



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 375 OF 2018

CALEB NASENGO.....CLAIMANT

VERSUS

THELUJI DRY CLEANERS LTD.....RESPONDENT

R U L I N G

Application dated 19th November, 2018 seeks stay of execution of the Judgment/decree delivered on 25th October, 2018 pending the hearing of the intended Appeal.

The application is premised on the grounds that substantial loss shall be suffered if stay is not granted, Application has been made without undue delay, the Respondent is willing to comply with the requirement of security or it may be directed to do and that the extracted decree does not tally with the terms of the judgment as delivered *inter alia*.

The Application is further supported by affidavit of Margret Kamau, Manager of the Respondent who deposes that the Applicant is dissatisfied by the judgment and has noted an Appeal. That the Claimant has no means to refund the decretal sum of Kshs 496,499.30 which comprise of 303,304.30 Judgment sum and Kshs 191,695 taxed costs.

The Notice of Appeal was duly filed on 20th November, 2018.

At the time of filing this application, Applicant's goods were proclaimed on 15.11.2018.

The application is opposed by a Replying Affidavit of the Claimant in that same is unmerited in that the Applicant did not oppose the bill of costs that was taxed at 191,695.

That the decretal sum continues to rise and the Claimant has been waiting from 2012 when the suit was filed.

That no sufficient cause has been shown by the Applicant for the stay to be granted.

Determination:

The principles that guide granting of stay pending appeal as stated in the case of ***Reliance Bank Ltd (in liquidation) -vs- Norleke Investments Ltd – Civil Appeal. No. Nairobi 93/2002*** include:

- i. That the appeal or intended appeal is an arguable one; that is that it is not a frivolous appeal;
- ii. That the intended appeal would be rendered nugatory if stay is not granted were the appeal to succeed.
- iii. The Applicant is likely to suffer substantial loss if stay is not granted and
- iv. The Applicant has provided security for the Judgment sum.

In ***Wangalwa & Another -vs- Agness Naliaka Cheseto HCCC Misc. Appl. No. 42 of 2012, eKLR***, Gikonyo J held “ No doubt in law, the fact 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.....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.”

In the present application it has not been deposed that the pending appeal is arguable. Quite to the contrary the Applicant in the Supporting Affidavit of Margret Kamau concede that the Respondent had not in the suit denied the claim for underpayments in respect of which Kshs 150,118.80 was awarded and the claim in respect of salary for June 2012 in which the court awarded Kshs 11,942.50.

The two uncontested awards total Kshs 162,060.80. This admitted amount cannot therefore be the subject of the Appeal.

In contention in the intended Appeal is the award in respect of compensation for unlawful termination in the sum of Kshs 95,540; Kshs 33,760.50 in lieu of untaken leave for the period January 2009 to June 2012 and Kshs 11,942.50 in lieu of one month notice.

The costs taxed by the taxing master follow the event.

Upon considering the submissions by the parties, the court declines to grant stay of execution in respect of uncontested award in the sum of Kshs 162,060 which amount is payable forthwith.

Stay of execution is granted in respect of the balance of Kshs 332,938 which amount is inclusive of costs and interest on condition the amount is deposited in a joint interest earning account in the names of the counsel for the parties within the next 30 days failing which the order for stay will abate and execution to proceed.

DATED, SIGNED and DELIVERED at BUNGOMA this 29TH day of MARCH, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:

Wambua Kigamwa & Co. Advocate for the respondent/Applicant

Mwakio, Kirwa & Co. Advocates

Chrispo: Court Assistant.