



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1719 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 3rd July, 2019)

PATRICK LUBEMBE ASIMANI.....CLAIMANT/RESPONDENT

VERSUS

SOCIAL SERVICE LEAGUE

MP SHAH HOSPITALRESPONDENT /APPLICANT

RULING

1. The application before Court is the one dated 28th March 2019 filed by the Respondent/Applicants herein seeking orders of stay of execution pending the hearing and determination of the appeal they have filed.

2. The Application is premised on Rule 32(2) of Employment and Labour Relations Court (Procedure) Rule 2016 and Order 42 rule 6 of the Civil Procedure rules which provide as follows:-

1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside.

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".

3. The Applicants aver that they filed this application without any inordinate delay and that they stand to suffer substantial loss unless the stay order is granted. They also indicated that they are willing to abide by any orders as to security in the performance of such a decree or order.

4. They asked the Court to allow this application as prayed.

5. The Claimant/Respondent opposed this application. They contend that the Respondent is not a man of straw who is unlikely to pay back the amount in the event of the intended appeal succeeding.

6. The Respondent averred in his affidavit that the amount awarded by Court is not colossal and that the Respondent came to Court late since judgement was entered on 18/6/2018.

7. I have considered the averments of both Parties. This Court delivered the judgment in this cause on 18/6/2018. This application was filed on 28/3/2019, 9 months after the judgement. There was indeed an inordinate delay which is contrary to provisions of Order 42 rule 6(2)

above which indicates that no order of stay should be granted unless the Court is satisfied that there is no substantial delay.

8. 1 month is reasonable period to file such as application but this Court has found a delay of 3 months inordinate and therefore 9 months as in this case is inexcusable.

9. The Respondent have also not indicated the substantial loss they stand to suffer if the stay is not granted. The Respondent cited **Benard Khauka Wafula vs Gachie Ngugi adopted in Pamela Akinyi Opundo vs Barclays Bank of Kenya Limited (2011) eKLR** where Sewe J held as follows:-

"Unless there is evidence to show that the Respondent cannot be trusted with the money in question and that he/she is likely to squander the same before the appeal is heard and determined, thereby rendering the appeal nugatory, there is no reason why a litigant should be denied the fruits of his litigation. An appeal cannot be rendered nugatory in a monetary decree if payment is made, and it is not just to deny a successful party the benefit of judgment merely because he is poor. In an application for stay of execution pending appeal, the burden lies upon the applicant to prove that the Respondent will not be able to refund to the defendant any sums paid in the satisfaction of the decree. It is only when the applicant tables evidence to show that the Respondent will not be able to refund the same can it be said with any comfort that the appeal will be rendered nugatory."

10. I do agree with my sister Hon. J. Sewe that the Claimant who was denied his rights cannot further be denied the chance to enjoy the fruits of his judgement.

11. I do not find the Application warranted due to this delay. I therefore decline to grant the stay orders sought and I dismiss the application accordingly.

12. Costs to the Claimant/Respondents.

Dated and delivered in open Court this 3rd day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo holding brief Kanyiri for Respondent – Present

Abubakar holding brief Bosire for Claimant – Present