



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 301 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th February, 2019)

ALEXANDER KASINA MUKALA.....CLAIMANT

VERSUS

KENYA POWER AND LIGHTING COMPANY.....RESPONDENT

RULING

1. The Application before this Honourable Court is the one dated 23rd October, 2018. The Application was filed under Certificate of Urgency through a Notice of Motion filed under the Inherent Jurisdiction of Court, Section 17 of the Employment and Labour Relations Court Act, Section 3A, 75, 78, 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of law.

2. The Application seeks the following Orders:-

- 1. THAT this application be certified as urgent and service thereof be dispensed with in the first instance.**
- 2. THAT this Honourable Court be pleased to stay execution of the Judgment of this Honourable Court passed on 9th October, 2018 pending hearing and determination of this Application.**
- 3. THAT this Honourable Court be pleased to stay the execution of the Judgment of this Honourable Court passed on 9th October, 2018 pending hearing and determination of the pending Appeal.**
- 4. THAT the Costs of this Application be provided for.**

3. This Application is premised on the grounds that:-

- a) This Honourable Court (Hon L.J Hellen Wasilwa) delivered Judgment on the 9th October, 2018 awarding the Respondent herein an all-inclusive sum of Kshs. 637,312/- being compensation for unfair termination of employment together with costs and interest.**
- b) The Court further directed that there be a stay of execution of Judgment and decree for 15 days from the date thereof.**
- c) The Respondent having been dissatisfied with the Judgment has preferred an Appeal to the Court of Appeal by filing a Notice of Appeal and requested for typed and certified copies of the Proceedings, Judgment and Decree.**
- d) If Stay of execution is not granted substantial loss may result to the Respondent as once the said money is paid to the Claimant, it may not be recoverable.**
- e) The intended Appeal herein has reasonable chance of success and if execution is carried out it will render the Appeal nugatory.**
- f) There has been no delay in bringing this Application.**

4. The Application is supported by the Affidavit of **ELIJAH KOSKEY** sworn on 23rd October, 2018, in which he reiterates the averments made in the Notice of Motion Application.

5. The Claimant opposed this Application vide a Replying Affidavit filed in Court on 7th November, 2018 deposed to by **ALEXANDER KASINA MUKALA**, the Claimant herein, in which he avers that for an Order of stay pending the hearing of an Appeal can only be granted where the Appellant has demonstrated inter-alia that unless the order is issued he stands to suffer irreparable loss, which the Respondent/Applicant herein has not done.

6. He avers that he is in Business and is therefore capable of repaying the said sum of Kshs. 637,312/=.

7. He further avers that it is in the interest of justice that he be allowed to enjoy the fruits of his judgment as the matter was filed in 2008 (about 10 years ago).

8. The Claimant contends that the Applicant's Appeal has no chance of success in light of the evidence that was adduced in Court in this matter.

9. In disposing of the instant Application, the parties agreed to file written submissions.

Respondent's/Applicant's Submissions

10. The Respondent/Applicant submitted that it has satisfied the conditions for granting the Orders sought in the instant Application as provided for under Order 42 Rule 6. It was further submitted that the Court ought to exercise its discretion and allow the instant Application. The Applicant for emphasis relied on the Authority of **Butt Versus Rent Restriction Tribunal (1982) KLR 417** in which matter the Court gave guidance on how a Court ought to exercise its discretion. In the matter it was held:-

1. "The power of the Court to grant or refuse an Application for 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 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 power 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."

11. The Applicant further submitted that the purpose of stay of execution pending Appeal is to preserve the subject matter so that the right of Appeal can be exercised without prejudicing the Applicant, as the Appeal would be rendered nugatory. For emphasis the Applicant relied on the case of **Focin Motorcycle Co. Limited Versus Ann Wambui Wangui & Another (2018) eKLR** which cited with approval the case of **Stanley Karanja Wanaina & Another Versus Ridon Ayangu Mutubwa Nairobi H.C.C.A 427/2015** where it was stated:-

"It is not enough for the Respondent to merely swear the fact in an affidavit without going further to provide evidence of his liquidity. In my view, the Respondent has evidentiary burden to show that he has the resources since this is a matter that is purely within his knowledge."

12. The Respondent/Applicant further relied on the case of **National Industrial Credit Bank Limited Versus Aquinas Francis Wasike and Another (UR) C.A. 238/2005** for further emphasis.

13. The Respondent/Applicant avers that the Claimant has not disclosed in his Replying Affidavit any source of income that he would use to refund the Respondent the decretal sum should the appeal succeed he only states that he is in business.

14. The Respondent/Applicant contends that it has established that it will suffer substantial loss if execution is not stayed and that the Appeal will altogether be rendered nugatory. The Respondent/Applicant relied on the Authority of **Kenya Hotel Properties Limited Versus Willesden Properties Limited Civil Application Number NAI 322 of 2006 (UR)** cited with approval in **Superior Homes (Kenya) Limited Versus Musango Kithome (2018) eKLR** where the Court held:-

"The decree is a money decree and normally the Courts have felt that the success of the Appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the Respondent is not a "man of straw" but is a person who, on the success of the Appeal, would be able to repay the decretal amounts plus any interest to the Applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the Applicants if the stay is refused purely on grounds that the decree is a money decree. The Court however was emphatic that in consideration such matters as hardship, a third principle of law was not being established at all."

