



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1349 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 11th November, 2020)

EDNA SEMITI.....CLAIMANT/RESPONDENT

VERSUS

INTEX CONSTRUCTION LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Applicant filed a Notice of Motion dated 30th June, 2020 seeking the following orders: -

a) Spent.

b) Pending inert partes hearing and determination of this Application, this Honourable Court be pleased to grant a stay of execution of the Judgment of Honourable Lady Justice Hellen Wasilwa delivered on 28th January, 2020.

c) Pending the hearing and determination of the Applicant's intended appeal, this Honourable Court be pleased to stay the execution of the Judgment of Honourable Lady Justice Hellen Wasilwa delivered on 28th January, 2020.

d) The costs of this application be provided for.

2. The application is based on grounds that: -

a) On 28th January, 2020 judgment was delivered in this matter in favour of the Claimant/Respondent for a total sum of Kshs. 5,525,000/- and costs of the suit with interest at court rates from the date of judgment.

b) The Applicant is aggrieved by the said judgment and intends to appeal to the Court of Appeal against its entirety. The Applicant has an arguable appeal and in the event that stay is not granted it may suffer substantial loss as the Respondent may be unable to refund the substantial sum of money.

c) The Respondent has filed a Bill of Costs dated 11th March, 2020 which is proceeding for taxation before the Deputy Registrar seeking costs worth Kshs. 485,390.00/-.

d) The Applicant has learned that despite the taxation pending before the taxing master, the Respondent has unprocedurally instituted garnishee proceedings to recover the sum of Kshs. 5,525,000/- with interest at court rates from the date of filing the suit.

e) If the orders are not granted, these matters will be finalised and the Respondent shall proceed with execution of the Judgment against the Applicant before the intended appeal is determined.

f) The Applicant is willing to deposit with the Honourable Court as security a reasonable sum as the Court may direct and the Respondent will not suffer any prejudice if the orders sought are not granted.

g) The Applicant has brought the application timeously and without unreasonable delay.

3. The application is supported by the affidavit of Sharon E. Mwakugu the Legal Manager of the Respondent sworn on 30th June, 2020. The affiant deposes that the applicant is apprehensive that the Respondent will obtain the orders sought in the garnishee proceedings and proceed

to execute and recover the Kshs. 5,525,000/-.

4. She further deposes that the Judgment delivered in this matter failed to consider the terminal dues of Kshs. 694, 623 already paid to the Respondent upon termination.

5. In response to the application, the Respondent filed a Replying Affidavit sworn on 29th July, 2020. She deposes that the Judgment is self-explanatory and that it is only fair and just that she be allowed to enjoy the fruits of the Judgment.

6. She deposes that it cannot be reckoned that this application has been brought timeously. She avers that the applicant is guilty of laches because the application was brought on 30th June, 2020 approximately 6 months after judgment was delivered on 28th January, 2020.

7. She avers that the applicant has not explained why it took approximately 6 months to bring up the application. She avers that the Court should be alive to the prevailing social difficulties of a single mother losing her job which situation has been aggravated by the Covid-19 pandemic.

8. She avers it has been demonstrated that the Applicant has no ascertainable funds since its two bank accounts have Kshs. 26,128.91 and Kshs. -841.30.

9. The application was canvassed by way of written submissions.

Applicant's submissions

10. The Applicant submitted that Order 42 Rule 6 (2) of the Civil Procedure Rules sets out the test an Applicant must satisfy before an order for stay is granted. It submitted that the Court in **Butt v Rent Restriction Tribunal [1982] eKLR** held that a Court when considering an application for the grant of stay of execution order, it should exercise its discretion in such a way as not to prevent an appeal or render the appeal nugatory. It submitted that the appeal has an arguable appeal which will be rendered nugatory if the order is not granted.

11. It argued that the application has been filed without delay. It submitted that judgment was delivered on 28th January, 2020 and it filed its Notice of Appeal on 6th February, 2020 and Respondent's Bill of Costs is pending before the taxing master. It averred that upon the re-opening of the Courts due to Covid-19 pandemic, garnishee proceedings were filed vide a Notice of Motion dated 21st May, 2020 which necessitated the filing of the instant application.

