REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 540 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WILLIAM MUGA AKETCH.....CLAIMANT

VERSUS

TAILORS AND TEXTILE WORKERS UNION.....RESPONDENT

RULING

The Applicant, Tailors and Textiles Workers Union, filed a Notice of Motion Application on 24th May 2018 dated 22nd May 2018, brought under *Order 42 Rule 6 and Section 3A of the Civil Procedure Act* seeking an order of stay of execution of the court decree issued on 11/05/2018 pending the hearing and determination of the intended Appeal against the Respondent, William Muga Aketch.

The Application is supported on the grounds that:-

a) The Respondent/Applicant intends to appeal against the decision of the Employment & Labour Relations Court Cause No. 540 of 2014 issued and delivered on the 1st day of May, 2018 and have already filed the Notice of Appeal and applied for typed proceedings.

b) The Learned Judge erred in holding that the Claimant was entitled to benefits which he did not work or render any service for.

c) The Claimant/Respondent is likely to move to execute the decree issued thus rendering this appeal nugatory.

d) The Respondent/Applicant will suffer loss if a stay of execution is not granted and is ready and willing to provide reasonable security for the Judgment.

The Application is supported by the Affidavit sworn by the applicant union's National General Secretary, Rev. Joel Kandie Chebii wherein he states that this matter arose after the Respondent was removed from employment on 9th December 2009 which led to the filing of the aforementioned suit. That judgment was delivered against the Applicant Union in the sum of Kshs.1,214,125/= in favour of the Respondent. That the Applicant being aggrieved and dissatisfied with the said judgment, it lodged a Notice of Appeal dated 14th May 2018. That he pleads with the court to grant the Applicant the orders of stay of execution pending the Appeal whose grounds are set out in the attached draft Memorandum of Appeal.

The Ongaya J. heard the application ex-parte on 28th May 2018 and ordered:

1. That there be stay of execution of the decree issued against the applicant on 11th day of May 2018 pending interpartes hearing or further orders and subject to the applicant depositing all the decretal sum in an interest earning account in the joint names of the parties' advocates not later than 1st July, 2018.

2. That the application be served today for mention on 11th June 2018 at 9.00 am before Hon. Lady Justice Maureen Onyango for further orders and directions.

3. That costs in the cause.

The Applicant Union through its advocate then filed a Certificate of Urgency dated 22nd June 2018 for variation of the above orders issued

on 28th May 2018 to the extent that it should be allowed to deposit half the judgment sum as it is unable to raise the full amount. Further, that it should be granted an overdraft of the sum of Kshs.600,000/= towards the deposit being made; that if the order is not varied, the Applicant will suffer great injustice.

Respondent/Claimant's Case

The Respondent filed grounds of opposition dated 27th July 2018 stating that he shall be opposing the Application dated 22nd May 2018 and the certificate of urgency dated 22nd June 2018 on grounds that:-

1. The application is incompetent, defective, vexatious, frivolous and scandalous.

2. No sufficient cause has been pleaded or shown for the grant of stay orders. The depositions in paragraphs 6 - 9 are not grounds to support application for stay of execution.

3. No security has been given by the Applicant. The Applicant has no audience before the court on an application for stay having violated the court orders dated 28th May 2018 to deposit the entire decretal sum by 1st July 2018.

4. No substantive loss has been pleaded or demonstrated to warrant stay of orders.

5. The Certificate of Urgency dated 22nd June 2108 is unknown in law, defective, incompetent and an abuse of the court process, for inter alia, not being founded on any application.

6. The application is otherwise devoid of merit or substance, is only made to scuttle and delay the realization of the fruits of the judgment.

Applicant's Submissions

The Applicant submits that no Replying affidavit has been filed to challenge its application, supporting affidavit and the annexures and that it is obvious the facts in its application are not in dispute. That it has offered to deposit half of the decretal sum as security given the fact that if payment is effected to the Claimant/Respondent, he will not be able to refund the monies should the appeal be successful as he is not in any gainful employment. Further, that it has established before this Honourable Court it has an arguable appeal and that its application is therefore meritious and well-grounded in law to warrant a grant of the orders sought.