15. The Respondent/Applicant further contends that the instant Applicant was filed without unreasonable delay as it was filed on 23rd October, 2018 14 days after the delivery of the Judgment.

16. The Respondent/Applicant submitted that it is ready to furnish security for the due performance of the decree and that the Claimant's interests will be taken care of by the Respondent depositing the decretal amount and once the Appeal is determined the winner will have ready access to the amount. The Applicant for emphasis relied on the case of G.N Muema P/A (Sic) Mt View Maternity & Nursing Home Versus Miriam Maalim Bishar & Another (2018) eKLR where the Court held as follows:-

*“The Applicant demonstrated his willingness to furnish security demonstrated. However, this was indicated in his written submissions. In other words, there was no affidavit evidence pointing to the fact that he was willing to furnish security. **Be that as it may, the Court noted that although his willingness was demonstrated through the wrong pleading, it opted to consider this issue and avoid dismissing the same on a technicality as there was some sought of demonstration of such willingness.**”*

17. In Conclusion, the Respondent/Applicant urged the Court to allow the instant Application with no orders as to costs.

Claimant/Respondent's Submissions

18. It is submitted that the law covering the instant Application is found under Order 42 Rule 6 of the Civil Procedure Rules and that this Court has discretion to issue an order of stay of its own decision if the party satisfies the conditions as set out under Order 42 Rule 6 which is:-

i. That substantial loss may be occasioned to the party.

ii. That the application was made without unreasonable delay.

iii. That the party has offered security for due performance of the decree.

19. It is the Claimant /Respondent's contention that the Applicant has not satisfied any of the above conditions and is therefore not entitled to an Order of stay of execution.

20. For emphasis the Claimant/Respondent relied on the case of Scofinac Company Limited Versus Nelphat Kimotho Muturi (2013) eKLR where it was held that:-

“The principles guiding the grant of stay of execution pending appeal are well settled. These principles are provided under Order 42 Rule 6(2) of the Civil Procedure Rules under which this Court is to be satisfied that substantial loss may result to the Applicant unless the Order is made; that the Application has been made without unreasonable delay; and that such security as the Court Orders for the performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

21. The Claimant/Respondent further submitted that the High Court's power to grant orders of stay of execution are fettered by the conditions as set in Order 42 Rule 6 of the Civil Procedure Rules, 2010 and relied on the Authority of Vishram Raiji Halai Versus Thornton & Turpin Civil Application Number Nai. 15 of 1990 (1990) KLR 365 for emphasis.

22. The Claimant/Respondent averred that a successful party is entitled to the fruits of his Judgment or of any decision of the Court at whatever stage. The Claimant made reference to the case of Macharia T/A Macharia & Co. Advocates Versus Eas African Standard (No. 2) (2002) KLR 63 where the Court held:-

“...to be obsessed with the protection of the appellant or intending appellant in total disregard or flirting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed to another, contrary to sound principle for the exercise of a judicial discretion.”

23. The Claimant/Respondent submitted that he ought to be allowed to enjoy the fruits of his judgment in the interest of justice, which is the **Ordinary Principle**.

24. In Conclusion, the Claimant/Respondent submitted that the Applicant has failed to demonstrate in what manner it is likely to suffer substantial loss or that its appeal has high chances of success.

25. The Claimant/Respondent urged the Court to dismiss the instant Application with Costs.

26. I have examined all the averments and submissions as set out herein. Indeed Order 42 rule 6(2) of the Civil Procedure Rules is the guide on the consideration the Court will take into account before granting the orders sought.

27. The Applicant came to Court in good time and is not guilty of delay. He is also ready to deposit any security as may be ordered by this Court in particular depositing the decretal sum in Court. In principle, the Applicant satisfies two key conditions for grant of a stay order as provided under Order 42 rule 6(2).

28. The 3rd condition is that the Applicant must show that he stand to suffer irreparable harm if the stay is not granted. The

Respondent/Applicant submitted that the Claimant is a man of low means and unemployed and will not be in a position to refund the decretal sum if the appeal is allowed. The Claimant indicated that he does business and is in a position to refund the amount if the appeal succeeds.

29. The Claimant however failed to substantiate the type of business he does nor its output. The Claimant failed to prove he is in a position to cushion the Respondent/Applicant if the appeal succeeds.

30. This Court has discretion to grant the stay granted so as to avert any injustice. Given that the Applicant are ready to deposit the decretal sum in Court, I exercise my discretion and allow the stay on condition that the decretal sum is deposited by the Respondent in Court within 30 days with effect from the date of this ruling. In default, execution to issue.

31. Costs to abide the outcome of the appeal.

Dated and delivered in open Court this 20th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njoki holding brief Nyambura for Applicant/Claimant – Present

Wanjohi holding brief Mutua for Claimant/Respondent – Present