



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 46 OF 2020 (E29/2020)

(Before Hon. Justice Hellen S. Wasilwa on 6th October, 2020)

THE REGISTERED TRUSTEES OF THE SISTERS

OF MERCY (KENYA) T/A “THE

MATER MISERICORDIAE HOSPITAL”.....APPELLANT

VERSUS

BENARD OMONDI NGODE.....RESPONDENT

RULING

1. The Applicant/Appellant, The Registered Trustees of the Sisters of Mercy (Kenya) t/a “The Mater Misericordiae Hospital” filed a Notice of Motion Application dated 17th July 2020 seeking for Orders that the Court extends the Stay of Execution of the Judgment and Decree dated 22/06/2020 pending the hearing and determination of the Intended Appeal. It further seeks that costs of and incidental to the application abide the Intended Appeal.
2. The Application is premised on the grounds that the Applicant is dissatisfied with the Judgment and Decree of the lower Court dated 22/06/2020 and intends to exercise its right to appeal as under **section 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016** with the objective “for review and possible reversal”. That the Court granted the Applicant a Stay of Execution for 30 days until 21/07/2020 and that the Applicant has manifested its intention to appeal by filing in this Court a Memorandum of Appeal dated 16/07/2020. That it has also formally applied for certified copies of the Judgment and typed proceedings vide a letter dated 24/06/2020 and contends that this application has been brought without unreasonable delay.
3. It further contends that the Applicant has neither knowledge nor means of ascertaining the financial resources or assets at the disposal of the Claimant. The Applicant is apprehensive that if the Stay of Execution pending the Intended Appeal is not granted, the Claimant/Decree-Holder will not be able to reconstitute the money paid over to him in satisfaction of the Judgment and Decree, plus costs of the suit and the Appeal if the Applicant prevails in the Intended Appeal. It is willing to provide a bank guarantee if need be and as ordered by this Court as security for due performance of such decree as may be ultimately binding on it. That it is necessary for the ends of justice that this Court preserves the subject matter of the Appeal, which in essence is a money-decree.
4. The Applicant also filed a Supporting Affidavit sworn by its In-house Advocate Evelyn Maina who produced Exhibit marked “**ENM**” being copies of the Memorandum of Appeal and the letter to the DR applying for certified copies of the Judgment and typed proceedings.
5. The Respondent, Benard Omondi Ngode filed his Replying Affidavit dated 27th July 2020 averring that the application herein is incompetent, fatally defective and an abuse of Court process. Further, that the Applicant has not satisfied the conditions for stay in that firstly, it has not shown there is an appeal with chances of success and secondly, it has not shown that it will suffer substantial loss if stay is not granted. He contends that the Applicant intends to deny him the fruits of his judgment by delaying payment of the same and that the partial decree for Kshs. 268,381.71 that was granted to him by the Court on 08/01/2020 remains unpaid to date. That the Appellant is further yet to satisfy the consent order of 29/01/2020 for pension money that was duly adopted by the court which he claims for Kshs. 240,674.85 together with interest accrued thereon. That the Applicant purporting to now appeal is untenable since it is trite law that consent order cannot be reviewed or appealed against unless it was obtained by fraud or duress.
6. The Respondent avers that the Applicant had consented being on the wrong and agreed to pay his terminal dues as claimed as was demonstrated in the Applicant’s letter dated 11/03/2019 addressed to his advocates. That he has however never been paid his terminal dues as further awarded by the Honourable Court and avers that if the appeal is to succeed, he is capable of refunding because he is a man of means.
7. He further avers that the ability to grant security is not a ground to warrant a stay order pending appeal and that the proposal of a bank guarantee is unacceptable as what is at stake is a money decree. He proposes without prejudice to the foregoing that if the Court grants the

stay order, then an order be issued that they pay him half of the decretal amount upfront and the other half be deposited in a joint interest earning account to be opened and operated by his lawyer and the Appellant's lawyer.

8. In a Supplementary Affidavit dated 02/09/2020 sworn by Evelyn for the Applicant/Appellant, she avers that the Applicant did not at all consent to payment of either quantified or unquantified pension benefits to the Respondent and that the consent was silent on the amount payable and is unambiguous on who is to pay and the role of the Applicant. She avers that the amount of pension payable is a ground for appeal before this Court and that payment of the same will amount to unjust enrichment to the Respondent. That the averments made by the Respondent at paragraphs 5 to 16 in his replying affidavit are not factual and are irrelevant to the application herein and that the same should be expunged. She also denies that the Applicant consented to pay the Respondent's terminal dues.

9. She contends that on 20/07/2020, this appellate Court granted an unconditional Stay of Execution on merit upon persuasion by the Memorandum of Appeal and that the stay order which is in force was not pegged to hearing of this application. That the application is thus spent save for security on the decretal amount as rightly noted by the Honourable Court and she urges the Court to uphold the stay of execution pending the hearing and determination of the Appeal.

Applicant's Submissions

10. The Applicant/Appellant submits that it is trite law that a stay of execution pending appeal can only be granted after an applicant satisfies the conditions set out in **Order 42 Rule 6(2) of the Civil Procedure Rules** or under its counter-part rule: **Rule 5(2) (b) of the Court of Appeal Rules**. Further, that the Respondent's replying affidavit has not demonstrated his ability to reconstitute the decretal amount paid to him in the event the Appeal succeeds. It cites **Nairobi Civil Application No. 238 of 2005, National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another (UR)** where the Court of Appeal stated that the onus lies on a respondent to show proof of ability to refund the decretal sum were the applicant to succeed.

