



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1345 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 21st May, 2019)

WILLIAM OLANDO.....CLAIMANT

VERSUS

MANPOWER NETWORKS LIMITED.....RESPONDENT

JUDGEMENT

1. On 6th February 2019, the Respondent filed a Notice of Motion Application dated 5th February 2019 seeking the following Orders:-

a. THAT this Honourable Court be pleased to certify this Application as urgent and its service be dispensed with in the first instance.

b. THAT there be a stay of execution of the judgment and decree made on 20th December 2018 against the Applicant herein pending the hearing and determination of this instant application inter partes and/or until further orders of this Honourable Court.

c. THAT there be a stay of execution of the judgment and decree made on 20th December 2018 against the Applicant herein pending the hearing and determination of the Applicant's appeal and/or until further orders of this Honourable Court.

2. The Application is based on the grounds that: The Respondent intends to appeal against the judgment and has lodged a Notice of Appeal on 18th January 2019 in the Court of Appeal. Further, if the orders for stay are not granted, the Claimant is likely to proceed with the execution of the judgment before its appeal is heard and determined, rendering the Appeal nugatory thereby occasioning substantial loss and damage to the Respondent.

3. That the Respondent is prepared to comply with such conditions as the Honourable Court may deem just and fit.

4. The Application is supported by the Affidavit of James Tsuma sworn on 5th February 2019 and is based on the grounds on the face of the Application. Save that the Respondent further avers that the judgment entered for the sum of Kshs.115,600.00 as general damages was manifestly and inordinately excessive in the circumstances. In addition, the Respondent undertake that they are ready to give security for due performance of the decree in the event the appeal is not successful. They urged the Court to exercise its unfettered discretionary powers in their favour and grant the orders as prayed.

5. The Claimant opposed the Application vide his Replying Affidavit sworn on 25th February 2019. He avers that he has not seen any errors or mistakes that the Honourable Judge made in the judgment and asserts that a party is at liberty to appeal if they are of the view that a judgment was entered based on an error of law or fact. The Claimant further avers that the Respondent has not explained why it is dissatisfied with the judgment delivered by the Honourable Court.

6. It is the Claimant's position that it is not enough for the Respondent to plead that the Appeal has an overwhelming chance of success and ought to demonstrate the basis to enable this Honourable Court determine whether the intended Appeal is arguable. That the Appeal is meant to hinder the Claimant from enjoying the fruits of the judgment. He further posits that execution is a lawful process, which does not amount to substantial loss.

7. The Claimant avers that should the Court of Appeal overturn this Honourable Court's judgment, he will be willing and able to refund the Respondent their moneys as he has land in Nyando. He urged the Court to dismiss the Application with costs to him.

8. The Respondent filed a rejoinder to the Claimant's Affidavit vide the Further Affidavit of James Tsuma sworn on 28th February 2019. In its Affidavit, the Respondent contended that its Application was not incompetent, bad in law, misconceived and an abuse of the Court process. They asserted that the judgment has errors and mistakes and that their Application was aimed at frustrating the Claimant as the Respondent was simply exercising their constitutional right of appeal, which appeal had high chances of success.

9. The Respondent also avers that the Claimant was a piece work employee paid Kshs. 8.00 per 1 tonne of cement the Respondent loaded thus not entitled to the awards granted to him by Court. Further, that they stand to suffer irreparable damage if the appeal succeeds since the Claimant has not shown that he will be able to refund the decretal amount, as he has not provided a title to the Nyando property. It is its position that the Court has to assess whether the decree holder is in a position to refund the decretal sum before disallowing a stay of execution application.

Submissions by the Parties

10. The Application was disposed of by way of written submissions. The Respondent filed its submissions on 29th March 2019, while the Claimant filed his on 2nd April 2019.

11. In its submissions dated 21st March 2019, the Respondent submits that the Claimant was not entitled to in law to an award of house allowance and leave days being a piece rate worker.

12. The Respondent further submits that it has met the conditions set in law to grant a stay of execution under Order 42 of the Civil Procedure Rules, 2010. Its Application was filed without any undue delay, has demonstrated that it will suffer a substantial loss in the event it pays the Claimant the decretal sum, is willing and ready to abide by any reasonable and fair security conditions issued by this Court and has an arguable appeal. They rely on the cases of: **Focin Motorcycle Co. Limited vs. Ann Wambui & Another [2018] eKLR, National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another [2006] eKLR, Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR, Wilfred K. Onyango vs. DHL Excel Supply Chain Kenya Limited [2017] eKLR and Krystalline Salt Limited vs. Kwekwe Mwakale & 67 Others [2017] eKLR.**

13. In his submissions, the Claimant was of the position that the Respondent's Application was misconceived, incompetent and legally untenable because:-

a. To this date, the Respondent was yet to request for proceedings in order to progress with the Appeal process.

b. The Memorandum of Appeal has not been filed, further delaying the appeal process.

c. The Counsel for Respondent was present in Court when the judgment was delivered but did not deem it necessary to seek stay.

14. The Claimant further submits that no evidence has been tendered as to the Respondent's ability to provide security. Further, the argument that the Claimant is incapable of repaying the decretal sum should the appeal succeed is without basis. He relies on the case of **Samwel Kimutai Korir (Suing as Personal and Legal Representative of Estate) of Chelangat Silevia vs. Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] eKLR** where the Court held as follows:-

"I find that, poverty per se, cannot be a basis for keeping a party away from enjoying the fruits of his decree as the court needs to look at all aspects of the case and balance the interests of the respondent vis-à-vis the Applicant who under Article 48 of the Constitution, is guaranteed right to access to justice and right to fair hearing under Article 50 (1) of the Constitution which latter right cannot be limited under Article 25 of the Constitution."

15. The Claimant further relied on the of **Meghji Bhimji Sanhani Builders & Contractors vs. Nairobi Golf Hotels Kenya Limited [CA No. 1900 of 1995] (UR)** where the Court held that:-

"A bald statement from the bar or indeed an Affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence...carries no weight."

16. The Claimant further submits that the Respondent has not demonstrated that he will suffer irreparable damages should the instant application be dismissed. He invited the Court to look at the case of **James Wagalwa & Another vs. Agnes Naliaka Cheset [2012] eKLR** where the Court held that the conditions set out under Order 42 (6) share an extricable bond such that the absence of one will affect the exercise of discretion of the Court granting stay of execution.

17. I have examined submissions of the parties herein. Order 42 rule 6 provide incidences under which stay orders can be granted by Court. The Applicant must approach Court within reasonable time, the Applicant must demonstrate he stands to suffer irreparable harm if the orders are not granted and that he is willing to provide security as may be ordered by this Court.

18. The Respondents approached this Court without delay. They have also pointed out that they have preferred an appeal against the judgement of this Court.

19. I will therefore allow stay on condition that the Respondent deposits the entire decretal sum in a joint account held in the joint names of the Claimant and the Respondent's Counsel within 30 days. In default execution to issue.

Dated and delivered in open Court this **21st day of May, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Wanjara holding brief Maina for Applicant

Claimant – Present