



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1332 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 21<sup>st</sup> May 2019)**

**ABDUL RAHIM.....CLAIMANT**

**VERSUS**

**HALL EQUATORIAL LIMITED.....RESPONDENT**

**RULING**

1. The application before the Court is by the Respondent/Applicant dated 15<sup>th</sup> November, 2018, brought under Sections 3,12(3) (VIII), 13 of the Employment and Labour Relations Court Act, Rule 17 of the Employment and Labour Relations Court (Procedure Rules), 2016, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law, seeking for Orders that:-

- 1. The application herein be certified urgent in the 1<sup>st</sup> instance and service hereof be dispensed with.***
- 2. Pending the inter-partes hearing and determination of the application herein, this Honourable Court be pleased to order stay of execution of the Judgment dated 16<sup>th</sup> February, 2018, as well as the resultant decree thereof and/or any other subsequent proceedings meant to enforce the judgment.***
- 3. Pending the hearing and determination of intended appeal to the Court of Appeal by the Respondent herein, this Honourable Court be pleased to order stay of execution of the judgment dated 16<sup>th</sup> February, 2018, as well as the resultant decree thereof and/or any other subsequent proceedings meant to enforce the judgment.***
- 4. The costs of this application abide the outcome of the intended appeal by the Respondent.***

2. The Application is premised on the grounds:-

- 1. That the judgment in this matter was delivered on 16<sup>th</sup> February, 2018, and immediately thereafter, the Respondent through his then Advocates filed a Notice of Appeal dated 20<sup>th</sup> February, 2018 before this Honourable Court.***
- 2. In preparation for lodging the appeal before the Court of Appeal, the Respondent made a request for certified copies of typed proceedings and judgment through a letter dated 20<sup>th</sup> February 2018.***
- 3. The Court's registry failed to furnish the Respondent with the certified copy of the typed proceedings and judgment in time for the Respondent to lodge its appeal, and as such, the Respondent wrote another letter dated 19<sup>th</sup> July, 2018, to the Deputy Registrar protesting the delay in availing of the certified copy of the typed proceedings and the judgment.***
- 4. In preparation for execution of the Judgment, the Claimant has, on 27<sup>th</sup> September, 2018, filed its Party to Party Bill of costs and the same is due for taxation before this Honourable Court.***
- 5. In a bid to stay the taxation proceeding, the Respondent filed an Application dated 12<sup>th</sup> November, 2018 under a certificate of urgency seeking stay of the taxation proceedings, however, the Court declined to grant the prayer on the ground that taxation of costs is an administrative role, and as such, the Court could not interfere with the role of the Deputy Registrar. It is on this basis that he Respondent seeks to invoke the Jurisdiction of this Honourable Court by seeking stay of execution of the Judgment delivered on 16<sup>th</sup> February, 2018, as well as the resultant thereof pending the***

*hearing and determination of its intended appeal to the Court of Appeal.*

*6. The Respondent is desirous of appealing against the whole judgment of this Honourable Court delivered on 16<sup>th</sup> February, 2018 on the grounds inter alia of fundamental errors on points of law on the part of the Court, failure to consider the full facts placed before the Court and failure to take into consideration uncontroverted evidence tendered by the Respondent.*

*7. The threshold for grant of stay of execution are well settled as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010, as well as in case, that is, the applicant must prove the following:-*

*I) Substantial loss may result to him/her unless the order for stay is made.*

*II) That the application must be made without unreasonable delay; and*

*III) The applicant is ready to deposit such security as the Court may order for the due performance of such decree or order as may ultimately be binding on him.*

*8. In addition to rendering this application and the intended appeal nugatory, the Respondent will suffer substantial loss should the order of stay not be granted as the Respondent's intended appeal raises triable issues for determination by the Appellate Court. Further, the Respondent herein has in fact filed an application before the Court of Appeal seeking leave of the Court to file an appeal out of time being Court of Appeal Civil Application Number 326 of 2018. As such, substantial loss will result to the Respondent should the Claimant proceed to execute the Judgment herein before the intended appeal is heard and determined.*

*9. The Respondent being a well established Company carrying on its business in Kenya is ready and willing to comply with any Orders and/or directions by the Court as a condition for the grant of the Orders sought herein. As a condition for the grant of stay as prayed herein, the Respondent is ready and willing to deposit such security as the Court shall direct.*

*10. The application herein has been made timeously and without unreasonable delay. The advocates now on record for the Respondent were instructed on 15<sup>th</sup> October, 2018, and immediately thereafter moved to safeguard the interests of the Respondent by filing the instant application and an application seeking leave to file appeal out of time at the Court of appeal.*

*11. Further, the Claimant is unlikely to suffer any prejudice and/or irreparable loss and damage should this Honourable Court grant the Orders sought herein.*

*12. It is in the interests of justice, fairness and equity that the judgment dated 16<sup>th</sup> February, 2108 as well as the resultant decree thereof and/or any other subsequent proceedings meant to enforce the said judgment be stayed pending the hearing and determination of the intended appeal by the Respondent.*

3. The Application is supported by the Affidavit of Sivathanu Pillai Sivaraj who reiterates the grounds on the face of the application and further state that the Respondent is a man of straw and therefore incapable of refunding the decretal amount should the intended appeal be successful. Furthermore, that the Applicant was granted leave to appeal out of time on 25<sup>th</sup> February, 2019 and that the Respondent is ready and willing to abide by any conditions for the grant of the Orders sought.

