



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1803 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PROF. ROSE AOKO OGWANG.....CLAIMANT

VERSUS

NATIONAL GENDER AND EQUALITY COMMISSION.....RESPONDENT

RULING

On 10th August 2018, this Court delivered the judgment of Nderi J. where the Respondent was required to pay the Claimant the sum of KShs.11,368,800.00, interest thereon and the costs of the suit. The Respondent was aggrieved by this decision and is keen on appealing the same thus the instant application seeking the following orders:

1. Spent.
2. There be a stay of execution of the judgment delivered by Onyango J. on 10th August 2018, pending the hearing and determination of this Application *inter partes*.
3. There be a stay of execution of the judgment delivered by Onyango J. on 10th August 2018, pending the hearing and determination of an intended appeal against the said judgment.
4. The Court do grant any other order that it may deem just and expedient to grant in the circumstances.

The Respondent is apprehensive that the Claimant may execute the judgment at any moment. It is the Respondent's case that the sum awarded is enormous as it is a public institution operating on public monies allocated by the Parliament. If the Claimant collects the monies, the Respondent's operations will be halted thereby inhibiting it from administering services to the public.

Further, recovery of the monies from the Respondent should the appeal be dismissed is guaranteed as its existence is certain with a known place of business. On the other hand, the Claimant does not have any known assets of such value thus retrieving the monies in the event that the Respondent's appeal succeeds will be difficult.

It is the applicant's case that it has an arguable appeal and that the Claimant will not suffer any harm if a stay of execution is granted. The Application is supported by the Affidavit of Sora Katelo, its Chief Executive Officer, setting out the grounds on the face of the motion.

The Claimant has opposed the Application vide Grounds of Opposition and the Claimant's Replying Affidavit. It is her case that the Application has not been brought in good faith as it is merely intended to deny her the fruits of her judgment. Further, the Applicant has not satisfied the conditions for granting of stay of execution pending appeal as set out in order 42 rule 6 (2) of the Civil Procedure Rules.

She avers that the Applicant will not suffer any loss by payment of the decretal sum because her employment was to lapse in 2017 and therefore all the expenses related to her employment had been budgeted for and approved by the Cabinet Secretary of the National Secretary. It is her position that the hardship she has suffered outweighs any harm the Respondent is likely to suffer and that the Respondent has not demonstrated that it has an arguable appeal or that it will suffer loss that is not capable of compensation through damages or restitution should the appeal fail.

The Applicant avers that the court has powers under section 12 (3) (v) and (viii) of the Employment and Labour Relations Court Act to award compensation or any other appropriate relief as it deems fit. It is her position that this Court cannot evaluate the grounds of appeal set out in the Application as this Court cannot sit on appeal of its own decision.

The Applicant contends that she has properties being KAMAGAMBO/KABUORO/6076 and KAMAGAMBO/KABUORO/6535 that can be applied for restitution should the appeal succeed.

The Respondent filed a rejoinder to the response vide the Supplementary Affidavit of Sora Katelo where it is deposed that there is no inordinate delay in filing the Application as it had been filed within 2 months of receiving a copy of the judgment due to circumstances beyond its control, being that it had been in the process of obtaining new commissioners.

Further, the salary allocated for payment to the Claimant is unavailable to the Respondent since any funds not utilized in any financial year are reallocated in the subsequent financial year and are not available as surplus. It is also averred that the properties owned by the Claimant are small parcels of land jointly owned with another person and are located in the remote areas of Nyanza region thus unlikely to attract the value of KShs. 11,368,800.00 plus interest and costs.

Parties disposed of the Application by way of written submissions. The Respondent submits that the filing of its Application after the lapse of 2 months from the date of delivery of judgment does not amount to inordinate delay and asserts that the delay is reasonable. It relies on the cases of *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another* [2018] eKLR, *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR and *APA Insurance Limited vs. Michael Kinyajui Muturi* [2016] eKLR.

The Respondent submits that the monies are easily recoverable from it in the event it loses the Appeal as it is a public body hence its continuity is largely guaranteed. Further, since the Claimant's properties are jointly owned, the Respondent's interests will be subject to the interest of the joint owner and it is impossible to ascertain whether the Claimant's interest in the two parcels of land can offset the judgment amount.

The Claimant submits that an Applicant needs to do more than merely stating that it would experience hardship were it to be compelled to pay the decretal amount and relies on the case of *Kenya Hotel Properties Limited vs. Willesden Investment Limited* [2007] eKLR where the Court stated that the Applicant needs to put on the table its financial position and how the same would be affected. The Claimant further submits that pursuant to Section 47(e) of the National Gender and Equality Commission Act, 2011 the Respondent is expected to make provisions for contingent liability in its annual estimates for the years the suit was pending. The Respondent has not adduced its annual estimates to support its depositions hence has not discharged its burden of proving the allegations made.

The Claimant urges the Court to find she has demonstrated capacity to refund the decretal amount in the event the appeal succeeds. She relies on the case of *Michael Kiboi Gatumia vs. Mastermind Tobacco (K) Limited where the* [2013] eKLR where the Court held that the purpose of an application for stay of execution pending appeal is to preserve the subject matter and not to prevent a successful litigant from accessing the fruits of litigation. The Claimant submits that the Affiant, **Sora Katelo**, was not affected by the transition of commissioners. Since he was the acting CEO, he was capable of giving instructions on and swearing an affidavit in support of the Application.

Determination

The issue for determination before this Court is whether the Respondent should be granted the Orders for stay sought.

Under order 42 rule 6(2) of the Civil Procedure Rules, no order for stay of execution shall be made 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.

The delay by the Respondent of 2 months has been explained; that there were no Commissioners. The Claimant has not disputed the Respondent's claim that there was a vacuum in its office that led to the delay. The Court in *Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another* [2014] eKLR stated that on applying the courts mind on the delay caution is advised for courts not to take the word "inordinate" in its dictionary meaning but in the sense of excessive as compared to normality."

Order 42 rule 7(1) provides that where an order is made for the execution of a decree from which an appeal is pending, the Court on sufficient cause being shown by the appellant, may require security to be taken for the restitution of any property subject to execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Court.

The Respondent stated that it was willing to obey the conditions set by Court for the grant of an order for stay of execution. However, rule 8 is to the effect that no security shall be required from the government or where the government has undertaken the defence of the suit. Further, the Respondent has submitted that it is likely to suffer a hardship if the orders for stay of execution are not granted because, being a public body, its operations will be stalled once it pays the monies.

The Claimant opposes the issuance of the order for stay on the ground that she has properties and will therefore be able to refund the judgment sum should the appeal succeed. However, these properties are jointly owned and are located in remote areas of Nyanza. Therefore, the Respondent's interest is subject to the joint owner's approval and the value of the properties may not equate to the judgment amount. The Claimant has not demonstrated that she will be able to refund the judgment amount should the appeal succeed and that would mean that the Respondent risks losing the sum of Kshs.11,368,800.00 together with interest accrued since then. In *National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another* [2006] eKLR, the court stated that:

"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.”

I find that there is no risk of the respondent failing to make good the decretal sum should the appeal fail while the claimant has not demonstrated similar ability to refund the amount awarded by the court should the appeal succeed.

For the foregoing reasons the application is allowed conditionally and the following orders are made—

1. Stay of execution of judgment in this suit is granted pending appeal.
2. This is conditional upon the Respondent filing the Memorandum of Appeal within 6 months failing which the stay of execution shall automatically lapse after the expiry of the period.
3. The respondent shall pay the claimant’s costs of this application in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE