



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 1195 OF 2016

PETER MUTUKU NTHUKU.....CLAIMANT

-VERSUS-

PERIMETER PROTECTION LIMITED.....RESPONDENT

RULING

Introduction

1. The Respondent (herein after called the Applicant) brought the Notice of Motion dated 28th November 2018 under Rule 27 and 30 of the Employment and Labour Relations Court (Procedure) Rules, Order 22 Rule 22 of the Civil Procedure Rules, Section 12 of the Employment and Labour Relations Court Act and Article 159 (2) of the Constitution. She seeks the following the orders:

- (a) THAT this application be certified urgent as be heard ex-parte in the first instance.
- (b) THAT pending the hearing and determination of this application, there be a stay of execution of any/and or decree arising out of the Judgment delivered on 31st July 2018.
- (c) THAT there be stay of execution of any and/or all decree arising from the judgment delivered on 31st July 2018 pending hearing and determination of this application and the intended Appeal.
- (d) THAT the costs of this application be provided for.

2. The application is supported by the Affidavit of Daniel Wamarite sworn on 28th November 2018 and is premised on the following grounds:

- (a) That by the Ruling given on 23rd November 2018, the Honourable Court partly allowed the Respondent's application dated 24th August 2018 by allowing the Respondent to file a notice of appeal out of time.
- (b) The Court further observed that the application for stay was premature and would only be considered upon compliance with the terms given in the ruling.
- (c) The Respondent has now complied with the terms of the ruling by filing a notice of appeal and seeking for certified copies of all proceedings and judgment.
- (d) The Respondent has further paid a sum of Kshs. 38,285 being the undisputed sum and is ready and willing to give security regards to the disputed sum.
- (e) The Claimant processed the decree on 28th November 2018 and on the same day, the 28th November 2018, processed the warrants of attachment which were promptly signed.

(f) M/s Icon Auctioneers have now proclaimed the Respondent's assets and intend to cart them away unless the entire decretal sum is paid.

(g) That no prejudice will be occasioned to the Claimant for the grants of the Orders.

3. In response to the Application, the Claimant filed his Replying Affidavit on 5th December 2018 stating that the Respondent/Applicant has failed to demonstrate that he is not in a position to refund the decretal sum should the Applicant's appeal succeed. That the appeal cannot be rendered nugatory by a money decree being satisfied where substantial loss is not demonstrated by the Applicant. That the application is only aimed at defeating the course of justice and that despite service of a draft decree the applicant has never replied to the Claimant indicating her intention to appeal.

4. The Claimant further contended that the Applicant has failed to demonstrate what substantial loss she will suffer should the orders sought be denied. That the decree herein is a money decree which is capable of being ascertained and paid forthwith should the applicant, in the unlikely event, succeed on the appeal.

Applicant's Submissions

5. The Applicant submitted that in a gesture of goodwill she paid a sum of Kshs. 38,285 being the undisputed amount and the sum of Kshs. 15,000 that was awarded to the Claimant's advocate. The Applicant argued that despite this goodwill gesture the Claimant applied for warrants of execution which were issued in time resulting to proclamation of her assets. That she is apprehensive that unless stay of execution of the decree is issued the decretal sum will be paid to the Claimant which will lead to the appeal being rendered nugatory because the Claimant is a man of no known means and he has not disputed that assertion. The Applicant relied on the decision in **Halai & Another v Thornton & Turpin (1963)** and **APA Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR**.

6. In addition, that the application was made without unreasonable delay as the applicant was granted leave to file the notice of appeal on 23rd November 2018 and on the same day she filed the Notice of Appeal and that upon proclamation on 28th November she filed the instant application.

7. Finally, the Applicant submitted that she had paid the undisputed sum of Kshs. 38,285 and that pursuant to the order issued on 6th December 2018 the advocates were at an advanced stage of opening an interest earning joint account for purposes of depositing the decretal amount as security for the decreed sum.

