



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 694 OF 2013

CLARICE ODHIAMBO.....CLAIMANT

VERSUS

THE COCA-COLA COMPANY.....1ST RESPONDENT

COCA-COLA EURASIA & AFRICA GROUP.....2ND RESPONDENT

(Successor in Title to Coca-Cola Africa Group) COCA-COLA CENTRAL,

EAST & WEST AFRICA LIMITED.....3rd RESPONDENT/APPLICANT

(Successor in title to Coca-Cola East and Central Africa Division Limited)

RULING

1. On 15.3.2019, this Court entered judgment of KShs. 11,165,766.00 in favour of the Claimant for unlawful termination on account of redundancy. The Claimant was also awarded severance pay from April 1997 to May 2007, 3 months' salary in lieu of notice, accumulated leave, costs and interests at Court rates. Aggrieved by the decision, the Respondent filed Appeal in the Court of Appeal and the Claimant also filed a Notice of Cross Appeal challenging the same judgment.

2. On 12.9.2019, the Claimant filed a Party and Party Bill of Costs and on 25.12.2019 she threatened to commence execution proceedings. As a result, the Respondent filed the Application dated 10.12.2019 seeking the following orders–

- a. THAT pending the hearing and determination of this Application *inter partes*, this Honourable Court pleased to grant an interim order for stay of execution of the judgment delivered herein on 15.3.2019.
- b. THAT pending the hearing and determination of the intended appeal to be filed by the Applicant against the judgment delivered on 15.3.2019, this Honourable Court be pleased to grant an order for stay of execution of the judgment delivered herein on 15th March 2019.
- c. THAT the costs of and incidental to this Application be costs in the Appeal.

3. The Application is based on the grounds set out on the body of the motion and the Supporting Affidavits sworn by Ms Angela Temesi Ambetsa on 10.12.2019 and 5.2.2020. In brief, the applicant contended that she is apprehensive that if the execution proceeds, she will suffer a great loss because she will not be able recover the decretal amount; that she has no knowledge of the whereabouts of the Claimant's assets and her source of income hence it would be difficult to recover the decretal amount in the event the appeal is successful, hence rendering the appeal nugatory.

4. The Applicant further contended that the Application has been made without delay as the costs of suit had not been taxed; and that she will comply with any reasonable condition as ordered by this Court including depositing such reasonable security in a joint interest earning account in the names of the parties' advocates on record, pending the hearing and determination of the Appeal. While appreciating that the claimant has pension benefit, she averred that the Respondent's provident fund is held by an independent third party and it cannot be attached, assigned or pledged as security for the decretal amount in the event the appeal is successful.

5. The Claimant opposed the Application vide the Grounds of Opposition filed on 24.1.2020. In brief she contended that the Application does not meet the threshold for the grant of stay of execution; that the application has been filed after unreasonable delay and no explanation has

been given for the unreasonable delay of over 10 months; that the Claimant has substantial savings with the Applicant's pension scheme which has not been accessed for 12 years hence she is a person of means; that the Applicant is a global company with immense resources hence unlikely to suffer any substantial loss for paying the decretal sum; and finally she avers that she is entitled to the fruits of her judgment.

6. The Application was disposed of by way of written submissions which were highlighted by counsel on 16/7/2020.

Applicant's submissions

7. The Applicant submitted that she has an arguable appeal which will be rendered nugatory if the stay order sought is withheld. She contended that the claimant is not a person of means and the whereabouts of her assets is unknown, and as such she stands to suffer a substantial loss if the order for stay is not granted and the appeal succeeds after execution of the impugned judgment. She relied on **Anthony Karanja Wainaina vs. Adrian Company Limited [2020] eKLR** where this court considered a similar application.

8. As regards the Claimant's pension as proof of financial means, the applicant submitted that Pension funds are statutorily encumbered by section 36 of the Retirement Benefits Act 1997, rules 15 and 22 of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations 2000, and is dependent upon her goodwill to voluntarily pay. She contended further that there is no privity of contract between her and Minet Kenya Financial Services Limited since they are separate entities. She relied on **Marilyn Mbutia vs. Safaricom Limited [2019] eKLR** for emphasis.

