



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 34 OF 2017

JUMAA MANGARO.....CLAIMANT

VS

CHINA JIANGXI INTERNATIONAL KENYA LIMITED.....RESPONDENT

RULING

1. On 11th February 2020, I delivered judgment in favour of the Claimant in Cause No 34 of 2017 which, by consent of the parties, was elected to serve as a test suit for the following causes:

- a) Cause No 30 of 2017: Kalama Jefa Chai v China Jiangxi International (K) Ltd;
- b) Cause No 31 of 2017: Anthony Wambua David v China Jiangxi International (K) Ltd;
- c) Cause No 32 of 2017:Janji Nyale Mbaru v China Jiangxi International (K) Ltd;
- d) Cause No 35 of 2017:Mwahenzi Bakari Mwahenzi v China Jiangxi International (K) Ltd;
- e) Cause No 36 of 2017:Gabriel Mburu Washe v China Jiangxi International (K) Ltd;
- f) Cause No 37 of 2017: Danson Karisa Mwamuye v China Jiangxi International (K) Ltd;
- g) Cause No 38 of 2017:Swaleh Kombe Karisa v China Jiangxi International (K) Ltd;
- h) Cause No, 39 of 2017:Danson Kiti Mwatsuma v China Jiangxi International (K) Ltd;
- i) Cause No 40 of 2017:Kaingu Deche Washe v China Jiangxi International (K) Ltd;
- j) Cause No 79 of 2017:Wilfred Kombora Deche v China Jiangxi International (K) Ltd;
- k) Cause No 80 of 2017:Mwero Swalehe v China Jiangxi International (K) Ltd;
- l) Cause No 81 of 2017:Solomon Mwarema Chai v China Jiangxi International (K) Ltd;
- m) Cause No 82 of 2017:Naftali Hamisi v China Jiangxi International (K) Ltd;
- n) Cause No 83 of 2017:Kenga Charo Shungu v China Jiangxi International (K) Ltd;
- o) Cause No 84 of 2017: Juma Salim Nzagu v China Jiangxi International (K) Ltd

2. The Respondent lodged a Notice of Appeal on 25th February 2020 and subsequently filed a Notice of Motion application dated 31st August 2020 and amended on 13th October 2020.

3. The application seeks an order of stay of execution of the judgment of the Court delivered on 12th February 2020, and all consequential orders flowing from the said judgment together with all consolidated suits heard with this suit pending the lodging, hearing and final determination of an intended appeal.

4. The application is supported by the affidavit of the Respondent's Administrator, Michael Musembi and is based on the following grounds:

- a) There was an erroneous finding by the Court as to the nature of the Claimant's employment being permanent rather than project based for the construction of residences in Kikambala, with the consequence that the award of Kshs. 165,500 was applied to 15 consolidated cases being ELRC Nos 30 of 2017, 31 of 2017, 32 of 2017, 35 of 2017, 36 of 2017, 37 of 2017, 38 of 2017, 39 of 2017, 40 of 2017, 79 of 2017, 80 of 2017, 81 of 2017, 82 of 2017, 83 of 2017, and 84 of 2017; the total award being the sum of Kshs. 2,664,000;
- b) The Claimant was successful in having his Bill of Costs dated 10th March 2020 assessed for the total sum of Kshs. 2,765,410 and a determination on this was issued on 5th October 2020, despite the Respondent's protestations;
- c) The Claimant has extracted decrees in all the 16 cases exposing the Respondent to liability in the total sum of Kshs. 5,429,410;
- d) The Respondent filed a Notice of Appeal dated 25th February 2020;
- e) The Respondent will suffer substantial loss should the Claimants, who were contracted labourers, with no known fixed abode or sources of income, proceed to execute the decree and costs in the aggregate sum of Kshs. 5,429,410;
- f) The Respondent has always sought to preserve its rights during the proceedings and presented this application without unreasonable delay;
- g) The Respondent is ready and willing to provide security as the Court may impose;
- h) It is in the interest of justice that the orders sought herein are granted.

