



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO.51 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 11th June, 2019)

DEVKI STEEL MILLS LIMITED.....APPELLANT

VERSUS

HENRY MBUVI WAMBUA.....1ST RESPONDENT

JOKALI HANDLING SERVICES LIMITED.....RESPONDENT

RULING

1. The Application before this Honourable Court is the one dated 29th January, 2019. The Application was filed under a Certificate of Urgency through a Notice of Motion filed Under Order 51 Rule 1, Order 46 Rule 6 of the Civil Procedure Rules, 2010 Section 1A, 1B and 3A of the Civil Procedure Act Cap. 21 Laws of Kenya and all other enabling provisions of the Law.

2. The Application seeks the following Orders:-

1. THAT the Application herein be certified as urgent and service dispensed with in the first instance.

2. THAT the Honourable Court be pleased to issue temporary stay of execution orders as against the Appellant pending the hearing and determination of the Application herein.

3. THAT the Honourable Court be pleased to issue stay of execution orders as against the Appellant pending the hearing and determination of the instant appeal.

4. THAT the Costs of this Application be awarded to the 2nd Defendant.

3. This Application is premised on the grounds that:-

a) Judgment in the instant suit was delivered on the 25th of September, 2018.

b) The 2nd Defendant was dissatisfied with the said judgment and lodged an Appeal in the instant Court challenging the Judgment in its entirety being Appeal No. 51 of 2018.

c) The Appeal is arguable with high chances of success.

d) The Plaintiff has however threatened to proceed with execution in the event of which the Appeal will be rendered nugatory and occasion great prejudice to the defendant.

e) The Application has been filed without unreasonable delay.

f) It is in the interest of justice that the Application herein be allowed.

4. The Application is supported by the Affidavit of **JAMES KARIUKI MBOGO** sworn on 29th January, 2019 in which he reiterates the

averments made in the Notice of Motion Application.

5. The Respondent opposed this Application vide a Replying Affidavit deponed on 18th February, 2019 by **HENRY MBUVI WAMBUA**, the Respondent herein, in which he avers that the instant Application ought to be dismissed as the same lacks merit.
6. He further avers that the Application is an afterthought and is only aimed at delaying him from enjoying the fruits of the Judgment entered in his favour. He further states that the intended Appeal raises no triable issues as indicated by the Applicant.
7. In conclusion, the Respondents urge the Court to dismiss the instant Application as the same is without merit.
8. The Appellant thereafter filed a Further Affidavit deponed by **JAMES KARIUKI MBOGO**, the Human Resource Manager with the Appellant, on 15th March, 2019 in which he reiterated the averments made in the face of the Notice of Motion Application and the Supporting Affidavit thereto.
9. The Appellant contends that the assertion made by the Respondent that the Appeal lacks merit are merely speculative as the merits of the Appeal is a reserve of this Honourable Court and it's only the Court that can make such a determination.
10. He urged the Court to allow the instant Application as the same has merit.
11. In disposing of the instant Application, the parties agreed to file written submissions.

Appellant/Applicant's Submissions

12. It is submitted by the Appellant/Applicant that the instant Application has met the threshold for granting of Orders sought therein as highlighted by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.
13. The Appellant/Applicant further submitted that his Appeal is arguable and has high chances of success. To fortify their argument the Appellant placed emphasis on the case of **Housing Finance Company of Kenya Vs Sharok Kher Mohammed Ali Hirji & Another (2015) eKLR** where it was held:-

“On the first aspect as to whether the intended Appeal is arguable and not frivolous, we restate this Court’s decision in Kenya Tea Growers Association & Another Vs Kenya Planters & Agricultural Workers Union Civil Application No. 72 of 2001 wherein the Court addressed what is considered to be an arguable appeal thus,

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision.”

14. It is also the Appellant/Applicant’s submission that given that the Respondent has not disputed in his Replying Affidavit that he is unable to repay the decretal sum, the application should be allowed. He further submitted that the said decretal amount is a substantial amount, which the Respondent has not shown ability to repay should the Appeal succeed.
15. He urged the Court to find as such and that the Appellant will suffer irreparable loss as it shall be impossible to recover the same should the Appeal succeed. For emphasis the Appellant cited the Authorities of **Mombasa HCCA No. 65 of 2013, Faisal Amin Jan Mohammed T/A Dunya Forwarders Vs Shams Trading Co. Ltd , Nai 15 of 2002 ABN Amro Bank, NV Vs Le Monde Foods Ltd** and **Mombasa HCCA No. 79 of 2013, Kenya Orient Insurance Co. LTD Vs Mohammed Dulo Dima Alias Moh’d Omar Dima & 2 Others.**
16. On the issue of Security, it is the Appellant/Applicant’s submission that it has shown its willingness to comply with any terms and conditions as the Court may direct as deponed in its Supporting Affidavit at Paragraph 10.
17. In Conclusion the Respondent urged this Court to allow the instant Application as prayed having fulfilled the requirements for the grant of the said orders.
18. There are no submissions on Record filed on behalf of the Respondent herein.
19. I have examined the averments of the Parties.
20. Order 42 rule 6(2) states 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”.

21. The only considerations by this Court in deciding whether or not to grant the stay are as above.

22. The Applicant filed this Application on 29.1.2019 seeking stay of judgement and orders delivered on 25.9.2018. In this Court's view 4 months is inordinate delay given that the period of appeals is 14 days. 1 month at most will be considered reasonable period.

23. That notwithstanding, the Applicant has not shown that he has filed an Appeal and which Appeal may be rendered nugatory if the stay is denied. The Applicant has indicated that he is willing to abide by any order on security that may be given by this Court.

24. I have looked at the contents of this application. The Applicant seeks this Court's intervention to stay an execution process if at all but has not annexed the judgement, the subject matter of this application.

25. This Court is unable to determine if the Intended Appeal is arguable or not without a copy of the impugned judgement. In the circumstances, I find the omission costly and I decline to allow stay as prayed.

Dated and delivered in open Court this 11th day of June, 2019

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo holding brief Morara for Applicant - Present

Respondent – Absent