



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 916 OF 2016

GEORGE MAEBA MAGETO.....CLAIMANT

VS

UNILEVER TEA (K) LIMITED.....1ST RESPONDENT/APPLICANT

HILLARY LOMBARD.....2ND RESPONDENT

RULING

1. On 25th October 2018, I delivered judgment in favour of the Claimant as against the 1st Respondent in the sum of Kshs. 479,400. Being dissatisfied with the judgment, the Respondent filed a Notice of Appeal on 29th October 2018.

2. The 1st Respondent subsequently filed an application by way of Notice of Motion under certificate of urgency dated 3rd December 2018 seeking stay of execution of the judgment and attendant decree. It is that application which is the subject of this ruling.

3. The application, which is supported by the affidavit of the 1st Respondent's Legal Officer, Winnie Ochieng' is based on the following grounds:

a) The Applicant has filed a Notice of Appeal in respect of the decision delivered by the Court on 25th October 2018 in accordance with Rule 75 of the Court of Appeal Rules, 2010;

b) The Applicant intends to appeal against the whole of the said decision as specified in the Notice of Appeal;

c) The Applicant has an arguable appeal as disclosed by the draft Memorandum of Appeal annexed to the affidavit in support of the application;

d) If the order of stay of execution is not granted, the Applicant's appeal will be rendered nugatory as the Claimant is an individual who, in the event that the Respondent is successful on appeal, might be difficult to locate and will not be in a position to refund the decretal amount;

e) The Applicant is prepared to put up, by way of security, the entire decretal amount in an interest earning bank account in the joint names of the parties' Advocates.

4. The Claimant filed Grounds of Opposition on 21st December 2018 stating the following:

a) That the application is frivolous, vexatious, lacks merit and is calculated to inflict pain and suffering on the Claimant;

b) That no appeal had been filed whose chance of success may be discerned;

c) That there are uncontested claims namely;

i) Salary in lieu of notice.....Kshs. 36,000

ii) Gratuity.....216,000

iii) 5 days worked in September 2016.....3,000

iv) Prorata leave.....8,400

d) That keeping the decretal sum either in court or in a joint interest earning account is of no benefit to the Claimant.

5. The conditions under which stay of execution pending appeal may be granted are codified in Order 42 Rule 6(2) of the Civil Procedure Rules which provides that:

2. No order of stay shall be made under sub rule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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.

6. In its well tested decision in **Butt v Rent Restriction Tribunal [1982] KLR 417**, the Court of Appeal set out the following guiding principles for exercise of discretion in applications for stay of execution:

“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 stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the 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 Produce Rules, can order security upon application by either party or on its own motion. Failure to put up security for costs as ordered will cause the order for stay of execution to lapse.”

6. I do not need to say more. The 1st Respondent has a right of appeal and the Claimant has a lawfully obtained judgment in his favour. The role of the Court is to strike a balance between the rights of the parties.

7. This is a money award and the 1st Respondent’s apprehension that if its appeal succeeds, the Claimant may not be able to repay it cannot be wished away. Conversely however, the Claimant’s right to reap the fruits of his award should also not be ignored.

8. With the foregoing in mind and balancing the rights of the parties I grant a conditional stay of execution in the following terms:

a) The 1st Respondent will pay the equivalent of 50% of the award amount to the Claimant through his Advocate within the next fourteen (14) days from the date of this ruling;

b) The balance being 50% of the award amount will be deposited in an interest earning bank account in the joint names of the Advocates for the Claimant and the 1st Respondent within the next thirty (30) days from the date of this ruling;

c) Failure to observe any of the aforesaid conditions of stay will lead to automatic lapse of the stay herein granted.

9. The costs of this application will follow the outcome of the appeal in the Court of Appeal.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Gichana for the Claimant

Miss Onyango for the Respondents