The Applicant relies on ***Cause No. 518 of 2011 Peter Njoroge Ndung'u –v- Board of Directors of David Sheldrick Wildlife Trust*** where the court held that a stay of execution would be granted after a party established that it would suffer substantial loss. That in this case, it has met the conditions that were set in the foregoing case with regard to the urgent filing of the application and that it has also established it will suffer irreparable loss should the decretal sum be paid to the Claimant/Respondent.

Respondent's Submissions

The Respondent submits that the Application and Certificate of Urgency are incompetent, defective, devoid of merit and an abuse of the court process. That Order 42 Rule 6 (1) of the Civil Procedure Rules requires an applicant to demonstrate sufficient cause and provides in part as follows:

> ***"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 appeal from may*** for sufficient cause ***order stay of execution of such decree or order..."***

That in ***Attorney General –v- Law Society of Kenya & Another [2013] eKLR***, sufficient cause was defined as the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused and that it must therefore be rational, plausible, logical, convincing, reasonable and truthful. That it should not be an explanation that leaves doubts in a judge's mind and unexplained gaps in the sequence of events. The Respondent submitted that the Applicant in this case has not discharged its burden by placing before this court sufficient cause as defined in the ***Attorney General -v- LSK*** case above.

He submits that sub rule 2 (a) and (b) of Order 42 Rule 6 bars the court from granting stay unless it is satisfied that substantial loss may result to the applicant if the order is not granted and the application is made without unreasonable delay and further, such security as the court orders for the due performance of such decree or order has been given. That in this case the burden is on the Applicant to prove substantial loss that would be occasioned in the event the decree holder is paid which it has failed to do. That to date, the Applicant has not deposited the entire decretal sum as ordered by Court; that because of this non-compliance, it has no audience before court. That the Applicant only used the statement about security to obtain stay and buy time and that it was not a genuine request. That the court cannot exercise any more discretion in its favour. He relies in the case of ***Masisi Mwita -v- Damaris Wanjiku Njeri [2016] eKLR*** where the Court held,

> *"As stated earlier, the applicant did not deem it fit to address the issue of whether or not if the decretal sum is paid, he may not recover it from the Respondent. I find thus substantial loss, being one of the requirements under the rules has not been proved in the present case. I therefore find no reason to deny the Respondent the fruits of her judgment especially bearing in mind that this is a money decree."*

That the Judge in the Masisi Mwita case further emphasised the holding in ***Equity Bank Ltd -v- Taiga Adams Company Ltd*** stating that not one but four requirements under Order 42 Rule 6 must be met.

It is submitted by the Respondent that the Certificate of Urgency dated 22nd June 2018 bears an annexed document and is defective, incompetent, unknown in law and should be struck off and that it cannot be used to obtain court orders as there is no application accompanying it. That the Applicant has not advanced any arguments on it in its submission and he urges the court to dismiss the application and certificate of urgency.

Determination

In the judgment sort to be stayed, the court observed as follows –

> "This is a matter that has been litigated in four previous suits being Industrial Court Cause No. 3N of 2001, JR. Misc. Civil Application No. 327 of 2010 (Milimani) Petition No. 26 of 2012 and JR. No. 255 of 2012.

All the determinations were in favour of the claimant as the award in Cause No. 3N of 2010 was not set aside. That decision remains valid to date. The suit herein is in actual fact a bid to enforce the award of the court in 3N of 2010.

The award having not been set aside, the only issue is whether the claimant is entitled to the benefits of the award.

The respondent did not obtain any orders of stay against the award in Cause 3N of 2010 but at the same time did not comply with the same. By agreeing with the respondent the court would be sanctioning disobedience of a court award that has not been set aside or successfully challenged. The court would thus be promoting the disobedience of its own orders."

In spite of these findings, the applicant was granted conditional stay of the decree herein on 28th May 2018 which it has not complied with to date. Instead it appealed for variation of the said orders.

A party who has failed to comply with court orders has no audience before the court. The court cannot bend backwards to meet the demands of the applicant. The court must consider the rights of a litigant who has a valid judgment even as it considers the plight of the opposite party against whom a judgment has been made.

I find no merit in both the application for stay and the application to vary the orders made on 28th May 2018 with the result that I dismiss both with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019.

MAUREEN ONYANGO

JUDGE