



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC MISCELLANEOUS NO. 102 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 1st April, 2019)

ANTHONY WACHIRA WAIRIMU

JOHNSTONE NGARI MWANGI

(Suing as Legal representatives and Administrators of

the estate of JOSEPH KIURI MWANGI (DECEASED).....APPLICANTS

VERSUS

ZHONGMEI ENGINEERING (K) GROUP LIMITED.....RESPONDENT

RULING

1. The Applicant/Respondents herein, Anthony Wachira Wairimu and Johnstone Ngari Mwangi initially filed a Notice of Motion on 31st August 2018 seeking that judgment be entered for the then Applicants as against the Respondent for Kshs. 2,534,400.00 being the amount assessed under the Work Injury Benefits Act. On 6th December 2018, this Honourable Court allowed the Application, which was not opposed and adopted the findings of the County Occupational Safety and Health Officer.

2. The Respondent/Applicant herein Zhongmei Engineering (K) Group Limited then filed the current Notice of Motion on 20th December 2018, under Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant seeks the following reliefs:-

1. THAT this application be certified as urgent and the same be heard ex-parte in the first instance owing to its urgency and the circumstances herein.

2. THAT this Honourable Court be pleased to grant an order for stay of execution pending the hearing and determination of the Applicant's appeal against the Order of this Honourable Court issued herein on the 6th December 2018 adopting the award of the County Occupational Safety and Health Officer which the Respondent was awarded a sum of Kshs.2,534,400.00.

3. THAT pending the hearing and determination of this application this Honourable Court be pleased to grant the Applicant a temporary stay of execution of the judgment of the Honourable Lady Justice Hellen Wasilwa delivered on 6th December 2018 together with all consequential orders.

4. That costs of this application be provided for.

3. The Application is supported by the Affidavit of Xu Xiao Yu and is premised in the following grounds:

1. That this Honourable Court on 6th December 2018 adopted the award of the County Occupational Safety and Health Officer by which the Respondent was to be paid the sum of Kshs. 2,534,400.00 plus costs and interest thereon.

2. That the Applicant herein was aggrieved by the said Order and has lodged an appeal against it.

3. That the award entered against the Applicant is a substantive sum which together with costs and interest is in excess of Kshs.

3,000, 000 and the Applicant will suffer substantive loss should a stay of execution not be granted.

4. That this application has been brought without undue delay and the Applicant's appeal has high probability of success and it ought to be allowed and heard on the same.

4. The Respondents filed an Affidavit sworn by Anthony Wachira Wairimu in opposition of the Application. He states that the application is premature, as the Applicants have not assessed costs as required under Section 94 of the Civil Procedure Act thus no execution can issue.

5. He further states that the intended appeal is frivolous as the Appellant did not exhaust the appeal procedure when the damages awardable to the deceased were assessed by the County Occupational Safety and Health Officer.

Applicant's submissions

6. The Applicant submitted on the grounds set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. The Applicant submitted that the application before this Court was filed without undue delay on 20th December 2018 on the 14th day after the delivery of the Court's decision.

7. It further submitted that the sum awarded to the Respondent in this Application was an excessive sum and it intends to challenge the sum awarded. The Applicant submitted that it be allowed to deposit half of the amount entered in judgment or any amount which this Court may direct.

8. The Applicant submitted that the Respondents were awarded Kshs. 2,534,000 on 6th December 2018 together with costs and interest and that the amount has surpassed Kshs. 3,300,000 by the Respondent's assessment, which is a substantial amount. The Applicant therefore submitted that should the Respondent not be stopped from proceeding with execution, the Applicant stands to suffer great and substantial loss, irreparable and irredeemable loss to its great detriment.

9. The Applicant submitted that its appeal has a high chance of success. The Applicant relied on the case of **Focin Motorcycle Co. Limited v Ann Wambui Ngui Appeal No. 22 of 2017** where Lady Justice Gitari held:-

“The Applicant need not go further after establishing that he is likely to suffer that substantial loss. It has been stated that substantial loss lies in the inability of the 1st Respondent to refund the decretal sum.”

10. The Applicant submitted that this Court should allow its application to prevent substantial loss in the interest of the preservation of natural justice.

Respondents' Submissions

11. The Respondents submitted that the Application giving rise to the Appeal was brought under Section 1A, 1B and 63(a) of the Civil Procedure Act, Order 2 and Order 51 of the Civil Procedure Rules and Section 16,37 and 51 of the Work Injury Benefits Act Therefore, the appeal to the Court of Appeal does not lie.

12. The Respondent submitted that the procedure to appeal against a decision of the Occupational Safety & Health Officer is provided under Section 51. Further, Applicant is bound by the assessment of the County Occupational Safety and Health Officer having failed to raise any objection to the assessment within 60 days with the Director as provided under Section 51 (1) of the Work Injury Benefits Act.

13. The Respondents submitted that the Applicant has not applied for proceedings and served the letter for proceedings within 14 days as required under Rule 82 of the Appellate Jurisdiction Act. Further, the 1st Applicant being a partner at Wangai Nyuthe & Company Advocates is capable of refunding the decretal sum of Kshs. 2,534,400 if the Applicant is successful in its appeal.

14. The Respondents further submitted that this Court was only enforcing the award of the County Occupational Safety and Health Officer and this Court is therefore functus officio.

15. The Respondents submitted that for the Court to issue an order for stay pending an appeal, the Applicant has to furnish security for the due performance of the decree. The Respondents relied on the cases of **Machira T/A Machira & Co. Advocates v East African Standard (No.2) (2002) KLR 63** and **Micro Enterprises Support Programme Trust registered Trustees v Matford Savings & Credit Co-operative Society Limited & 5 Others (2013)eKLR.**

16. In respect of whether the Applicant will suffer substantial loss the Respondents relied on the case of **Republic v Commissioner for Investigations and Others HCC Misc Application No. 51 of 2013**. They further relied on the decision in **Anne Njeri Mwangi v Muzaffer Musafee Essajee & Another [2014] eKLR.**

17. I have examined all the averments of both Parties. The Respondent seeks stay against order of this Court granted on 6/12/2018. The order of stay relates to this Court's order granted adopting the award of the County Occupational Safety & Health Office by which the Applicant/Respondent was awarded Kshs.2,534.400/=.

18. In seeking stay, the Applicants indicate that they stand to suffer substantial and that the Applicant herein is unable to refund the decretal sum if the appeal succeeds.

19. Order 42 rule 6(2) of the Civil Procedure Rules provide as follows:-

“(2) 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.

20. The Applicants approached this Court seeking stay without much delay. They have also indicated that they are willing to comply with any conditions for stay including providing security.

21. Having considered the averments of both Parties, I find the application before me is merited. I will allow stay pending appeal on the ground that the Respondent/Applicant deposits the entire decretal amount in an interest earning account held in the joint names of Counsels on record within 60 days. In default execution to issue.

Dated and delivered in open Court this 1st day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mahungu for Claimants – Present

No appearance for Respondent