



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA T NAKURU**

**CAUSE NO.414 OF 2013**

**TRANSPORT WORKERS UNION (K).....CLAIMANT**

**VERSUS**

**LOCHAB BROTHERS LIMITED.....RESPONDENT**

**RULING**

By application and Notice of Motion dated 12<sup>th</sup> October, 2018 the respondent, Lochab Brothers Limited is seeking for orders that;

*There be a stay of execution and a stay of proceedings pending hearing and determination of the intended appeal to the Court of Appeal.*

The application is supported by the supporting affidavit of Ranjit Singh Lochab and his Supplementary Affidavit and on the grounds that there will be substantial loss where the judgement amount is paid and there exists sufficient cause to justify the grant of stay and there already exists a security deposit with the court for the due performance of the decree.

Mr Lochab avers that on 3rd October, 2018 the court delivered ruling with regard to the tabulation of dues owing to the claimant and directed the respondent to pay ksh.2,655, and 400.00. the court also made a finding that Application for stay of execution had been addressed and therefore could not be introduced at this stage as the respondent had failed to comply with the interim orders to deposit the judgement amount from 8<sup>th</sup> November, 2016 and became exposed and that the application for review had been overtaken by events.

The respondent is aggrieved by the findings of the court and wishes to file an appeal and in this regard has applied for certified copies of proceedings and ruling. The application for stay of execution is made without delay and where the judgement amounts are released to the claimant at Ksh.4,047,160.50 substantial losses shall occur. There is a deposit of the judgement amount vide receipt dated 15th January, 2018.

Mr Lochab also avers that there are good grounds for appeal and where stay of execution is not granted, the intended appeal shall be rendered nugatory.

In the Supplementary Affidavit, Mr Lochab avers that the claimant has no capacity to refund the sum of Kshs.4,047,160.50 upon a successful appeal and the cash at bank as of 25th September, 2018 is too low to satisfy the judgement amount being the sum of ksh.125,615.00. Motor Vehicle KCJ 800R is not the exclusive property of the claimant as the owner in priority is NIC Bank Kenya PLC whose interests are on priority. The claimant is indebted and thus cannot refund the judgement sum if paid before the appeal is heard.

There is Notice of Appeal dated 17th April, 2014 on record and the claimant cannot state that no such appeal exists.

In reply, the claimant filed the Replying Affidavit of Dan Mihadi the Secretary General of the claimant union and avers that the respondent filed Notice of Appeal on 22nd April, 2014 together with application stay of execution but there was no attendance and application was dismissed. No appeal has been prosecuted.

On 12th June, 2015 the respondent filed application for review of the judgement which was not prosecuted and has since been set aside. The application now filed seeking stay pending hearing of the intended appeal is without merit and should be declined. The respondent has not paid the judgement amount and even where the intended appeal were to succeed, the claimant had the capacity to refund the judgement amount. There is motor vehicle registration No.KCJ 800J and union dues received monthly.

Section 17 of the Employment and Labour Relations Court Act, 2011 give the right of appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the

Constitution, 2010. In exercise of such right, a party must comply with the requisite provisions of the law and the rules thereto.

Where there is an intended appeal such is notice of intent. such intention to warrant stay of execution of the judgement must be demonstrated as having been acted upon. A Notice of Appeal is not an Appeal as it were. Without attaching the notice of appeal or memoranda or draft of the same, there is no demonstration of an actionable matter to warrant the orders sought by the respondent. even where there is a Notice of Appeal filed herein, such alone is not sufficient cause to grant stay of execution. See **Jonathan Spangler versus Centre for African Family Studies (CAFS) Cause No.108 of 2015.**

The respondent's case is that where stay is not allowed thee will be substantial loss suffered as the claimant only has a motor vehicle jointly held and the cash in bank is not sufficient to ensure a refund of the judgement amount if paid to them. What constitutes substantial loss is enumerated by the court in the case of **James Wangalwa & Another versus Agnes Naliaka Cheseto HC Misc No. 42 of 2012 OR (2012) eKLR** where it was held *inter alia* that;

*No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**,... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.*

It is common cause the respondent filed Notice of Appeal on 22nd April, 2014.

The Notice of Appeal was filed pursuant to judgement herein delivered on 28th March, 2014.

It is now over 4 years and 10 months since judgement was delivered.

The application by the respondent dated 12th October, 2010 is seeking for the orders that;

*There be stay of execution and a stay of proceedings pending the hearing and determination of the intended appeal to the Court of Appeal.*

The application is premised on the grounds that the court is already in possession of security deposited by the respondent for the due performance of the decree.

In his Affidavit dated 12th October, 2018, Mr Lochab has attached a Notice of Appeal dated 11<sup>th</sup> October, 2018. Such intention to appeal cannot be faulted.

However noting the history of the matter, the earlier Notice of Appeal dated 22nd April, 2014 and where no action therefrom has moved to fruition, the intent surviving over 4 years, to allow the stay as herein sought would be to use the court process to stall the course of justice.

The claimant is entitled to the fruits of the judgement herein delivered on 28th March, 2014. The substance of the judgement stands. There is no stay therefrom.

**Accordingly, application by the respondent dated 12<sup>th</sup> October, 2018 is hereby dismissed with costs. The funds deposited with the court for the due performance of the judgement shall be released to the claimant forthwith. Costs to the claimant.**

**Delivered at Nakuru this 14<sup>th</sup> day of February, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....