4. The Claimant/Respondent filed a Replying Affidavit opposing the application wherein they state that judgment was delivered on 16<sup>th</sup> February, 2018, and the Respondent being dissatisfied with the Judgment filed a Notice of Appeal on 20<sup>th</sup> February, 2018. That since then there has been no application for stay of execution filed and there was no bar to his advocates on record filing the Bill of Costs.

5. That the delay in bringing the instant application is inordinate and inexcusable as since the filing of the Notice of Appeal there has been no further action in the file. Further that the Respondent filed an application dated 12<sup>th</sup> November, 2018, seeking stay of taxation proceedings which application was disallowed by the Court noting that taxation of costs is an administrative role falling in the purview of the Deputy Registrar and not the Court. It is also contended that the Applicant did not require typed proceedings to make an application for stay.

6. The Claimant/Respondent is of the view that the Respondent/Applicant has not satisfied the conditions for the grant of the Orders sought. That the Claimant should be allowed to enjoy the fruits of judgment noting that he was dismissed from employment in May, 2013. He also claims that the Respondent will not suffer any prejudice and the appeal will not be rendered nugatory if the application is disallowed.

7. That there is an Appeal No. 326 of 2018 in the Court of Appeal where the Applicant has applied for leave to appeal out of time and for the reasons cited herein the Application should be dismissed with costs.

#### **Applicant's submissions**

8. It is submitted that the Orders sought are discretionary and in granting the Orders sought the Applicant should be able to balance the interests of the Appellant and the Respondent as was held in the case of **Samwel Kimutai Korir (suing as Personal and Legal Representative of Estate of Chelangat Silevia Vs Nyanchwa Adventist Secodnary School & Nyanchwa Adventist (2017)eKLR.**

9. That in view of the fact that the Claimant may not be in a position to refund the amounts awarded by the Court should the appeal be successful, there is a likelihood that substantial loss may thus occur. They cite the case of **National Industrial Credit Bank Ltd Vs Aquinans Francis Wasike, Court of Appeal Civil Application No. 238 of 2005** quoted in approval in the case of **Samwel Kimutai Korir (suing as Personal and Legal Representative of Estate of Chelangat Silevia Vs Nyanchwa Adventist Secondary School & Nyanchwa** (supra) the Court held that:-

***“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”***

10. The Applicant also submits that the application has been made without unreasonable delay. That the advocates on record were instructed on 15<sup>th</sup> October, 2018 and immediately thereafter moved to safeguard the interests of the Respondent by filing the instant application and an application seeking leave to file appeal out of time at the Court of Appeal which was allowed on 25<sup>th</sup> February, 2019.

11. Further that the Applicant is ready to provide security as the Court may Order for the due performance of the decree. They urge the Court to allow the application.

#### **Claimant/Respondent's submissions**

12. The Claimant submits that the Respondent has not satisfied the conditions requisite for the Orders sought. That stay of execution should only be granted where sufficient cause has been shown by the Applicant as set out under Order 42 Rule 6.

13. The Claimant avers that the Respondent has not shown what substantial loss they will suffer if the application is denied. Further that the application filed this application a whole 8 months after the Judgment of the Court and no explanation has been given for the delay. They cite the case of **Trattoria Limited vs Joaminah Wanjiku Maina NBI Misc Appl No. 432/2013** where it was held:-

***“It is now well settled that what amounts to unreasonable delay for purposes of Order 42 Rule 6 Civil Procedure Rules is dependent on the peculiar circumstances of each case. The Court denied stay in that case where the delay lasted 11 months.”***

14. That the application should fail for being brought after unreasonable delay and for lack of proof of what substantial loss the Applicant will suffer irrespective of the fact that they are willing to provide security for due performance of the Decree.

15. I have examined all the averments of the Parties. Order 42 rule 6 of the Civil Procedure Rules states as follows:-

***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 to 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 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”.***

16. From the Applicant's averments, he filed the application within reasonable time and therefore there was no delay in bringing forth this application before Court.

17. The Applicant indicated that he stands to suffer irreparable harm and is also willing to adhere to any condition that may be imposed by Court. Due to the fact that an appeal has already been preferred, it would be in the proper exercise of my discretion to allow the stay application so that the appeal if successful is not rendered nugatory.

18. I will therefore allow the application for stay on condition that the Respondent deposits ½ the decretal sum in an interest earning account held in the joint names of the Counsel on records and releases the other half to the Claimant within 60 days. In default execution to proceed upon completion of the taxation process.

Dated and delivered in open Court this 21<sup>st</sup> day of May, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ngayo for Applicant – Present

Okeiga holding brief Marysheila Onyango for Claimant – Present