9. In view of the foregoing, the Applicant submitted that the evidence of encumbered assets does not adequately meet the test of financial means to repay a decretal amount upon a successful appeal. The Applicant relied on **Anthony Karanja Wainaina vs. Adrian Company Limited [Supra]** where this Court observed that the interests of justice dictate that the Court satisfies itself on the issue of assets adduced and the difficulty in recovering the decretal amounts. She further relied on **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and Another [2006] eKLR** where the Court observed that the burden of proof was on the Respondents to show the resources they have once an Applicant expresses that a Respondent would be unable to pay back. She also relied on the case of **Focin Motorcycle Limited vs. Ann Wangui & Another [2018] eKLR** where the court made a similar holding.

10. The applicant submitted that the Claimant's right to enjoy the fruits of the judgment is not automatic and prayed for conditional stay which balance the parties' interests. She contended that by offering security as a condition for the stay is a demonstration of good faith. For emphasis she placed reliance on **Focin Motorcycle Limited vs. Ann Wangui & Another [Supra]**.

11. The applicant contended that the Claimant has also filed a Notice of Cross Appeal hence it would be unfair for her to benefit from the same judgment she is challenging.

12. The applicant further submitted that there was no unreasonable delay before filing the application and explained that the Deputy Registrar was yet to finalize the taxation of the bill of costs. She relied on **Eldoret Grains Limited vs. National Cereals Produce Board [2014] eKLR** where the Court held that the period to take into account when determining the issue of inordinate delay is the period after a Court's ruling on taxation.

Claimant's submissions

13. the Claimant submitted that the Respondent will not suffer any substantial loss if the orders of stay are not granted as she had offered to pay her a separation payment of KShs. 19,230,945.55, which was significantly higher than the judgment amount. She has relied on **Halal & Another vs. Thornton & Turpin (1963) Limited [1990] eKLR**, **Equity Bank Limited vs. Taiga Adams Company Limited [2006] eKLR** and **James Wangalwa & Another vs. Agnes Naliaka [2012] eKLR** in which, the circumstances under which orders for stay can be granted were discussed.

14. The Claimant further submitted that she has pension savings in the Applicant's pension scheme hence capable of settling any debt should the judgment be set aside. She contended that her pension savings are not offered as security but as evidence of capability to repay the judgment award. She contends that the correct test is whether she is a woman of straw and not whether the Applicant will be able to access her pension savings.

15. The Claimant further submitted that the application for stay was filed after a long and unreasonable delay of 10 months with no reasons being offered for the delay and as such, the Applicant is disentitled to orders for stay of execution. Finally, the Claimant submitted that she has the right to enjoy the fruits of the judgment and contended that this Court will not stifle the applicant's right of appeal if she is allowed to enjoy those fruits. She relied on the cases of **Samvir Trustee Limited vs. Gurdian Bank Limited Nairobi [2007] eKLR** and **Machira T/A & Company Advocates vs. East African Standard [2002] eKLR** where it was held that a successful party is entitled to the fruit of their judgment.

16. While the ruling was pending, the claimant filed a Replying Affidavit sworn on 15.9.2020 and successfully sought leave of the Court that it be considered in determining the respondent's instant application for stay of execution. The gist of a further affidavit is that over kshs.5 million was withdrawn from the claimant's pension without her authority and it is in the custody of the respondent. In the claimant's view the said sum has doubled after attracting interest and it is evidence that she is a person of means. In order to be fair to all the parties, I granted leave to the respondent to file any further affidavit, to respond to the issues raised by the claimant's Further Affidavit. The gist of the respondent's rejoinder is that this court lacks jurisdiction to deal with pension claims and reiterated that pension is not capable of being used as security for payment of a judgment debt. After the respondent filed her further affidavit, the court heard fresh oral submissions from both counsel on the new issues raised.

Issues for determination and analysis

17. I have carefully considered the Application, affidavits and submissions by counsel. It is common ground that the Applicant has instituted an Appeal in the Court of Appeal being, Civil Appeal No.577 of 2019 challenging the judgment of this court delivered on 15.3.2019 while the claimant has filed a Notice of Appeal also challenging the same judgment. The main issue for determination herein is whether the Applicant has met the legal threshold for granting stay of execution pending appeal.

18. The legal threshold for granting stay of execution pending appeal is set out under Order 42 rule 6 (2) of the Civil Procedure Rules which provides as follows—

“No order for stay of execution shall be made under sub-rule (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.”

Whether the application was made without unreasonable delay.

