



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 141 OF 2017

RONO CHERUIYOT 1st CLAIMANT
PAUL KIPRONO.....2nd CLAIMANT
KIRUI EDWARD KIPLAGAT.....3rd CLAIMANT
HILLARY K. BOR.....4th CLAIMANT
DENNIS KIBET.....5th CLAIMANT
DANIEL MADAFU CHUMA 6th CLAIMANT
GEORGE GITAU CHIRA7th CLAIMANT
EDWARD KEMEI 8th CLAIMANT
PETER MWANGI NJAGUA9th CLAIMANT
FRANCIS MUTUKU MUTUA.....10th CLAIMANT
KIPKROR KOECH11th CLAIMANT
BENARD KIPKOECH.....12th CLAIMANT
ERIC KIPSANG KIRUI.....13th CLAIMANT
REUBEN KIBET KOSGEL.....14th CLAIMANT
KIPRONO FREDRICK KOECH.....15th CLAIMANT
CATHERINE KINANU KIRERA.....16th CLAIMANT

v

SBI INTERNATIONAL HOLDINGS (AG) LTDRESPONDENT

RULING

1. In a judgment delivered on 15 July 2019, the Court found that the Respondent had erroneously computed the salary arrears and severance due to the Claimants. An award was made directing the Respondents to pay each of the Claimants the dues (which had been computed by the Labour Office upon an order by the Court).

2. The Claimants moved to execute on 26 September 2020.

3. The move prompted the Respondent to file a Motion under a certificate of urgency on 3 October 2020 seeking orders
 - (a) ...
 - (b) ...
 - (c) This Honourable Court be pleased to order stay of execution of the decree dated the 7th August 2019 issued in ELRC No. 141 of 2017 pending the hearing and final determination of the applicant's Appeal against the Judgment.
 - (d) Costs of this application be provided for.
4. When the Motion was placed before the Court on 5 October 2020, the Court declined to certify it urgent on the ground that a Notice of Appeal had been filed way out of time.
5. The Court directed the Respondent to serve the application ahead of an *inter-partes* hearing on 9 November 2020.
6. On 6 October 2020, the Respondent filed a second Motion under a certificate of urgency seeking orders
 - (a) ...
 - (b) The Honourable Court be pleased to review and vary its Ruling and orders made by the learned Justice Nduma Nderi delivered on 5th October 2020 in respect of the application dated 30th September 2020.
 - (c) This Honourable Court be pleased to order a stay of execution/and all consequential decrees, orders and proclamation and execution process of the decree dated 7th August 2019 issued in ELRC No. 141 of 2017 pending the hearing and final determination of the application herein.
 - (d) This Honourable Court be pleased to order a stay of execution of the decree dated the 7th August 2019 issued in ELRC No. 141 of 2017 pending the hearing and final determination of the applicant's Appeal against the Judgment.
 - (f) Costs of the application and the suit be awarded to the Defendant/applicant.
7. When this second Motion was placed before the Court on 7 October 2020, the Court issued an order of stay of execution pending the *inter-partes* hearing.
8. The Court also directed that the application be served and parties file and exchange affidavits and submissions with mention scheduled for 2 November 2020 to confirm compliance.
9. On 9 October 2020, the Respondent filed a third Motion seeking orders
 - (a) ...
 - (b) This Court be pleased to grant conservatory orders directing the Respondents and their agents to forthwith release the applicant's construction vehicles registration number KAX 778C and KAW 418G Mercedes Actros currently confiscated and/or detained by the Respondents and/or its agents.
 - (c) This Honourable Court be pleased to issue orders compelling the Respondents to personally appear in Court and show cause why they should not be punished for failing to comply with Court orders issued herein on 7th October 2020.
 - (d) The OCS Eldoret be directed to ensure compliance with these orders.
 - (e) The costs of this application be provided for.
10. The Court directed that the Motion be served before mention on 2 November 2020.
11. The auctioneer who had proclaimed filed a replying affidavit in opposition to this Motion on 23 October 2020 in which it was deposed that the court orders of 7 October 2020 had not been served by the time the attachment was being carried out on the morning of 8 October 2020. It was also sworn that the attachment had been done at 8.00 am while the Court order was served at 2.40 pm.
12. The 1st Claimant also filed a replying affidavit in opposition to the first and third Motions on 23 October 2020.
13. The said Claimant filed another affidavit on 30 September 2020 and this must have prompted the Respondent to cause its drivers to file 2 supplementary affidavits on 2 November 2020.
14. When the parties appeared before the Court on 2 November 2020, it directed the auctioneer to release the attached motor vehicles upon

the Respondent depositing the decretal sum in Court on or before 4 November 2020.

15. During the same appearances, the Court indicated that it would take all the 3 applications at once. The parties were directed to file and exchange affidavits and submissions.

