



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2158 OF 2016**

(Before Hon. Lady Justice Maureen Onyango)

**JOHN KAHAGURI MAINA..... CLAIMANT/RESPONDENT**

**VERSUS**

**PREMIER TAVERN HOTEL.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**CHARLES GATHOGO.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**EMILY MAINA.....3<sup>RD</sup> RESPONDENT/APPLICANT**

**RULING**

On 7<sup>th</sup> August 2020, this Court entered judgment in favour of the Claimant after finding that his employment was unfairly terminated. He was awarded Kshs.408,000.00, costs of Kshs.50,000.00 and interest thereof. Consequently, the Respondents filed an appeal and a subsequent application dated 3<sup>rd</sup> September 2020, seeking the following orders–

- a. Spent.
- b. Spent.
- c. That this Court be pleased to order a stay of execution and all consequential orders arising from the judgment delivered on the 7<sup>th</sup> of August 2020 pending inter partes hearing hereof and final disposal of this application.
- d. That this Court be pleased to order a stay of execution and all consequential orders arising from the judgment delivered on the 7<sup>th</sup> August 2020 pending the hearing and determination of the lodged appeal.
- e. That cost of this application be in the cause.

The Application was based on the grounds set out therein and the supporting affidavit of Charles Gathogo sworn on 3<sup>rd</sup> September 2020. The Claimant opposed the application vide his Replying Affidavit sworn on 17<sup>th</sup> September 2020.

**The Applicant's Case**

The Applicants averred that they lodged an arguable appeal against the entire judgment. However, there was a likelihood that execution may issue after the expiry of 30 days in the absence of extension of stay orders which would render the appeal nugatory thereby occasioning them irreparable harm. Additionally, that the Claimant is not a known person of sufficient means hence may fail to refund the decretal sum in the event the appeal succeeds.

They further averred that the Claimant would suffer no prejudice if the orders sought are not granted. That it is in the interest of justice that the orders sought be granted.

**The Claimant's Case**

The Claimant contended that the Respondents had not made an effort to settle the decretal amount yet it had been more than a month since judgment had been entered. He further contended that the application for stay was incompetent, mischievous, an afterthought and an abuse of the court process as it was an attempt to prevent him from enjoying the fruits of his judgment.

He argued that the grounds of appeal set out in the memorandum of appeal demonstrated that the appeal lacked merit. It was his position that the grounds of appeal were farfetched and aimed at deceiving the court that there were triable issues yet they were not in line with the trial proceedings. In his view, the trial court was justified to award damages upon finding that the dismissal had been unlawful.

The Claimant averred that the Respondents had not demonstrated how they stood to suffer prejudice if stay was not granted. For instance, they did not adduce evidence to show that the execution of payment of the decretal sum would render the appeal nugatory, neither did they demonstrate that he was a man of straw incapable of refunding the decretal amount if the appeal was successful.

Further, they failed to meet the condition for granting stay pending appeal as set out in order 42 of the Civil Procedure Rules. For example, they had not furnished security for due performance of the decree. He urged this Court to direct the Respondents to pay the decretal amount and the auctioneers fees, in the event the orders sought are granted. He further urged this Court to direct the Respondents to deposit the decretal amount in a joint interest earning account at Kenya Commercial Bank.

The Application was disposed of by way of written submissions with both parties filing the same.

### **The Applicants' Submissions**

The Applicants' submissions consisted of averments made in their application supporting affidavit. In response to the Claimant's replying affidavit, they submitted that by admitting that he had knowledge of the notice of appeal and memorandum of appeal, the Claimant was thus informed of the process. The Applicants urged this Court not to entertain the Claimant's arguments on the merits of their appeal.

They contended that there had been stay of execution orders issued by Wasilwa J. as the reason the decretal amount had not been paid. They contended that the appeal was stilted on the decretal sum hence remitting the same to the Claimant would erode the subject matter of the appeal. They submitted that the Claimant stood to suffer no prejudice as they had deposited the entire decretal sum with the Court.

It was the Applicants' submissions that the Claimant had admitted that he had set the execution process in motion as a proclamation notice had already been issued by his auctioneers before the lapse of the timelines prescribed by law and the existence of a Court order which was tantamount to contempt of court.

It was the Applicants' submissions that they had met the threshold set by Order 42 Rule 6(2) of the Civil Procedure Rules and the case of **Butt v Rent Restriction Tribunal [1979] eKLR**.