5. The Claimant filed Grounds of Opposition on 21st September 2020 stating:

- a) That the Respondent cannot seek to clarify the contents of the judgment as it has preferred an appeal against it; a party cannot apply for review and appeal from the same decree or order;
- b) That the Respondent participated in the taxation proceedings without objection, it could only be construed that the instant application is seeking to obstruct or delay the course of justice and it is intended to deny the Claimants the fruits of justice;
- c) That the Respondent has moved the Court vide Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides that the Court must be satisfied on the following conditions:
 - i) Substantial loss may result to the applicant unless the order is made;
 - ii) The application has been made without unreasonable delay; and
 - iii) Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
- d) That there is no evidence on record on the Respondent's financial ability except the bland statement that the Respondent will suffer massive losses to its business;
- e) That judgment was delivered on 12th February 2020; the Respondent filed a Notice of Appeal on 25th February 2020 but did not request for copies of proceedings from the Deputy Registrar in order to progress its appeal neither did it file a Memorandum of Appeal. Rather, the Respondent waited until the Claimant filed his Bill of Costs at whose taxation the Respondent participated. It is only after the aforesaid events and pending the Taxation Ruling that the Respondent made the present application for stay of proceedings and execution;
- f) That the Respondent has never indicated that it would supply security to the Court for the due performance of the decree or order of the Court;
- g) That the Respondent argues that its intended appeal is arguable and that if the Court does not grant stay of execution and the appeal succeeds, it will be rendered nugatory. However, the Respondent has not filed a Memorandum of Appeal and the Court would therefore not be in a position to deduce if the appeal is arguable and/or whether the intended appeal is safe;
- h) That even if the Respondent has strong grounds of appeal, that would not in itself, justify an order for stay; the applicant must establish sufficient cause and it has not done so in this instance.

6. The Claimant's response is further evidenced by a replying affidavit sworn by his Counsel, Margaret Nguyo on 18th September 2020 which mirrors the Grounds of Opposition.

7. In addition, Counsel and some of the Claimants filed affidavits of means.

8. The Respondent's application is grounded on Order 42 Rule 6(1) & (2) of the Civil Procedure Rules which provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on an application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

9. By its application, the Respondent asks this Court to exercise judicial discretion in its favour and every applicant who enters this arena must demonstrate that they deserve to invoke these powers. The yardstick in this regard is clearly set out in Order 42 Rule 6 (2) of the Civil Procedure Rules.

10. Courts have consistently held that for an applicant proceeding under Order 42 Rule 6 to succeed in their quest, they must satisfy all the three (3) conditions set therein, namely:

- a) That the applicant has demonstrated that they will suffer substantial loss if the order is not made;
- b) That the application has been made without unreasonable delay;
- c) That the applicant has provided security for the due performance of such decree or order as may ultimately be binding on them.

11. The Respondent itself made reference to the decision in ***Magnate Ventures v Simon Mutua Muatha & another [2018] eKLR*** where **Kamau J**

Stated the following:

“Evidently, the three (3) prerequisite conditions set out in....Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.”

12. The Respondent states that it will suffer substantial loss if the order sought is not granted because the Claimants have no capacity to repay the decretal sum.

13. In response, the Claimants state that they have fixed abodes with various sources of income and would therefore be in a position to refund the decretal sum, should the Respondent succeed on appeal.

14. Regarding the question of substantial loss, the primary legal burden lies on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to repay the decretal sum.

15. But the issue of a respondent's ability to refund a decretal sum is often a fluid one and if the other conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules are met, the Court would be well guided to preserve the subject of appeal, by granting an order for stay of execution. This position was affirmed by the Court of Appeal in ***Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji [2015] eKLR***.

16. In the present case however, the Respondent failed to satisfy the key condition on delay. Judgment was delivered on 12th February 2020 and the Respondent lodged a Notice of Appeal on 25th February 2020 but thereafter went to sleep, until it was threatened with execution.

17. The notion that the Respondent may have been prevented from taking action by the onset of the COVID-19 Pandemic is a feeble excuse that the Court rejects for two reasons; first, if indeed the Respondent was serious about pursuing an appeal, it had every chance to take steps in this direction well before the Pandemic set in and second, even in the midst of COVID-19, the Court availed litigants online platforms to pursue urgent matters, which evidently, the Respondent did not seize.

18. To date, there is no evidence of the Respondent ever having applied for typed proceedings so as to progress its intended appeal. Moreover, the Respondent did not bother to exhibit a draft Memorandum of Appeal to demonstrate that it has an arguable appeal.

19. All these lapses, put together, point to a litigant whose sole intention is to forestall the legal process of execution. This Court will not aid such a party.

20. In the result, the Respondent's application dated 31st August 2020 and amended on 13th October 2020 is declined with costs to the

Claimant.

21. The interim orders granted on 22nd October 2020 are vacated.

22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY NOVEMBER 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:

Mrs. Kariuki for the Claimant

Miss Opondo for the Respondent