



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE 338 OF 2017**

**CHARLES P.O. NYAMUNGA & 68 OTHERS.....CLAIMANT/RESPONDENT**

**VERSUS**

**MASENO UNIVERSITY.....RESPONDENT**

**RULING**

1. The respondent/Applicant filed an application dated 28th May, 2019, seeking the following Orders inter alia: -

**(a) This honourable Court grant a temporary stay of execution of the Judgement and decree made and/or declared on the 21st February, 2019 and all consequential Orders arising therefrom pending the hearing and determination of the respondent's appeal.**

**(b) Costs be provided for.**

2. The application is founded on grounds set out on the face of the application numbered (a) to (I) and may be summarized;

**(a) That the applicant has noted an Appeal on the 4<sup>th</sup> March, 2019 and wrote a letter delivered to the Deputy Registrar Employment and Labour Relations Court on 7<sup>th</sup> March, 2019 requesting for certified copies of proceedings and judgment.**

**(b) That the intended Appeal raises triable issues and has high chances of success.**

**(c) That the applicant will suffer substantial loss and damage if the Orders of stay are not granted.**

**(d) That the applicant is willing and able to abide by the terms and conditions for allowing the application and in particular is willing to deposit a Bank Guarantee for the computed and agreed amount as security.**

**(e) That the appeal has been brought promptly and in good faith.**

3. The computed decretal sum was agreed upon by consent of the parties on 5/12/2019 the Court having granted the parties in its judgment 60 days within which to compute and file the decretal sum.

4. The Claimant/respondent in its response to the application by way of grounds of opposition dated 6<sup>th</sup> June 2019 and filed on 10<sup>th</sup> June, 2019 averred that the application has been filed upon unreasonable delay contrary to the provisions of Order 42, rule 6(2) (a) of the Civil Procedure Rules in that the application was filed on 29<sup>th</sup> May, 2019, more than three (3) month's after the judgment delivered on 21st February, 2019.

5. The applicant relies on the decision in the case of **Nyaboga Ogwona-vs- Madison Masul Nyamweya – Civil Application No. 44 of 2017** in which it was held:-

**“A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour”**

6. The applicant further relied on **Erick Sijeje and 5 Others -vs- Esther Sijenje Civil Application No. 38 of 2019**, wherein on application for extension of time the Court held: -

**“Now it is quite clear, and Counsel for the applicants had to concede, that the delay in bringing the application for extension of time was quite considerable. The judgment sought to be impugned having been delivered on 21<sup>st</sup> January, 2019 the application for extension of time filed on 15<sup>th</sup> April, 2019 was nearly three months late. The 2<sup>nd</sup> to 6<sup>th</sup> applicants did not even attempt to give one explanation.”**

7. The applicant further relied on the case of **Joseph Wambutsi Shikose –vs- Ima Haulier, Ltd. Civil Application No. 33 of 2019** where Judgment was delivered on 3<sup>rd</sup> December, 2019 and the application for extension of time was filed on 4<sup>th</sup> April, 2019, Four (4) months after the judgment and the Court held that the application was visited with inordinate delay and dismissed the same.

8. The respondent further argues that the applicant has not demonstrated that it would suffer substantial loss if the stay is not granted in terms of Order 42, rule 6(2) (a) of Civil Procedure Rules.

9. That Further the applicant has not demonstrated that failure to grant the stay Order would render the appeal nugatory and that the applicant has not offered any security as required by Civil Procedure Rules, Order 42 rule 6 (2) (a).

13. The Court has carefully considered the application as supported by the grounds set out in the notice of motion and the supporting affidavit, including, the written submissions by the applicant vis avis the grounds of opposition and submissions by the Claimant/respondent and has come to the conclusion that the application was filed more than three months after the judgment was delivered. However, the Appeal was noted timeously, on 4<sup>th</sup> March, 2019, within the 14 days’ time frame for noting appeals to the Court of Appeal.

14. The applicant has also offered bank security for the decretal sum pending the hearing and determination of the appeal. The applicant has however not demonstrated that the claimants would be unable to refund the sums awarded to them if the Appeal was successful. The applicant has therefore not shown it would suffer substantial loss if Orders for stay are not granted. The Claimants are entitled to enjoy the fruits of their judgment especially in view of the fact that this suit was initially filed as Kisumu High Court Civil Suit No. 8 of 2003 and was later transferred to Employment and Labour Relations Court No. 338 of 2017.

15. The Court is also cognisant of the fact that similar suits have been previously heard and determined by the High Court and Employment and Labour Relations Court and the applicant has not distinguished those decisions from this one in its arguments that the appeal has high chances of success and that the appeal would be rendered nugatory if Orders for stay are not granted.

16. The balance of convenience favours the claimant/respondents who have waited to be paid duly earned terminal benefits for more than 17 years since the year 2003, when they filed this suit at the High Court.

17. Accordingly, the Court is not inclined to exercise its discretion in favour of the applicant in respect of the full decretal sum but only issue an Order for stay for the half (½) decretal sum, the rest to be paid to the Claimants/respondents within 30 days, failing which the Order for stay would lapse, forthwith.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of November, 2020**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

M/s Osewe for respondent/Applicant

Mr. Orengo for Claimant/respondents

Chrispo – Court clerk.