



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 454 OF 2012**

(Before Hon. Lady Justice Hellen S. Wasilwa on 30<sup>th</sup> April, 2019)

**HELLEN WASEKA.....CLAIMANT**

**-VERSUS-**

**MIDDLE EAST BANK KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Application before this Honourable Court is the one dated 18<sup>th</sup> January, 2019.
2. The Application was filed under a Certificate of Urgency through a Notice of Motion filed Under Rules 32(2) and 33(1) (d) of the Employment and Labour Relation Court (Procedure) Rules, 2016, Inherent Powers of the Court and all other enabling provisions of the Law.
3. The Application seeks the following Orders that:-
  1. *This Application be certified as urgent and be heard ex-parte in the first instance.*
  2. *In the first instance, the order for stay of execution granted on 20<sup>th</sup> December 2018 be extended until the hearing and determination of this Application;*
  3. *Further, the stay of execution be extended until hearing and determination of an intended application for stay of execution pending Appeal in the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules PROVIDED such an application is filed by the Defendant/Applicant within 21 days of being provided with uncertified copies of the proceedings and Judgment herein; and*
  4. *Costs of this application be costs in the proposed appeal.*
4. This Application is premised on the grounds that:-
  1. *On 20<sup>th</sup> December 2018 the learned Judge after delivering her Judgment, on application of the Defendant, granted a stay of execution for 30 days;*
  2. *After the said stay was granted the Defendant's advocate applied for a copy of the Judgment but the Learned Judge indicated that it would be ready on 5<sup>th</sup> January, 2019;*
  3. *On 5<sup>th</sup> January 2019 the copy of the Judgment was not ready because of Christmas holidays and pressure of work at the Registry;*
  4. *Because of Christmas holidays the offices of the Defendant's Advocates were closed from 21<sup>st</sup> December, 2018 till 7<sup>th</sup> January, 2019;*
  5. *On 10<sup>th</sup> January 2019 the Defendant filed a Notice of Appeal against the said Judgment of the learned Judge;*

6. On 10<sup>th</sup> January 2019 the Defendant's advocate applied for copies of the proceedings and judgment in this case;

7. On 11<sup>th</sup> January 2019 the Defendant advocate applied for Photostat copies of the proceedings and judgment;

8. The Respondent is most anxious to apply to the Court of Appeal for a stay pending appeal but cannot do so until it is first provided with proceedings and judgment in this case; and

9. Hence, it is in the interest of justice that the said order for stay of execution be extended by a reasonable time to enable the Defendant apply to the Court of Appeal for a stay of execution.

5. The Application is supported by the Affidavit of **FELIX NGANG'A KARANJA** sworn on 18<sup>th</sup> January, 2019 in which he reiterates the averments made in the Notice of Motion Application.

6. The Respondent/Applicant filed Further Affidavit sworn by **FELIX NGANG'A KARANJA** and filed in Court on 5<sup>th</sup> February, 2019 in which he reiterates the averments made in the Notice of Motion Application as well as the Supporting Affidavit thereto.

7. He further contends that it is not the intention of the Respondent to delay the Appeal and that an Appeal has already been lodged vide Nairobi Civil Appeal No. 36 of 2019 and an Application for stay pending hearing and determination of the Appeal will be filed pursuant to Rule 5 (2) (b) of the Court of Appeal Rules.

8. He urged the Court to allow the extension as requested by the instant Application.

9. The Claimant opposed this Application vide a Replying Affidavit sworn on 25<sup>th</sup> January, 2019 and filed in Court on 28<sup>th</sup> January, 2019, deponed by **GEOFFREY ERIC ODONGO**, Counsel on record for the Claimant herein, in which he confirms that Judgment in this matter was delivered by the Honourable Court on 20<sup>th</sup> December, 2018, when the Applicant applied for and was granted a 30 days stay of execution by the Honourable Court.

10. He avers that he is a stranger to the assertion by the Respondent/Applicant that its offices were closed from 21<sup>st</sup> December 2018 to 7<sup>th</sup> January 2019. Further, that the allegation that the Respondent/Applicant applied for Photostat of proceedings and judgment is not supported by any evidence.

11. The Claimant contends that the Application is fatally defective, incompetent, and bad in law and an abuse to the Court process. Further, that the Applicant had applied for 30 days stay which was duly allowed by the Honourable Court.

