



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA

AT NYERI

CASE NO. 1 OF 2019

GRACE MUTHONI MBOGO.....CLAIMANT/ RESPONDENT

VERSUS

AMBOSELI COURT LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant's notice of motion application dated 11th August 2020 under certificate of urgency sought the following orders
 - i. That service of this application be dispensed with in the first instance for reasons of urgency and the same be heard *ex parte*.
 - ii. That a temporary injunction do issue restraining the Claimant/Respondent, her servants and/or agents from removing and advertising for sale the Respondent/Applicant's properties irregularly attached pending hearing and determination of this application.
 - iii. That there be a stay of execution of the decree in Nyeri ELRC Cause No. 1 of 2019 and the resulting orders herein pending hearing and determination of the Respondent's/Applicant's Notice of Motion herein.
 - iv. That there be a stay of execution of the decree in Nyeri ELRC Cause No. 1 of 2019 and the resulting orders herein pending hearing and determination of the Respondent's/Applicant's Appeal commenced by Notice of Appeal filed on 21st May 2020
 - v. That the Honourable Judge be pleased to grant a stay of execution of the decree arising from the judgment delivered by Honourable Justice Nzioki Wa Makau in Nyeri on the 24th day of April 2020.
 - vi. That the Auctioneers be ordered to tender their accounts before the court as the warrants of attachment are billed at Kshs. 165,000/- which is inordinately excessive and go against the Auctioneers Act.
 - vii. That the costs of this application be provided for.
2. The notice of motion is premised on the grounds on the face of the application and the annexed affidavit of Margaret Gathoni Mbugua which were to the effect that the Claimant/Respondent has carried out proclamation of attachment on the Respondent/Applicant's business properties, and these goods so proclaimed are at risk of being removed and advertised for sale and it is meet that pending hearing and determination of this application and the appeal there be a stay granted. The Respondent/Applicant being dissatisfied with the judgment in the Nyeri ELRC Cause No. 1 of 2019 preferred an Appeal and filed Notice of Appeal on 21st May 2020. The Respondent/Applicant asserted that it is a body corporate with means to comply with the terms and conditions of granting the order of stay of execution by either depositing the decretal amount in a joint interest earning account in a Bank to be held between the plaintiff's Advocates and defendant's Advocates.
3. The Respondent/Applicant asserts it has an arguable appeal with good prospects of success and the appeal will raise important points of law including the fact that the Honourable Judge erred in law and fact in failing to account that there were no leave dues due to the Claimant/Respondent since she had exhausted the same and also wrongly granted her pension due for April 2018 while the same had been submitted to ICEA Insurance which was confirmed by the Claimant/Respondent in her testimony. The Respondent/Applicant asserted that unless a stay of execution of the Decree is granted pending the hearing and determination of this application as well as the intended appeal the intended appeal if successful will be rendered nugatory. The Respondent/Applicant argued that there is a real risk that it stands to suffer immediate and substantial loss as well as disruption to its operations which operations are sustained and dependent on substantial financial liquidity and if the Claimant/Respondent is allowed to proceed with the execution, the Respondent/Applicant will suffer real loss since the

COVID 19 pandemic has already disrupted its financial liquidity and any execution against its properties while there is a pending appeal will only not only prejudice the Respondent/Applicant but bring wanton loss. The Respondent/Applicant asserts that the balance of convenience lies in its favour in that it stands to suffer immediate loss as well as irremediable disruption to its operations if execution is commenced. The Respondent/Applicant asserts that this application has been brought without any unreasonable delay and being meritorious it should be disposed in the first instance. The Respondent/Applicant asserts that it is a major shareholder of a hotel establishment management company known as Legend Hotels and is a going concern, therefore in a position to pay the decretal sum and interest thereon at Kshs. 426,055.30 in the event the Appeal is dismissed. The Respondent/Applicant asserts that despite the hotel industry being affected by the Covid 19 pandemic the Respondent/Applicant is willing to deposit reasonable security as the Court may direct.