11. It further submits that the Applicant herein runs a hospital and being an essential service provider in the prevailing COVID-19 pandemic, it requires resources to provide the crucial medical services and that an order to pay the decretal amount may therefore hamper its operations and even deny a needy patient the requisite medication. It refers to the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where the court emphasised that a stay of execution pending appeal may be granted also in an application involving a money decree so as to alleviate any undue hardship the applicant would suffer if stay is refused. That the Respondent's assertion that he is "a man of means" is not enough to demonstrate he can refund any monies paid to him as he has no known abode or employer whilst the Applicant is an established health facility which is a going concern.

12. The Applicant submits that the Court is at this juncture required to determine whether the Appeal is arguable or not which it has demonstrated as being arguable in its grounds of appeal. That in **Civil Application No. 106 of 2019 (UR 72/19) Ginson Kiragu Mberia alias Ginson Kiragu Njagi v Stanley Bundi Rimberia and another**, it was stated that even one bona fide issue will satisfy the requirement for the law does not look for a multiplicity of arguable issues.

13. It is submitted by the Applicant that parties have not agreed on a suitable security for the decretal amount even though the Court granted them the opportunity to negotiate on a suitable security. It urges the Court to consider the application on a balance of convenience and find the Bank Guarantee as the sufficient security for the decretal amount or alternatively exercise its discretion for a reasonable security like depositing half the decretal amount in a joint escrow account.

14. It submits that this Court should resist the invitation to hear the appeal at the interlocutory application stage and he relies on **Civil Application No. 354 of 2004 (UR 183/04) Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali** where the Court of Appeal stated that the provisions of the Evidence Act have been applied to affidavits and thus the rules of admissibility and relevance apply and that hearsay evidence and legal opinions are for exclusion. That this Court should therefore give a wide berth to argumentative matters, matters of opinion and copies of and extracts of documents contained in the Replying Affidavit.

15. The Applicant also cites **Civil Application No. Nai 329 of 2018 (UR 266 of 2018), Regnoil Kenya Limited v Winfred Njeri Karanja** where it was stated that in dealing with Rule 5(2) (b), the court exercises original and discretionary jurisdiction which exercise does not constitute an appeal from the judge's decision to that Court. The Applicant concludes that the extension of the stay order is a necessary tonic to preserving the subject matter of the Appeal.

Respondent's Submissions

16. The Respondent submits that the Applicant has not demonstrated in its affidavits the substantial loss it would suffer on account of paying terminal dues and pension dues which they had admitted to paying. That the Applicant has further not produced any materials from the lower court to enlighten this court what the claim was before the lower court. That **Order 42 Rule 6(2) of the Civil Procedure Rules** provides that:-

1) "No order for stay of execution shall be

made under subrule (1) unless:-

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

17. That substantial loss occurring to the Applicant should be demonstrated by the applicant placing before court clear evidence or material to show that he stands to suffer substantial loss if stay is not granted and that this is so as to enable the court apply its mind on the issue. He relies on the case of **Machira t/a Machira & Co. Advocates v East African Standard (No. 2) [2002] 2 KLR 63** as cited with approval in **Jacob Wandera v Ali Kadima Yunus [2016] eKLR** where the court stated:-

“If the applicant cites as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award, decree or order, before disposal of the applicant’s business (e.g. appeal or intended appeal.)”

18. That in **Kenya Shell Limited v Kibiru & another [1986] KLR 410**, Platt JA stated as was cited with approval in **Jacob Wandera v Ali Kadima Yunus (supra)** where the court held thus:-

“It is usually a good rule to see if order XLI rule 4 (now order 42 rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions to grant a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

19. He further submits that the Applicant has not pleaded fraud, coercion or collusion to warrant this Court to set aside the lower court’s judgment. He is not satisfied with the Applicant’s willingness to provide a bank guarantee and submits that that no decree, judgment and pleadings have been attached to enable this Court address the issue of security. That this Court therefore has no basis to order provision of security otherwise it would be acting on abstract and he relies on the decision in the case of **Jacob Wandera (supra)** where Mwita J declined to grant stay because of failure by the applicant to avail sufficient material in the form of a decree, judgment or copies of pleadings to enable the court address the issue of security. Similarly in the case of **Panaj Automobiles (K) Ltd v Matheka Kaluku & another [2019] eKLR** the court stated that it could not grant the orders sought as crucial relevant materials which the court would have evaluated were omitted and that the uncertainty militated against the applicant’s application.

20. The Respondent submits that it is unheard of in our jurisdiction for a Court of law to issue an ex parte restraining perpetual orders as argued by the Applicant. That this Court’s discretion to grant or refuse stay was well put by Madan J in the case of **Butt v Rent Restriction Tribunal [1979] eKLR** where he further said that what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. That Madan J also stated 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.

21. He submits that guided by the principles of law and authorities above, the result is that the Application dated 17th July 2020 is only fit for dismissal with costs.

22. I have considered the averments of the Parties herein. The Applicant seeks an order of stay.

23. I have noted that the application herein lacks requisite documents to enable this Court address the application. The Applicant seeks stay of the lower Court’s judgement which judgement has not been attached.

24. The Respondent contend that the judgement was pegged on a consent of the Parties and which I am also unable to deduce in absence of the requisite documentation.

25. I therefore find the application is not merited and I dismiss it accordingly. Costs in the appeal.

Dated and delivered in Chambers via zoom this 6th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Busiega for Respondent – Respondent

Mbugua for Applicant – Present