Claimant/Respondent's submissions

8. The Claimant submitted that the Applicant has not met the conditions for granting an order of stay of execution under Order 42 rule 6 of the Civil Procedure Rules. That the corner stone of the jurisdiction of his Honourable Court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. That the Applicant has not demonstrated that she would suffer substantial loss if the order of stay is withheld. That the only way of showing substantial loss is by demonstrating that if the decretal sum is paid he would not be in a position to refund as he is a person of no means. He relied on **P.J. Dave Flowers Ltd v David Simiyu Wamalwa [2017] eKLR** in which the Honourable Court in addressing substantial loss cited James **Wangalwa & Ano. V Agnes Naliaka Cheseto**.

9. The Claimant further submitted that the Applicant has not demonstrated that there exists an arguable appeal with high chances of success as provide under Order 42 Rule 6 of the Civil Procedure Rules, and that she willing to give security for costs. Finally, he prayed that the Application be dismissed with costs for being an attempt to delay justice.

Analysis and determination

10. The main issue for determination is whether the Respondent has fulfilled the requirements for the

grant of an order of stay pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules provides:

“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 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.” Undue delay

11. The Applicant submitted that there was no undue delay as this Application was filed on 29th November 2018 and that the proclamation notice was issued on 28th November 2018. Judgement was delivered on 31st July 2018. The Applicant on 27th August 2018 filed an application for stay pending appeal but this Court in its Ruling delivered on 23rd November 2018 held that the application was premature and partially allowed it to the extent that the Applicant was granted leave to file and serve an appeal within 14 days. The Applicant filed its Notice of Appeal on 23rd November 2018.

12. After careful consideration of the rival submissions, I find that despite there being a lapse of three from the date the Judgment was delivered, the instant application was without undue delay as the application was filed immediately after proclamation and immediately after the leave to file a Notice of Appeal was granted on 23rd November 2018.

Substantial loss

13. The Applicant argued that they would suffer substantive loss should the application be denied. It was the Applicant’s submission that the Claimant is a man of means hence he is not in a position to refund the decretal sum if the appeal succeeds hence it would suffer substantial loss. The Claimant on his part argued that for the discretion of this Court, under Order 42 Rule 6(2), is to be exercised, the applicant ought to demonstrate that here would be resultant substantial loss.

14. I have carefully considered the rival affidavits and submissions on the issue of substantial loss and I am of the view that the burden of proof is on the applicant to prove that the decree holder will not be able to refund the decreed sum if the appeal succeeds after the execution. In this case, the applicant merely made a general statement that the claimant is not a man of means. That general statement, in my view cannot shift the burden of proof to the claimant. The Applicant has not demonstrated that it would suffer substantial loss as it is not sufficient to only state that the Claimant is not in a position to refund the decretal amount. Whereas I agree that the claimant is enjoined to prove his ability to refund the decreed sum if the appeal succeeds, that does not in any way absolve the applicant from his legal burden of proving that substantial loss will be occasioned by the inability to refund the decretal amount.

15. In *Timsales Limited v Hiram Gichohi Mwangi [2013]eKLR* the Court held:

“The mere fact that the process of execution has commenced is likely or is to commence or has been completed by itself, does not amount to substantial loss for the reason that execution is a lawful process. The Appellant must establish other factors which show that the execution will irreparably negate his right as the successful party in the appeal.”

Security

16. The Applicant argued that the parties are at an advanced stage of opening an interest earning joint account and that sufficient security has thus been offered. The Applicant also indicated that it had already paid the sum of Kshs.38,285 and Kshs.15,000 to counsel. Despite the finding herein above that substantial loss will not be suffered, I see no harm to any one of the parties if I directed that the money deposited as security as a condition for stay, in the advocates joint account, remains there pending the outcome of the appeals, save for cost of the suit which shall be paid to the claimant forthwith.

Conclusion

17. The Applicant has failed to show that she will suffer substantial loss if the stay order is withheld. However for the reason that the decreed sum is already held in an interest earning account by the counsel for the two parties, I order that the status quo remains pending the hearing and determination of the appeal or until further orders of this court. However, the costs taxed by the Deputy Registrar of the court shall be paid forthwith.

Dated, Signed and Delivered at Nairobi this 9th day of April, 2019

ONESMUS N. MAKAU

JUDGE