



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.400 OF 2016

PAUL MUIRURI NGUGI.....CLAIMANT

VERSUS

ANIL WALIA

T/A SHINNERS GIRLS HIGH SCHOOL....RESPONDENT

RULING

The respondent, Anil Walia t/a Shiners Girls High School by application and Notice of Motion dated 18<sup>th</sup> February, 2019 is seeking for orders that;

This court is pleased to stay execution of the judgement entered on 31<sup>st</sup> January, 2019 pending the hearing and determination of the intended appeal.

The application is supported by the affidavit of Anil Walia and on the grounds that following judgement of the court delivered on 31<sup>st</sup> January, 2019 and decree issued on 14<sup>th</sup> February, 2019 the claimant may execute the same to the detriment of the respondent who wish to file an appeal. A Notice of Appeal has been filed dated 11<sup>th</sup> February, 2019 and to give it a chance to be heard the orders sought seeking stay of execution should issue otherwise the appeal shall be rendered nugatory. The respondent stands to suffer irreparable loss and damage if the decretal sum is paid to the claimant and the subject of the suit should be preserved with an order of stay.

In his affidavit Mr Walia avers that a Notice of Appeal has been filed and to preserve the subject matter seek a stay of execution of the judgement herein. The claimant shall suffer no prejudice if the orders sought are allowed.

The claimant in reply filed his Replying Affidavit and on the grounds that the respondent has filed the application in bad faith and in an attempt to stop him from enjoying the fruits of his judgement. No explanation is offered why stay of execution is sought or what substantial loss shall be suffered if the judgement is executed. The respondent is an institution and should not be granted stay of execution before furnishing security so as to strike a balance in the interests of both parties.

The claimant also avers that the right of appeal should be balanced with his right to enjoy the fruits of the judgement. The decretal sum should be deposited in court.

In address execution process, the court is allowed to apply the provisions of the Civil Procedure Act and the Rules thereto.

Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which allows this court to stay execution of its judgement which is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

***No order for stay of execution shall be made under sub rule (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.***

In this case, there is no appeal filed. The respondent has filed Notice of Appeal. Where there is intention to file an appeal no draft memoranda or indication as to what component is to be addressed. The intention to appeal is left bare.

As well submitted by the respondent on the principles applicable for the grant of stay of execution pending the hearing of an appeal in the case of **Butt versus Rent Restriction Tribunal [1982] KLR 417** and where the Court of Appeal gave guidance on how a court should exercise discretion and held that:

- 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.*

On the principles set out above, the respondent fails to submit any matter or material to the court in support of its application to ensure discretion due is exercised in its favour into granting stay of execution. Save for the notice of appeal filed herein, no other matter is done in securing the right of appeal against the judgement of the court. The judgement of the court stands as delivered on 31st January, 2019 and the claimant ought to be allowed to enjoy the fruits of his judgement. No offer of security is made in whatever nature.

Where the intention to file the intended appeal is put in motion, the respondent fails to demonstrate what loss shall be suffered or the prejudice which shall follow if stay of execution is not allowed. Whether the claimant is able to repay the decretal sum or not is a matter totally ignored by the respondent as the applicant.

In the end the court finds no matter to justify the application before it to warrant and or justify the grant of the orders sought. This is aptly captured in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited versus Aquinas Francis Wasike & another (UR)**;

*This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 lack of them. Once an applicant expresses 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.*

The above put into account, the application by the respondent is found without any merit

**Accordingly, application dated 18<sup>th</sup> February, 2019 is hereby dismissed with costs to the claimant.**

**Delivered in open court at Nakuru this 11th July, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistants: ..... & .....

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