4. The Claimant/Respondent was opposed and filed a replying affidavit dated 18th August 2020 and stated that the application is fatally defective as it had not been brought under the Vacation Rules applicable to this court. The Claimant/Respondent averred that the Notice of Appeal itself is defective as it was filed outside the 14 days from the date of judgement, it is undated and it has not been served upon the Claimant/Respondent or her advocate to date. The Claimant/Respondent averred in her replying affidavit that the Respondent/Applicant failed to demonstrate that the intended appeal has merit or is even arguable and further failed to disclose the grounds of the intended appeal and never attached a draft Memorandum of Appeal. The Claimant/Respondent averred that the application has not met the threshold for grant of orders of stay of execution pending appeal as the Respondent/Applicant failed to demonstrate any substantial loss that will result if execution is not stayed. The Claimant/Respondent averred that she is a lady of means and well capable of refunding the decretal sum should the Respondent/Applicant succeed at the appellate level. The Claimant/Respondent averred that the Respondent/Applicant may permanently close operations in Kenya and or imminently transfer its assets to Legend Hotels or another company in which case she will suffer irredeemably as she will never be able to execute the decree. The Claimant/Respondent averred that the application is not merited and is ripe for dismissal with costs, however in the unlikely event the court allows the application, the Respondent/Applicant be directed to pay the Claimant/Respondent half the decretal sum with the balance being deposited in a joint interest earning account to be opened by the parties' advocates. The Claimant/Respondent also prayed that the Respondent/Applicant be directed to settle auctioneer charges.

5. Parties agreed to dispose the application by way of written submissions. The Respondent/Applicant submitted that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right can be exercised without prejudicing the applicant, as the appeal would be rendered nugatory if there is no stay. The Respondent/Applicant submitted that the Claimant/Respondent in her supporting affidavit stated that she has no income and in those circumstances, substantial loss would occur if the appeal succeeds and the Claimant/Respondent is unable to refund the decretal sum. It was submitted that it is the Claimant/Respondent's onus to show proof of ability to refund the decretal sum where the Respondent/Applicant's appeal succeeds. The Respondent/Applicant submitted that the Claimant/Respondent has in her affidavit stated that she is a lady of means but did not go ahead to prove or rather rebut the fact that she stated that she is unemployed. This, it was submitted, creates uncertainty on the appellant's part as to whether she will refund the monies if the appeal succeeds. The Respondent/Applicant relied on the case of **Pan African Insurance Company (U) Ltd v International Air Transport Association (HCT-00-CC-MA- 086-2006) ((U)) [2008] UGCOMM 24 (27 March 2008)** where the Uganda High Court held that a court can only exercise the discretion to grant a stay of execution if there are special circumstances and good cause to justify a stay. The inability of the victorious party to be able to refund the decretal amount in the event of a successful appeal is one of such circumstances if proved. The Respondent/Applicant relying on the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike [2006] eKLR** submitted that once she 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/she has in compliance with S. 112 of the Evidence Act which the respondent has failed to prove. The Respondent/Applicant submitted that the appeal has high chances of success and it will be rendered nugatory should the decretal sum be paid to the Claimant/Respondent who has already indicated that she is currently unemployed. Merely stating that she is a lady of means cannot suffice as she has to ably demonstrate that she is capable of refunding the decretal amount. The Respondent/Applicant submitted that the fact that the notice of appeal was filed outside the 14 days, does not ouster or negate the Respondent/Applicant's right of appeal neither does it prevent the Respondent/Applicant's case from proceeding. If anything, the appropriate application for leave to file appeal out of time will be made to enable the Respondent/Applicant ventilate its appeal as enshrined in Article 48 of the Constitution of Kenya on Access to Justice. The Respondent/Applicant submitted that the Court should intervene and order the Claimant/Respondent's Auctioneers to tender an account of their bill by filing the same and having it taxed by the Deputy Registrar in accordance with the 4th Schedule of the Auctioneer Rules since they are of the opinion that the figures tabulated in the warrants of attachment are inordinately exorbitant. In closing, the Respondent/Applicant submitted that the substantial loss does not have to be a colossal sum. It is sufficient if an applicant seeking a stay of execution demonstrates that it will go through hardship such as instituting legal proceedings to recover the decretal sum paid to a respondent in the event an appeal was successful and that failure to recover such decretal sum would render the intended and/or pending appeal nugatory if successful.