12. It relied on the case of **Amal Hauliers v Abdulnasir Abukar Hassan [2017] eKLR** where the Court held that there was no inordinate delay as the application was filed after the Respondent's counsel wrote to the Applicant's counsel of the intention to execute.

13. It submitted that its draft Memorandum of Appeal shows that it has an arguable appeal. It relied on the decision **Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union [2012] eKLR** that an arguable appeal need not to show that it is likely to succeed and that it is enough to show that there is at least one issue upon which the Court should pronounce its decision.

14. It submitted that there are fundamental question of law which the appellate court is being called to determine which include the Judge's failure to consider its appeal and that the Court awarded manifestly excessive damages without considering the amount already paid to the Claimant.

15. It submitted that should the appeal succeed; it is apprehensive that it will not recover the decretal amount from the Respondent. It cited the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006]** where the Court held that; once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must shift to the Respondent to show the resources he has since the matter is within his knowledge.

16. It argued that the application remains unchallenged and there is no evidence to the contrary. It argued that the Respondent has indicated that he is not employed this he will not be able to pay back the decretal amount should the appeal succeed.

17. It averred that it is willing and ready to comply with any directions that this Court will issue. In conclusion, it urged the Court to allow the application with costs pending the hearing and determination of the appeal.

Respondent's submissions

18. The Respondent submitted that the application was filed slightly over 5 months after judgment was delivered and that the Applicant had sought and was granted 30 days stay of execution which lapsed on 28th February, 2020. She argued that the applicant has not explained why an extension of the period for stay was not sought. She argued that the applicant cannot seek refuge to the event of the Covid-19 pandemic which came into play after the stay period had lapsed.

19. She argued that despite the prevailing pandemic, that the court did not stop its operations. It stated that the fact that the application was filed electronically is a clear indication that the Applicant was aware of the new modalities set by the judiciary for continuity of the provision of legal services. She further argued that the applicant's advocate appeared in Court on 16th June 2020 and 23rd June, 2020 when the garnishee proceedings were being heard.

20. She submitted that the applicant's failure to explain the delay in bringing an application for extension of time can only create an inference

that this application is an afterthought and brought merely to scuttle the hearing of the garnishee proceedings.

21. She argued that the applicant would not be prejudiced if the orders are not granted. She submitted that the period of stay can only be extended by an appropriate application seeking to extend time. It submitted that from the garnishee proceedings, the bank accounts held by the Applicant hold bear nil balance thus it has no funds capable of being withdrawn and deposited in court as security.

22. He argued that the applicant has not demonstrated what substantial loss it will suffer if stay of execution is not granted. She submitted that the fact that she is unemployed or the fact that the applicant does not know of her assets does not constitute evidence of the fact that the applicant will suffer substantial loss. She submitted that the principle of suffering substantial loss is a statutory requirement therefore the Applicant is under legal obligation to demonstrate the substantial loss it may incur.

23. She argued that the applicant has not provided any evidence of the payment of Kshs. 694,623 which was paid as terminal dues.

24. In conclusion, she submitted that the applicant has not meet the criterion set out under Order 42 Rule 6 (1) of the Civil Procedure Rules. She argued that the application has been brought late in the day and the applicant has no triable case as it seeks to delay the cause of justice. She therefore urged the court to dismiss the application with costs.

25. I have examined the averments of the Parties herein. Judgement in this case was delivered on 28/1/2020. This application was filed on 30/6/2020 5 months later.

26. Order 42 rule (6) (2) provides as follows: -

“(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”.

27. In respect of this case and in relation to Order 42 above, the Applicant is guilty of laches having filed this application 5 months after the delivery of judgement.

28. The Applicant also needs to demonstrate the irreparable damage they stand to suffer if the orders sought are not granted. In this case, the Applicants aver that they have filed an appeal and indeed they annexed a Notice of Appeal to this application. With the understanding that they have filed an appeal, if the orders of stay are not granted the substratum of the appeal may be destroyed in case the appeal succeeds.

29. In the circumstances, I allow the application for stay of execution on condition that the Applicant deposits ½ the decretal sum in an interest earning account held in joint names of Counsels on record within 60 days and releases the remaining to the Claimant within the same period. In default execution to proceed.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wangalwa for Respondent – Present

No appearance for Applicant – Absent