12. It is further contended that the Applicant if he so wishes should make an Application for stay of execution as opposed to hiding behind the pretext of the extension of the initially stay granted.

13. The Claimant's Counsel avers that the Respondent/Applicant filed the instant Application as a delaying tactic aimed at delaying and/or denying the Claimant herein from enjoying the fruits of the judgment in her favour.

14. In conclusion, the Claimant urged the Court to dismiss the instant Application with Costs as the same is without merit.

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

#### **Claimant's Submissions**

16. It is submitted by the Claimant that the Court disregards paragraphs 7, 8 and 9 of the Respondent's Submissions as they raise new issues which are neither in the Supporting Affidavit nor the Further Affidavit and that the Deponent cannot be cross examined on the same.

17. It is further submitted that the Application before the Court is fatally defective, incompetent and bad in law and an abuse to the Court process. Further, that the same ought to be dismissed with costs.

18. The Claimant submitted that the Application must meet the test set out under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 for the Court to allow the instant Application. For emphasis the Claimant relied on Authority of **Tropical Commodities Ltd & Others Vs International Credit Bank Limited** where it was stated:-

***"...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."***

19. To further fortify his position on the issue of not meeting the criteria as set out in Order 42 Rule 6(2) the Claimant further relied on the cases of **Andrew Kuria Njuguna Vs Rose Kuria Njuguna (Nairobi Civil Case No. 224 of 2001 (Unreported)**, **Antoine Ndiaye Vs African Virtual University (2015) eKLR** as cited in the case of **Macharia T/A Machira & Co. Advocates Vs East African Standard (2002) KLR 63** and **Kungu Muthua Vs James Icharia Kungu (2015) eKLR**.

20. The Claimant contends that the Applicant seeking stay of execution has to furnish the Court with Security which has not been done by the Applicant herein save for the vague offer of security highlighted under paragraph 9 of the Applicant's submissions.

21. In conclusion, the Claimant submitted that the instant Application lacks merit and the same ought to be dismissed with costs.

**Respondent's Submissions**

22. It is the Respondent/Applicant's submission that the instant Application seeks a review/extension of the Order staying execution of the decree, which was made immediately after the Judgment was delivered. Further, that the prayer is made pursuant to the Court's inherent jurisdiction to grant a temporary stay specifically under Rule 33 (1) (d) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

23. The Respondent/Applicant further submitted that he has provided sufficient reasons for the grant of the prayer in the Supporting Affidavit of Felix Ngang'a Karanja sworn on 18<sup>th</sup> January, 2018.

24. The Respondent/Applicant contends that it has filed an Appeal to the Judgment to the Court of Appeal and that it intends to file an Application for stay before the same Court under Rule 5(2) (b) of the Court of Appeal Rules soon.

25. In conclusion, the Respondent/Applicant urged the Court to exercise its inherent power and allow the instant Application as the Appeal filed would be rendered nugatory if the same were to be successful.

26. The Respondent/Applicant also filed a Reply to the Claimant's Submissions dated 26<sup>th</sup> February, 2019, in which reply they reiterate that they only seek an extension of the interim stay pursuant to this Honourable Court's inherent jurisdiction.

27. Further, that the Application is not being made pursuant to Order 42 Rule 6 of the Civil Procedure Rules hence the Authorities cited by the Claimant have no relevance to the instant Application.

28. The Respondent/Applicant contended that the Application for stay will be handled by the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules and that they are ready to accept a stay of 15 days after taxation of the Claimant's costs and issuance of the certificate of Costs.

29. I have examined all the averments on record. There is no indication that the Claimant has commenced any execution process. The matter is pending taxation, which has not also been done.

30. However, given that the Respondent have already filed a Notice of Appeal at the Court of Appeal, and given that this Court should not make any order that may destroy the substratum of the appeal, I allow stay orders on condition that the Respondent deposits the entire decretal sum in an interest earning account held in the joint names of Counsels on record within 60 days. In default execution may proceed upon taxation and issuance of a decree.

31. Costs in the cause.

**Dated and delivered in open Court this 30<sup>th</sup> day of April, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ayako holding brief Odongo for Claimant – Present

Eshmail – Absent