



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1607 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL MWANGI.....CLAIMANT

VERSUS

ROBERT NDERITU T/A

NAIROBI MILLENNIUM FAST FOOD.....RESPONDENT

RULING

The application before me for determination is dated 19th November 2018 and seeks the following orders-

1. That the matter be certified urgent and heard ex-parte in the first instance.
2. That there be stay of execution of the judgement delivered on 2nd November 2018 pending the hearing and determination of the intended appeal and hearing and determination of this application.
3. That costs be included in the claim.

The application is supported by the affidavit of ROBERT NDERITU sworn on 19th November 2018. He submits that he is aware that a judgment was entered against him which judgment he is dissatisfied with and has filed a notice of appeal. The respondent submits that the application and notice of appeal were filed in a timely manner. He further submits that the appeal has merit and is arguable and failure to allow the application would render the appeal nugatory and an academic exercise. The respondent submits that the claimant will not suffer any prejudice, that the respondent has complied with the order made by court on 3rd December 2018 to deposit the decretal amount in an interest earning account in the names of the 2 firms of the advocates. The respondent submits that they will suffer financial loss if they pay a person who is not their employee.

At the hearing of the application, counsel for the respondent urged court to allow the application and submitted that court was allowed to deviate from the authorities cited by the claimant.

The claimant responded to the application by filing a replying affidavit sworn on 2nd January 2019 by Isaac Simiyu Kuloba. The claimant submits that the respondent has not satisfied the conditions for grant of a stay of execution. They rely on Order 42 Rule 6(2) of the Civil Procedure Rules 2010. The claimant seeks to rely on the following cases;

1. *Focin Motorcycle Co. Ltd v Ann Wambui Wangui and anor [2018] eKLR*
2. *Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR*
3. *Samuel Muchiri Wa Njuguna v Zachary Waruiri Mukui [2007] eKLR*

The claimant submits that the law entitles a successful litigant to execute unless substantive loss is likely to be occasioned to the respondent. The claimant further submits that the respondent has not placed before the court valid grounds and evidence to warrant the stay. The claimant submits further that the application is defective, incompetent, bad in law and without legal basis and is simply to buy time and should therefore be dismissed with costs.

In determining an application for stay an applicant must demonstrate that;

1. Substantial loss may result to the applicant unless the order was made
2. The application was made without unreasonable delay
3. 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.

Further in *G.N Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maali Bishar & Another [2018] eKLR* the court stated;-

‘It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.’

This court notes that judgement was delivered on 2nd November 2018 and the Notice of Appeal was filed on the 15th November 2018. The same was filed within reasonable time and therefore the second condition has been met.

In an application like this one, the court has to balance the right of the claimant who has obtained a valid decree that he is entitled to the benefit of on the one hand and that of the respondent who is aggrieved by the court’s decision and has a right of appeal.

This court notes that the respondent has deposited decretal sum and filed their appeal in good time. The right of appeal is enshrined in the constitution and every person has a right to pursue their claim to the highest court in the land. It is part of the right to access to justice and the right to the equal protection of the law. I find that the respondent has correctly raised his apprehension as to the wherewithal and ability of the claimant to refund the decretal sum should the appeal succeed. For the claimant the sum has been secured in the joint interest earning account. The balance thus tilts in favour of allowing the application.

For the foregoing reasons the application is allowed. There shall be stay of execution of the decree herein pending the outcome of appeal by the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE