



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 410 OF 2018**

**(Formerly Mombasa ELRC No. 131 of 2018)**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 12<sup>th</sup> February, 2019)**

**AHMED MOHAMMED DAGANE.....CLAIMANT**

**VERSUS**

**THE COUNTY SERVICE BOARD GARISSA COUNTY.....RESPONDENT**

**RULING**

1. The Application before Court is the one dated 28<sup>th</sup> September, 2018. The Application was filed under a Certificate of Urgency through a Notice of Motion filed Under Order 42, Rule 6 (1), (2), Order 51 Rule (1) of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Section 12 of the Employment and Labour Relations Court Act and all other enabling provisions of the law.

2. The Application seeks the following Orders:-

1. ***THAT this Application be certified as urgent and service hereof be dispensed with in the first instance.***
2. ***THAT there be a stay of execution of the Ruling delivered on 16<sup>th</sup> day of July 2018 and Order made on 21<sup>st</sup> March, 2018 pending the hearing and determination of this Application inter-partes.***
3. ***THAT there be a stay of execution of the Ruling delivered on the 16<sup>th</sup> day of July 2018 and Order made on 21<sup>st</sup> March 2018 pending the hearing and determination of the intended Appeal.***
4. ***THAT the Costs of this Application be provided for.***

3. This Application is premised on the grounds **THAT**:-

- a) ***On the 16<sup>th</sup> day of July 2018 the Court delivered a Ruling dismissing the Applicant's Application for Review dated 12<sup>th</sup> April 2018 and Ordered that the Court Order made on the 21<sup>st</sup> March 2018 stands undisturbed which order directed the Respondent to pay the Claimant his salary arrears from 1<sup>st</sup> November 2017 to March 2018 amounting to Kshs. 2,728,063 and continue to pay the Claimant his monthly salary to the tune of Kshs 473,689/= together with any salary increments with effect from January 2018 as and when they are due on a monthly basis pending hearing and determination of the Claim herein.***
- b) ***The Applicant herein being dissatisfied with the said Ruling intends to appeal against the entire Ruling and has already filed and served Notice of Appeal.***
- c) ***The Claimant is likely to commence execution proceedings against the Applicant.***
- d) ***The Applicant will suffer substantial loss if the Orders sought herein are not granted.***
- e) ***The Appeal has a good chance of success.***
- f) ***The Appeal will be rendered nugatory if the stay order is not granted.***

*g) It is in the interest of Justice and the overriding objectives of the law that the Application herein be allowed as prayed.*

*h) The Applicant is willing to abide by any conditions that this Honourable Court may deem fit to impose on it.*

*i) Further grounds to be adduced at the hearing hereof.*

4. The Application is supported by the Affidavit of **ABDI MUHUMED ALI** sworn on 28<sup>th</sup> September, 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 8<sup>th</sup> October, 2018 deponed by **AHMED MOHAMMED DAGANE**, the Claimant/ Respondent, in which he avers that the Applicant is bent on abusing the Court process by engaging in deliberate delaying tactics and/or fictitious claims aimed at frustrating and delaying the Claimant from enjoying fruits of Court Orders granted in his favour.

6. He further avers that the Applicant is misleading the Court that there is an Appeal whereas there is no Appeal. Further, that the Applicant has not requested for typed proceedings as no such letter is attached to the Application.

7. The Claimant contends that he is a man of means and therefore will be able to repay the Kshs. 3,000,000 should the Appeal be successful.

8. The Respondent/Applicant filed a Further Affidavit sworn by **ABDI MUHUMED ALI** on 12<sup>th</sup> October, 2018 and filed in Court on 16<sup>th</sup> October, 2018, in which he reiterates the contents of his Supporting Affidavit sworn on 28<sup>th</sup> September, 2018.

9. The Respondent/Applicant avers that being aggrieved by the Court's Ruling delivered on 16<sup>th</sup> July 2018 he duly instructed his Advocates on record to file and Serve a Notice of Appeal and the same was preferred within the stipulated period as indicated in Rules 75 , 77 and Rule 82 (1) of the Court of Appeal Rules, 2010.

10. The Respondent/Applicant contends that on 2<sup>nd</sup> August, 2018 at 4.54pm the Claimant's Advocates on record were duly served with the Notice of Appeal together with a copy of letter requesting for typed proceedings and the said Advocates accepted service by endorsing their stamp on both the letter and the Notice of Appeal.

11. The Respondent/Applicant further avers that the Claimant's means remain unknown as the same have not been substantiated by the Claimant further that the Claimant has since amended his Statement of Claim without leave to include a prayer for payment of terminal benefits thus acknowledging his termination from employment.

12. The Respondent/Applicant urged the Court to allow the instant Application.

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

#### **Respondent's/Applicant's Submissions**

14. The Respondent's/Applicant in his submissions urged the Court to allow the instant Application as they have satisfied the conditions set under Order 42 Rule 6 (2) of the Civil Procedure Rules for grant of orders of stay pending Appeal. For emphasis, the Respondent/Applicant relied on the Authority of **Tabro Transporters Limited Versus Absalom Dovalumbasi (2012) eKLR** where the Court held that:-

*“By law, it is the obligation of the Court to preserve the subject of the suit which is inherent in the administration of justice. If the appellants are successful in the Appeal, there will be a barren result unless the subject of the appeal is preserved in whatever way the Court may deem fit.”*

15. The Respondent further relied on the case of **Erinford Properties Versus Cheshire (1974) 2 ALL ER 448** and **Shivabhai Nathabhai Patel Versus Manibhai Hathibhai Patel (1959) EA 907**.

16. The Respondent/Applicant further submitted that the fact that one is educated does not necessarily mean that one is able to make out such a huge payment further it does not exempt them from proving their capacity to repay the decretal sum should the Appeal succeed. For emphasis the Respondent relied on the case of **Bungoma H.C MISC Application No. 42 of 2011 James Wangalwa & Another Versus Agnes Naliaka Cheseto** where it is stated that an 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.

17. The Respondent/Applicant submits that it is willing to abide by any conditions imposed by this Honourable Court in relation to granting of security herein. Further, it is submitted that this Court has discretion in granting stay as highlighted in the case of **Andrew Leteipa Sunkuli & Another Versus Southern Credit Banking Corporation (2006) eKLR**.

18. The Applicant further urged the Court to exercise its discretion to allow the instant Application on the basis of facts and in such a way as not to prevent the Appeal, if successful, from being rendered nugatory and relied on the case of **Cotenca Inspection SA Versus Hems Group Trading Company Limited Civil Application Number NAI 303 of 2000**.

#### **Claimant/Respondent's Submissions**

19. It is submitted on behalf of the Claimant/Respondent that the Application herein ought to be dismissed as the Applicant has not satisfied the conditions for grant of the Orders sought as provided under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010. For emphasis the Claimant/Respondent relied on the case of **Elena D. Korir Versus Kenyatta University(2012) eKLR** where Justice Nzioki wa Makau stated that:-

***“The Applicant must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another Versus Thornton & Turpin Limited where the Court of Appeal(Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The Applicant must furnish security , the Application must be made without unreasonable delay.”***

20. The Claimant/Respondent further relied on the authority of **Masisi Mwita Versus Damaris Wanjiru Njeri (2016) eKLR** where the Court held that:-

***“It is clear from the wording of Order 42 Rule 6 (1) for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; a) Substantial loss may result to the applicant unless the Order is made; (b) The application has been brought without undue delay; (c) Such security as to costs has been given by the Applicant.”***

21. The Claimant/Respondent submitted that the Respondent/Applicant has not demonstrated and/or satisfied any of the principles set out in the above cases and as such the Application dated 28<sup>th</sup> September, 2018, ought to be dismissed with costs.

22. I have examined all the averments and submissions of both parties. Order 42 rule (6) (2) of the Civil Procedure Rules 2010 sets out the criteria to be applied by the Court before allowing orders of stay as prayed as follows:-

2) **“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**

**b) application has been made without unreasonable delay;**

**c) and such security as the court orders for the due**

**d) performance of such decree or order as**

**e) may ultimately be binding on him has been given by the Applicant.**

23. The Applicant filed this application on 29/9/2018 seeking stay of orders delivered on 16/7/2018 and orders made on 21/3/2018. In this Court’s view, orders of stay should follow on the heels following the impugned orders.

24. The Applicant approached this Court almost 6 months after the orders were made in March 2018 and therefore did not approach Court within reasonable time. Reasonable time in my view should not exceed 1 month.

25. Other than time, the Applicant/Respondent have not demonstrated that they stand to suffer irreparable harm if the orders are not made. They have however indicated that they have since filed a Notice of Appeal, which is the correct position.

26. The Respondent/Applicants have also indicated that they are willing to comply with any condition that may be imposed by this Court.

27. The Respondent on the other hand has indicated that he is a man of means and is therefore capable of refunding the 3 million decretal sum if the appeal succeeds. He did not however demonstrate the means by which he is capable of refunding the 3 million if at all.

28. I take note that the application before Court can be granted by this Court exercising its discretion if satisfied that the appeal will be rendered nugatory if the orders sought are not granted. From the position that the Claimant/Respondent has not demonstrated his sources of income by which he can refund the 3 million if the appeal succeeds and so that the appeal if successful is not rendered nugatory, I allow the application for stay on condition that the Respondent deposits the decretal sum in an interest earning account held in joint names of counsels on record within 30 days. In default execution to issue.

29. Costs in the cause.

**Dated and delivered in open Court this 12<sup>th</sup> day of February, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Mwangi holding brief Garane for Respondent – Present

Okemwa holding brief Rakoro for Claimant