6. The Claimant/Respondent submitted that there were only three issues that fall for determination – firstly, whether there exists a competent Notice of Appeal for the purposes of stay of execution, secondly - whether the Respondent/Applicant has met the threshold for stay of execution, and whether the auctioneer will be directed to tender account for fees charged. The Claimant/Respondent submitted that there does not exist a competent Notice of Appeal on record as Rule 75 of the Court of Appeal Rules requires that a Notice of Appeal be filed within 14 days from the date of the decision being appealed against. Additionally, Rule 77 of the said rules requires the intended Appellant to serve the Notice so lodged within 7 days. In the present case the appellant lodged the Notice of Appeal on 19th May 2020, twenty five (25) days after the date of the judgment and not served it upon the Claimant about four months later. This means that the Respondent/Applicant has violated both Rules 7 and 77 despite them being couched in mandatory terms. The Respondent/Applicant having not requested for enlargement of time to file and serve the Notice of Appeal on record it means that the Notice of Appeal on record is incompetent. The Claimant/Respondent submitted that stay of execution pending appeal presupposes existence of a competent appeal. The Claimant/Respondent cited the case of **JN v JIN [2017] eKLR** and that of **Andrew Ng'ang'a Ndung'u v Godfrey Karuri & Another [2006] eKLR** where an application for stay of execution was declined for reasons that the appeal was incompetent. The Claimant/Respondent also cited the case of **Kesi Kahindi & 23 Others v Phillip Kimeu & Another [2020] eKLR** where Munyao J. declined a similar application as the Respondent/Applicant had not sought for extension of time for filing the Notice of appeal. The Judge termed the Notice of appeal as incompetent and incapable of anchoring an appeal to the Court of Appeal. Consequently, the Court stated that it is therefore pointless issuing an order of stay pending appeal. The Claimant/Respondent submitted that the Respondent/Applicant failed to demonstrate any loss that it will suffer if the order is not made and on the contrary, it only boasted that it is the majority shareholder of hotels known as Legend Hotels which have sufficient revenue and means. The Claimant/Respondent submitted that the decree in question is a money decree and in the event the appeal is successful, the Claimant/Respondent will only have to refund the decretal sum. The Claimant/Respondent submitted that she is a lady of means and has resources adequate to refund the decretal sum. In addition, she deponed that the Respondent/Applicant knows her assets well together with her fixed address. The Claimant/Respondent further submitted that the

Respondent/Applicant has not demonstrated that the appeal has any chance of success and/or that it has an arguable appeal. The Respondent/Applicant did not attach a draft Memorandum of Appeal nor cited the grounds upon which it intends to appeal. The Claimant/Respondent submitted that the application has not been filed timeously as Judgment was delivered on 24th April 2020 and it only took the proclamation by the auctioneers for the instant application to be filed. Therefore, it was submitted, the instant application is an afterthought, filed with an intention of denying the decree holder fruits of her judgment. The Claimant/Respondent submitted that the Respondent/Applicant has not furnished nor shown willingness to furnish security for costs. The Claimant/Respondent submitted that all the Respondent/Applicant has indicated is that it is a majority shareholder of another company known as Legend Hotels which has sufficient revenue to comply with the conditions, however there is nothing from Legend to show that it has agreed to comply with the conditions. On the issue of whether the auctioneer will be directed to tender account for fees charges, the Claimant/Respondent submitted that Rule 55 of the Auctioneer Rules has established a clear forum for the determination of this issue. It was submitted that it is well settled that whenever an Act of Parliament provides for a specific procedure for the resolution of dispute, that procedure must be strictly followed before invoking the inherent jurisdiction of the Court. Finally, the Claimant/Respondent submitted that if the Court is minded to allow the Application, then the court should impose a condition that decretal amount in full and costs thereunder as shall be taxed by the deputy Registrar and the Auctioneers fees payable to be deposited in a joint interest earning account pending hearing and determination of the Appeal.

7. The issues for determination crystalized from the foregoing is the following. Whether there is a competent appeal capable of founding an application for stay pending appeal. In the case of **Kesi Kahindi & 23 Others v Phillip Kimeu & Another** (*supra*) Munyao J. stated as follows:-

3. The first thing that I need to be satisfied is that the applicants have exercised their right of appeal by filing a Notice of Appeal. I have seen a Notice of Appeal in the file which was lodged on 2 April 2020. It will be recalled that judgment was delivered on 11 March 2020, meaning that the Notice of Appeal needed to be filed, latest, by 25 March 2020, following the provisions of Rule 75 (2), of the Court of Appeal Rules, 2010, which stipulates that a Notice of Appeal needs to be filed within 14 days of the judgment.

4. I have no application before me for extension of time for filing the Notice of Appeal, and that being the case, the Notice of Appeal is incompetent and incapable of anchoring an appeal to the Court of Appeal. Since there cannot be filed an appeal to the Court of Appeal, as there is no competent Notice of Appeal, it is pointless issuing an order of stay pending appeal.

8. Similarly, in this case the Judgment herein was delivered on the on 24th April 2020 whereas the purported notice of appeal was filed on 21st May 2020 more than 25 days later. An application for stay pending appeal presupposes there is an appeal pending at the Court of Appeal or that a proper notice to that effect has been filed. As there is no competent notice of the intention to appeal there is no basis for the grant of the order sought. It is pointless for the Court to even consider the conditions for grant of stay as it would be a mere academic exercise with no purpose since there is no appeal. Application is dismissed with costs to the Claimant. Claimant may proceed with execution.

It is so ordered.

Dated and delivered at Nyeri this 13th day of October 2020

Nzioki wa Makau

JUDGE