



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1967 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**SAMUEL MURAYA GITHINJI.....CLAIMANT**

**VERSUS**

**VICTORY CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

**CONSOLIDATED WITH**

**CAUSE 1968 OF 2012**

**MICHAEL MBUKU MUTISYA.....CLAIMANT**

**VERSUS**

**VICTORY CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

**RULING**

Before me, for determination is the Respondent's Notice of Motion Application dated 17<sup>th</sup> January 2019. It seeks the following orders:

1. That this Application be certified urgent and be heard ex parte in the first instance.
2. That there be a stay of execution/interim preservative orders of the Judgment delivered on 14<sup>th</sup> December, 2018 and the resultant decree of the Court there from pending the hearing inter parties hereof.
3. That there be a stay of execution/interim preservative orders of the judgment delivered on the 14<sup>th</sup> December, 2018 and the resultant decree of the Court there from pending hearing and determination of the Appeal.
4. That the Costs of this Application be provided for.

This Application is premised on the grounds that:-

- a) Irreparable and substantial loss shall result to the Applicant unless stay/preservative orders sought for is granted.
- b) The decree of the Court if not stayed or preserved shall defeat the intended appeal completely effectively rendering it nugatory.
- c) The Notice of Intention to Appeal has been filed.
- d) This Application is timely made.
- e) This Intended Appeal lies from the decision of this Court of Appeal on matters of law; the intended Appeal has overwhelming chances of success since the Claimant was the Resident Engineers casual workers/denies in terms of the Form of Agreement and requisition made directly by the Resident Engineer to that effect – not- once but always and accordingly the Claimant was not the

Respondent's worker/driver as he claimed.

f) The Appellant is willing to offer such reasonable security as the Court orders for the due performance of the decree as may be ultimately binding on it.

The Applications with respect to both matters are supported by the Affidavits of **KIRPAL SINGH SURI** sworn on 17<sup>th</sup> January 2019 in which he reiterates the grounds on the face of the motion.

The Claimants' opposed the Application by filing Replying Affidavits sworn by **MICHAEL MUTISYA** and **SAMUEL MURAYA** on 20<sup>th</sup> May 2019 in which they aver that the instant Application is only meant to deprive them of enjoying the fruits of the Judgment entered in their favour.

They further contend that the instant Application fails to meet the mandatory requirement for grant of the Orders sought as provided for under Order 42 of the Civil Procedure Rules, 2010. The Claimants urged this Honourable Court to dismiss the Applications with Costs.

The Application was argued orally on 21<sup>st</sup> May 2019.

### **Submissions by the Parties**

The Respondent submitted that its notice of Appeal was lodged in good time and thus is properly on record.

It contends that it is willing to provide security as directed pending hearing and determination of the Appeal as the same may be rendered an academic exercise should the orders sought in their Application not be granted.

The Respondent urged this Court to allow the Application as prayed.

It is submitted on behalf of the Claimants/Respondents that the applications filed herein ought to be dismissed as they do not meet the threshold for granting of the orders sought as provided under

Order 42 Rule 6 of the Civil Procedure Rules.

It is the Claimants' averment that the Applicant filed its notice of Appeal on 11<sup>th</sup> January 2019 more than 15 days after the Court had delivered its Judgment contrary to the provision of Rule 75 of the Court of Appeal Rules, which provides that the same was to be lodged within 15 days of the Court's decision. The Claimants contend that on this basis the Applicant has no audience having been indolent.

In Conclusion the Claimants/Respondents urged the Court to dismiss the instant Application for lack of merit and that the same is only meant to delay them from enjoying the fruits of the Judgment entered in their favour.

### **Analysis and Determination**

After considering the parties' arguments and the evidence adduced, it is the court's considered opinion that there is only one issue for determination being whether the instant Application is merited or not.

### **What is the threshold of Stay Pending Appeal Applications?**

**Order 42 Rule 6(2)** of the Civil Procedure Rules bars this Court from ordering stay of execution pending appeal unless –

- a) The Application is brought without inordinate delay.
- b) The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and
- c) The Applicant is willing to give security as the Court may deem fit to order.

The requirements for grant of stay of execution pending Appeal were set out in **Butt v Rent Restriction Tribunal [1982] KLR 417**, wherein the court of appeal 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.”*

### **Inordinate delay**

Judgment in this cause was delivered on 14<sup>th</sup> December, 2018. The Applicants being dissatisfied with the Judgment filed a Notice of Appeal on 11<sup>th</sup> January 2019. The instant Application was filed on 31<sup>st</sup> January 2019. The application was filed timeously taking into account that the period between 21<sup>st</sup> December and 18<sup>th</sup> January of the following year is excluded as provided under Order 50, Rule 4 of the Civil Procedure Rules.

### **Substantial Loss**

Substantial loss occurs where the decree holder is unable to refund the decretal sum in the event the Appellant succeeds in his Appeal thus rendering the appeal nugatory. As a safeguard Courts may then order stay pending appeal. The claimants/decreet holders have not demonstrated that they will be in a position to refund the decretal sum should the appeal succeed.

The court must however balance the interests of the applicant against the rights of the claimants/decreet holders to enjoy the fruits of their judgment.

The respondent did not file draft memorandum of appeal or state the grounds upon which it intends to appeal. It is therefore not possible for the court to assess the genuineness or arguability of the appeal. I note from the record that the hearing was in the absence of the respondent who did not call any witness. The respondent did not apply for review of the judgment or reopening of the case to enable it call its witness. It instead went ahead and filed its submissions, which the court considered together with its pleadings and documents in arriving at its decision.

Having not adduced any evidence at the hearing and having not sought leave to do so after the case was heard in its absence and its case closed, I find that there is little chance of success of the appeal and the appeal is only intended to deny the claimants/decreet holders the fruits of their judgment. The same is therefore ill motivated and an abuse of the appeal process.

For these reasons I decline to grant the orders sought and dismiss the applications for stay of execution with costs to the claimants/decreet holders.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**