



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CASE NO. 489 OF 2017

JUSTIN MUTUNGA DAVID.....CLAIMANT/ RESPONDENT

VERSUS

CHINA ROAD & BRIDGE

CORPORATION (K) LIMITED.....RESPONDENT/ APPLICANT

RULING

1. The Respondent/Applicant seeks stay of execution pending appeal. The motion is the one dated 2nd May 2019. The Claimant is opposed and filed a replying affidavit on 20th May 2019. He asserts that the motion is not merited as no efforts were made to satisfy the decree of the court.

2. The application seeks stay of execution of Judgment issued on 19th November 2018 and all consequential orders thereto pending the hearing and determination of the motion and the determination of the appeal. Mr. Ondieki for the Respondent/Applicant submits that for the Applicant to be deserving of the orders sought it has to satisfy the conditions under Order 42 Rule 6. To that end, he submits that the Respondent/Applicant is willing to furnish security for costs and decretal sum of Kshs. 485,598/= by way of a Bank Guarantee. He submits that the Applicant stands to suffer loss for reason that if Claimant is to realize the judgment and is paid the money, by his own admission he is currently unemployed and will be unable to refund. He states that the Claimant has commenced execution and proclaimed against the Applicant. He submits that there is an appeal per Order 42 Rule 6(4) which provides that an appeal is deemed filed if notice to that effect has been issued to Court of Appeal. He asserts that the Notice of Appeal was filed in time and that it was his submission that the first step is the filing of the notice of appeal which he had done.

3. Mr. Kagunda for the Claimant is opposed and submits that since Judgment was delivered on 19th November 2018 no payment was made or any attempt made by Respondent to pay the claim. He asserts that it is paramount to note the fact that a decree was sought and certificate of taxation served on 17th February 2019 some 3 months after Judgment and proclamation was served on 3rd May 2019 which proclamation was 6 months after Judgment was delivered. He submits that there is nothing sinister about execution as it is the way to recover after the failure to pay and that there is no default on the part of the Claimant. He submitted that there are 3 reasons to deny stay in this case are which are that there is no appeal that has been filed and that the stay of execution is superfluous and does not serve any useful purpose in the absence of appeal. He submits that stay of execution has been granted in the past and that on 19th November 2018 it was granted for 30 days and that this prayer has been exhausted. He argues that the Respondent sought stay to enable them pay and that period lapsed and therefore having had that prayer exhausted and it cannot be sought again. He asserts that there is inordinate delay to file the application for stay and no explanation is given for the delay of 6 months. He urged that if stay is granted then it should be on terms that the entire decretal sum be deposited in an interest earning account.

4. Mr. Ondieki in a brief rely submitted that the application is timely and the decree was issued in February and the stay motion has been filed within 45 days. He states that the Respondent/Applicant has a right to challenge the auctioneer's costs and that should not form part of security. He submits that a bank guarantee is an acceptable way of furnishing security and thus prayed that the Court grants the request by the Applicant.

5. The factors to consider in stay pending appeal is set out in the Court of Appeal decision in **Butt v Rent Restriction Tribunal [1982] KLR 417**. The Court gave guidance on how a court should exercise discretion in such an application and held as follows:-

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

6. The principles apply to such a case as the one before me. The Respondent/Applicant has indicated a willingness to furnish security and offers a Bank Guarantee. This is an acceptable mode of furnishing security *inter alia*. The Respondent/Applicant has been somewhat slow in processing the filing of appeal as the proceedings were sought in November 2018 and to date there is no suggestion of a draft memorandum of appeal. Be that as it may, the Rules provide that the filing of the Notice of Appeal is taken as the initiation of the appeal and therefore as far as the law is concerned the appeal is underway. As that is the case, if I do not grant stay, that intended appeal will be rendered nugatory. In the premises I will grant stay but on the following terms:-

a. The entire decretal sum due and payable as of 23rd May 2019 be deposited in an interest earning account in the joint names of the Advocates for the parties within 30 days.

b. The auctioneer's charges be settled by the Respondent within 15 days.

c. In default of these conditions the stay granted herein to lapse on expiry of the 30 days

d. The parties be at liberty to apply.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar