



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 219 OF 2016**

**ALFRED NATHAN MVUKO.....CLAIMANT**

**VS**

**HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT**

**RULING**

1. On 15<sup>th</sup> December 2017 my brother, **Makau J** delivered judgment in favour of the Claimant in the sum of Kshs. 143,937.50. The Respondent filed a Notice of Appeal on 19<sup>th</sup> December 2017.
2. A decree was extracted on 2<sup>nd</sup> July 2018 and thereafter the matter proceeded to taxation. By a ruling delivered on 12<sup>th</sup> October 2018, the Deputy Registrar of the Court taxed the party and party bill of costs at Kshs. 158,274.20 in favour of the Claimant.
3. The Respondent subsequently filed an application by way of Notice of Motion under certificate of urgency dated 31<sup>st</sup> October 2018 seeking stay of execution of the judgment delivered on 15<sup>th</sup> December 2017, pending the hearing and determination of an appeal in the Court of Appeal.
4. The application, which is supported by the affidavit of the Respondent's Human Resource Manager, Rajab Yeri Kombe is based on the following grounds:
  - a) The Respondent is dissatisfied with the judgment by **Makau J** delivered on 15<sup>th</sup> December 2017 and has filed an appeal;
  - b) The Respondent has an arguable appeal with high chances of success;
  - c) If stay is not granted, the Claimant will execute the judgment and that will occasion the Respondent substantial and irreparable loss and damage;
  - d) The Claimant has obtained judgment against the Respondent and taxation of the party and party costs has now been completed with a ruling delivered on 12<sup>th</sup> October 2018, where the Claimant's costs were taxed at Kshs. 158,274.20 and hence there is now a real likelihood of execution;
  - e) Execution against the Respondent is imminent and it will occasion substantial loss and damage.
5. In the supporting affidavit sworn by Rajab Yeri Kombe, it is deponed that the Claimant has no known assets capable of funding a refund of the decretal sum in the event the appeal succeeds.
6. Kombe further depones that the Respondent is prepared to give appropriate security for the amount due under the decree by way of an insurance bond and/or bank guarantee.
7. The Claimant's response is contained in his replying affidavit sworn on 16<sup>th</sup> November 2018. He depones that after filing its Notice of Appeal on 19<sup>th</sup> December 2017, the Respondent failed to follow up the matter until the filing of the current application, approximately a year later.
8. The Claimant further depones that the Respondent has not demonstrated the substantial loss it may suffer if the decretal sum is paid out. The Claimant adds that the Respondent has not offered any security, including security for costs in case the appeal is dismissed.

9. The Claimant goes on to depone that the Respondent's application is aimed at delaying and preventing him from enjoying the fruits of his judgment.

10. The conditions under which a stay of execution may be granted are codified under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules as follows:

***6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(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.***

11. The Court was referred to the decision in *Gatobu M'Ibutu Karotho v Christopher Muriithi [2008] eKLR* where **Ouko J** (as he then was) held that in order to succeed in an application for stay of execution, the applicant must show that they will suffer substantial loss if the order of stay is not granted and that the application has been brought without undue delay. The applicant must also give an undertaking for security.

12. As held by **Gikonyo J** in *James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR* the tripartite conditions for stay of execution are inextricable and the absence of one may well deny a party the discretion of the Court to grant an order of stay of execution.

13. On the issue of substantial loss, the Court notes that this is a money decree and the capacity of the Claimant to refund the decretal sum is therefore relevant. It was submitted on behalf of the Respondent that the Claimant who is his former employee has no known assets, an assertion that the Claimant did not debunk.

14. Regarding the question of time, the Claimant states that the Respondent took more than ten months after judgment to bring the current application. In response, the Respondent submits that they came to court soon after taxation when the threat of execution became imminent.

15. Looking at the court record, it is evident that the Respondent filed its Notice of Appeal within less than a week after judgment. Thereafter, the Respondent was actively involved in all the post judgment activities in the case. Further, once execution became imminent, the Respondent came to court without delay. Taking the circumstances of the case in their totality, the Respondent cannot be adjudged guilty of unreasonable delay.

16. On the third condition, the Respondent has offered security by way of an insurance bond or bank guarantee. Further, in his oral submissions before the Court, Counsel for the Respondent stated that the Respondent was ready and willing to deposit the entire decretal sum plus costs in a joint interest earning account.

17. It seems to me therefore that the Respondent has on the whole, satisfied the conditions for grant of stay of execution pending appeal. The right of appeal must however always be put on the scales together with the right of a successful litigant to reap the fruits of a judgment validly issued in their favour.

18. With this in mind, I grant a conditional stay of execution in the following terms:

a) The Respondent will pay to the Claimant 50% of the decretal sum within the next thirty (30) days from the date of this ruling;

b) The Respondent will deposit the balance being 50% of the decretal sum together with the entire sum in costs as taxed into an interest earning account in the joint names of Counsel for the parties within the next thirty (30) days from the date of this ruling;

c) Failure to meet any of the foregoing conditions will lead to automatic lapse of the stay hereby granted.

19. The costs of this application will be costs in the appeal.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF MARCH 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mboku for the Claimant

Mr. Onyango for the Respondent