16. The Respondent filed its submissions on 20 November 2020, the auctioneer on 27 November 2020 and the Claimants' on 2 December 2020.

17. In its submissions, the Respondent made reference to the first Motion (dated 30 September 2020 but filed on 3 October 2020 and the third motion dated 8 October 2020 but filed on 9 October 2020).

18. The Court will therefore address its mind to only these 2 applications.

Disobedience of court orders

19. On 7 October 2020, the Court issued orders staying the execution. The Respondent contended that the orders were served on the morning of 8 October 2020 upon the Claimant's advocate and the auctioneers.

20. To demonstrate that the orders had been served, the Respondent exhibited an extract of WhatsApp message sent to the phone of one of its drivers, from whom the vehicles were attached. The messages are postmarked 8:53 am and 11:29 am.

21. The affidavits exhibiting the extracts of the orders sent through WhatsApp did not disclose the numbers used to transmit the copies of the orders nor the owner of the phone numbers and on that singular reason, the Court is unable to find that the Claimants' and/or auctioneer were served before the attachment was done on the morning of 8 October 2020.

22. It was also asserted that the Claimants' advocate was served. Evidence of the service was not proved.

23. The Court is therefore not able to cite either the auctioneer or the Claimants' for contempt.

Stay of execution pending Appeal

24. The law and legal principles applicable to an application for stay of execution pending an Appeal before this Court are now legion and do not require a rehashing of the authorities.

25. The legal principles are direct derivatives from Order 42 of the Civil Procedure Rules and these are, *the grant of the order of stay is an exercise of discretion on the part of the Court; there is sufficient cause shown; that an application is brought without inordinate delay; that it is demonstrated that substantial loss may be occasioned if a stay is not granted and that security for the due performance of the decree is provided for.*

Substantial loss

26. The Respondent, in support of the Motion, contended that the Claimants did not have a source of income and therefore would not be able to refund the decretal sum if the Appeal succeeded.

27. This, it was asserted, would occasion the Respondent substantial loss.

28. The High Court in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, examined the ingredients of substantial loss and stated thus the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit...it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

29. Addressing the question of whether a stay of execution should be granted because a decree-holder may not be able to refund the decretal sum was an appeal to succeed, the High Court had this to say in *Cosmas Kipkoech Sigei v Madrugada Ltd & Ar* (2010) eKLR a stay will not be made on the ground that the decree-holder is a pauper, and will therefore be unable to refund the decretal sum if paid to him....

30. Apart from deposing that the Claimants were not earning any income, the Respondent did not demonstrate damages it would suffer except to assert that the attached properties were its tools of trade.

31. Since the Court had already made an order that the decretal sum be deposited into Court, the question of tools of trade became otiose.

32. The Respondent did not prove that it would be occasioned substantial loss.

Inordinate delay

33. The Court delivered its judgment on 15 July 2019.

34. A Notice of Appeal was lodged in Court on a date which is not clear but it was sealed by the Deputy Registrar on 29 July 2019.
35. The Respondent then applied for typed copies of proceedings on 26 July 2020.
36. However, it was not until 3 October 2020 that the Respondent filed the application seeking a stay of execution pending hearing and determination of Appeal.
37. The Respondent did not offer sufficient explanation why it took it (Respondent) over 1 year before applying for a stay of execution pending Appeal. Such an application does not require that certified copies of proceedings be ready.
38. The Court finds the delay inordinate. It appears the Respondent went to slumber and only woke up when the Claimants moved to execute.

Security

39. On 2 November 2020, the Court directed the Respondent to deposit the decretal sum into Court to facilitate the release of attached motor vehicles.
40. The deposits were made on 4 November 2020 and nothing turns on this element.
41. The Respondent made much of the fact that it was denied a chance to defend the Cause and prosecute its Counterclaim and that it was not involved in the taxation of the Bill of Costs.
42. It was also contended that the cause of action advanced by the Claimants was fictitious and that there was no recognition agreement with a trade union the Claimants asserted they were members of.
43. All these go to the merit of the Appeal and should not be decisive to the determination of the stay application. The assertions may have been useful if the Court of Appeal had been moved for a stay of execution pending appeal through the Court of Appeal Rules, where the question of whether an appeal is arguable is one of the considerations.
44. For this Court, a consideration of the merits of the judgment sought to be challenged would amount to the Court re-opening the hearing.
45. For the above reasons, the Court finds no merit in the Motions under examination. The same are dismissed with costs.
46. Consequently, the Court orders that decretal sum deposited in Court to be released to the Claimants' advocate on record if the Respondent does not secure stay orders from the Court of Appeal within the next 30 days.

Delivered through Microsoft teams, dated and signed in Kisumu on this 15th day of December 2020.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Kirwa instructed by Mwakio Kirwa & Co. Advocates
For Respondent	Prof Albert Mumma & Co. Advocates
Court Assistant	Chrispo