They further submitted that the Claimant's assertion that he was not a man of straw was not supported by evidence. They relied on **Nairobi Civil Application 238 of 2005; National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR)** where it was held that once an Applicant expresses a concern that the Respondent would be unable to refund the decretal sum, the burden shifts to the Respondent to show what resources they have, as it was peculiarly within their knowledge.

The Applicants submitted that the application had not been brought with inordinate delay since it could not have been filed earlier because it took time to get the judgment for preparation of the memorandum of appeal. They urged this Court to consider the hardships posed by COVID-19 that occasioned unseen delays.

Lastly, the Applicants submitted that they had deposited the entire decretal sum with the Court and that proof of the same was in the Court file. They relied on the case of **Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Company Advocates & 2 Others [2014] eKLR** where it was held that the purpose of security under order 42 was to guarantee due performance of the decree and not to punish the judgment debtor.

### **The Claimant's Submissions**

The Claimant on the other hand, submitted that the Applicants had not demonstrated the irreparable loss they stood to suffer and how the appeal would be rendered nugatory if the decretal amount is paid to him. He contends that their assertion that he was a man of straw was made in bad faith as he was a manager in a hospitality outlet earning a monthly salary of Kshs.84,509.00 hence capable of refunding the decretal amount should the appeal succeed.

It was his submissions that the application was incompetent and should be struck out for failure to comply with rule 82 of the Court of Appeal Rules due to the Applicants' failure to file a record of appeal within 60 days or at all.

The Claimant contended that filing the application 27 days after the judgment was delivered, was an inordinate delay there being no reason why the Applicants failed to file the application immediately judgment was delivered. He further contended that the appeal lacked chances of success as there was no attempt made to demonstrate how the Court had erred in arriving at its decision.

It was the Claimant's submissions that the Applicants did not provide proof of the deposited decretal amount within the timelines given by Court. He contended that it was in his best interest that the money be paid to him rather than being deposited in Court as it gained no interest. He further contended that the Applicants were only disputing the award of Kshs.160,000.00 hence the entire amount shouldn't have been the subject of the Application.

Lastly, he submitted that the Applicants' right to appeal did not override his right to enjoy the fruit of his judgment.

### **Analysis and Determination**

I have carefully examined the application, affidavit sworn in support and opposition thereof and the submissions filed by the parties. The issue for determination before Court is whether the Applicants have met the threshold to warrant the grant of stay of execution.

Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows—

**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.**

The application for grant of orders for stay was filed on 3<sup>rd</sup> September 2020, 26 days after the impugned judgment was delivered. This does not amount to inordinate delay. Further, the Applicants explained that the delay was caused by the delay in getting a copy the judgment to enable them prepare the memorandum of appeal.

As regards the second condition, this Court granted temporary stay of execution to the Applicants on the condition that they were to deposit the decretal sum with this Court within 14 days. The Applicants alleged to have deposited the same but evidence of the same was not annexed to their supporting affidavit neither is there evidence of such payment in the Court file. As such, the same remains a mere allegation.

The Applicant made averments to the effect that a proclamation notice had been issued hence the Applicants are likely to suffer prejudice if the stay of execution orders sought are not granted, which will render their appeal nugatory. The Court of Appeal in the case of **Butt v Rent Restriction Tribunal [Supra]**

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

The decree herein is a money decree. It is not automatic that all executions of money decrees would result in an appeal being rendered nugatory. The applicant must demonstrate that the appeal will be rendered nugatory.

In **Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. In addition, stay may only be granted for sufficient cause. The Court ought further to consider the overriding objective stipulated in Sections 1A and 1B of the Civil Procedure Act. According to Section 1A(2) of the Civil Procedure Act "**the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective**" while under Section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

Kimaru, J. in **Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** held that:

"The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal

is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

In **Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** Warsame, J (as he then was) stated as follows:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

Platt, Ag. JA (as he then was) in **Kenya Shell Limited v Kibiru [1986] KLR 410, at page 416** expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that position.

In the instant application, the Respondent (claimant) has in his submissions (he was acting in person) stated that he is currently employed in the Hospitality Industry earning a salary of Kshs.84,509.00 and is therefore capable of refunding the decretal sum should the appeal succeed.

For the foregoing reasons, I find the application without merit and dismiss the same with costs.

If the decretal sum has been deposited in court, the court directs that the same be released to the Claimant/Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF DECEMBER 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

**MAUREEN ONYANGO**

**JUDGE**