19. The applicant contended that the application herein was made without undue delay because the costs of the suit had not been determined by the Deputy Registrar of the court. She explained that the application was indeed made before the claimant’s bill of costs was taxed. The claimant has however argued that filing the application 10 months after the impugned judgment amounted to unreasonable delay and as such stay order should be denied.

20. Section 94 of the Civil Procedure Act provides that execution of a decree of a superior court before ascertainment of the costs can only be done with the leave of the court. It follows that, there is no danger of execution until costs are ascertained and as such a judgment-debtor needs not rush to seek stay before there is eminent danger of execution. In this case the claimant made the instant application 10 months after the impugned judgment but before the costs were ascertained through taxation of the claimant’s bill of costs. In the circumstances I return that the delay was explained and it was not unreasonable.

21. I gather support from *Eldoret Grains Limited vs. National Cereals Produce Board [2014] eKLR* where Fred Ochieng J held that: -

“In my considered view, the period to be taken into account when determining whether or not there had been inordinate delay is the period from when the Defendant became aware of the Ruling on taxation.

The reason for that is that although the Judgment was delivered on 8th May, 2012, execution could not issue immediately thereafter. Execution of a decree can only proceed after the Bill of costs had been taxed or after the Decree-Holder has obtained the leave of the court to proceed with execution prior to taxation.

Therefore, had the Defendant sought an order for stay of execution prior to the issuance of Certificate of Taxation, it could have been premature. In the circumstances, there is no inordinate delay by the Defendant, in seeking the order of stay of execution.”

Whether the applicant will suffer substantial loss if stay is denied.

22. Substantial loss is the main factor that the applicant for stay must establish to the court. In other words, the applicant has the legal burden of demonstrating by affidavit that the decree-holder will not be able to refund the decreed sum should the appeal succeed after execution of the decree. Such burden is not discharged by mere allegation through generalized statement. It must be an apprehension founded on reasonable grounds in order for evidentiary burden to shift to the Decree-Holder.

23. In *National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another [2006] e KLR*, the court held that-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

24. In this case, the Applicant has contended that she stands to suffer substantial loss because she does not know the whereabouts of the claimant’s assets and as such she is apprehensive that if execution proceeds and her appeal succeeds, she may not recover the decretal sum from the claimant. The claimant has sworn any affidavit to show that she is a person of financial means because she has a huge sum of unclaimed pension and further, that over kshs. 5 million being part of that pension has since been withdrawn without her consent and it is in the hands of the applicant herein and it has doubled through interest earning. She has further submitted through counsel that she is a person financial of means because she has not collected her pension of over Kshs 19 million a fact that has been acknowledged by the applicant.

25. I have considered the arguments by the two sides and I agree with the applicant that this court has no original jurisdiction to determine pension disputes. However, I must say that a person with a vested pension of over Kshs. 19 million which is ready for collection, cannot be treated as a person of straw. That person is a rich millionaire in Kenyan standards. Whether the said money can be used as security to settle judgment debts is not a relevant issue in this matter considering the fact that the claimant has also appealed against the same judgment that

she desires to execute.

26. In my view it would be an abuse of the process of the court to impugn a judgment by way of an appeal and purport to execute the same judgment before withdrawing the appeal. Accordingly, in order to balance the interests of both the claimant and the applicant, I am of the considered opinion that this is a proper case for granting a conditional stay pending appeal as proposed by the applicant.

Security for the due performance

27. The applicant proposed to deposit the decretal sum into an interest earning bank account to be held in the joint names of the counsel on record for both parties and I think that proposal is reasonable. Consequently, I proceed to allow the applicant's Notice of Motion dated 10.12.2019 in the following terms: -

- a. An order for stay of execution of the judgment delivered on 15th March 2019 be and is hereby granted pending the hereing and determination of **Nairobi Civil Appeal 577 of 2019; Coca Cola Central, East & West Africa Limited vs. Clarice Odhiambo** on condition that the whole decretal sum plus the taxed costs of the suit are deposited within 30 days of today, in in interest earning account to be opened in a reputable financial institution in the joint names of the counsel on record for both parties herein.
- b. In default by the applicant to comply with the said condition, the stay order shall lapse automatically after the expiry of the 30 days' period.
- c. For avoidance of doubt, should the default be caused by the claimant, the applicant will have the liberty to seek leave to deposit the said security in Court.
- d. Cost of this Application shall be in the Appeal.

Dated and delivered at Nairobi this 10th December, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE