that the order sought be granted as the Respondent stands to be greatly prejudiced.
3. The Appellant's response is contained in a replying affidavit sworn by its Legal Manager, Aloice Muoki on 4th September 2020.

4. Muoki depones that the interim order issued by the Court on 31st August 2020, staying execution of the judgment delivered on 30th July 2020 has had the effect of denying the Respondent access to funds it had deposited as security pending the hearing and determination of its appeal, already determined in the Respondent's favour.

5. Muoki adds that when this Court, sitting in its appellate capacity, held that the trial court had no jurisdiction over the principal suit, it essentially found that those funds were held contrary to the law as there is no just award of a competent court to secure.

6. The Appellant takes the view that there is no basis upon which the funds continue to be held since there is no just award to secure, pending any further action by the Appellant in the appeal.

7. The Appellant points out that the party moving the Court for stay pending appeal is the one that ought to post security as may be necessary and not the other way round.

8. The Appellant further points out that no measure of loss has been shown as likely to be suffered by the Respondent were his application for stay of the judgment of 30th July 2020 to be declined, as there is not even an allegation in the application or supporting affidavit that the Respondent, were he to succeed in his intended appeal in the Court of Appeal, would be unable to recover the award or to access any assets of the Appellant for execution.

9. Muoki depones that the Respondent Company is duly incorporated with a fixed physical address, is in profitable trade and has valuable attachable assets.

10. The Appellant denies that an appeal by the Respondent, if successful, would be rendered nugatory by the release of the funds deposited by the Appellant to be held jointly pending the determination of the already determined appeal.

11. Muoki states that the Respondent's Advocate has no legal capacity to make averments on oath on the loss his client stands to suffer were the funds to be released. She adds that because there is no affidavit by the Respondent on the allegations of loss, the application fails to meet the basic tenets of law for grant of the order sought.

12. The Appellant contends that it is the one that is at risk of suffering loss were the Respondent's appeal to the Court of Appeal fail as the Respondent is not a man of means, his address and place of abode are unknown to the Appellant and there are no known assets which the Appellant would attach in execution for costs.

13. Muoki depones that the Appellant incurred heavy auctioneering and storage charges at the Respondent's instance on the attachment of its forklift because the lower court could not make its pronouncement on jurisdiction.

15. The Appellant points out that it took the Respondent 28 days to move the Court for an order of stay of execution even though he was represented at the delivery of the judgment. According to the Appellant, the delay is inordinate in the circumstances of this case.

15. The order sought by the Respondent falls within the sphere of 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.

16. The Respondent opens his written submissions with the following statement:

“Your Ladyship, the purpose of this application before you is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay.”

17. In its written submissions, the Appellant makes reference to the Court of Appeal decision in *Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR 410* and the High Court (Havelock J) decision in *Micro Enterprises Support Programme Trust Registered Trustees v Mayford Savings & Credit Cooperative Society Limited & 5 others [2013] eKLR* where it was held that where substantial loss has not been established it cannot be said that an appeal will be rendered nugatory.

18. My interrogation of the present application reveals that what the Respondent seeks to do is to lock the decretal sum of Kshs. 391,890 plus accrued interest held in an interest earning account in the names of the parties' Advocates.

19. This money was paid out by the Appellant to satisfy the condition attached to the stay of execution granted by the lower court. As it stands now, the Appellant is the successful party in the appeal concluded before this Court.

20. Needless to say, the Respondent has a right of appeal before the Court of Appeal. I do not think however, that the Respondent can utilize the deposit made by the Appellant to secure their right of appeal. I say so because the duty to post security under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules lies on the party seeking stay of execution not the countering party.

21. Moreover, there is nothing to suggest that the Appellant would be unable to satisfy an award that may be made against it by the Court of Appeal. In fact, the Respondent himself did not make any such plea. As held in *Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR* the legal burden of demonstrating inability or financial limitation to settle a decretal sum lies with the party moving the Court.

22. The Respondent has not only failed to discharge this burden but has also not offered any security himself.

23. For the foregoing reasons, I find and hold that the Respondent's application dated 27th August 2020 is without merit and is therefore disallowed.

24. The interim orders granted on 31st August 2020 are discharged.

25. The costs of this application will be costs in the appeal before the Court of Appeal.

26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OCTOBER 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:

Ms. Muyaa for the Appellant

Mr. Mbuya for the Respondent