



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC NO. 349 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 1st July, 2019)

JOHN KAMWERE MWANGI.....CLAIMANT

VERSUS

REGISTERED TRUSTEES OF NAIROBI

GYMKHANA SPORTS CLUB.....RESPONDENT

RULING

1. The Application before this Court is the one dated **8th April, 2019**. The Application was filed under a Certificate of Urgency through a Notice of Motion filed Under Order 42, Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the Law.

2. The Application seeks the following Orders:-

1. *THAT this Application be certified as urgent and be dispensed with in the first instance.*
2. *THAT pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to grant an interim order of Stay of Execution of the Judgment delivered on 2nd April, 2019 by Honourable Lady Justice Hellen Wasilwa.*
3. *THAT Pending hearing and determination of the intended Appeal to be filed by the Applicant against the Judgment delivered on 2nd April, 2019, this Honourable Court be pleased to grant an Order for Stay of Execution of the Judgment delivered on 2nd April, 2019, and the Decree of this cause.*
4. *THAT pending the hearing and determination of the intended Appeal, there be a temporary injunction prohibiting the Respondent or his agents from executing and effecting the Judgment and Decree of this cause.*
5. *THAT the Costs and incidentals to this Application be costs in the Appeal.*

3. This Application is premised on the grounds **THAT**:-

a) *On 2nd April, 2019, the Honourable Court delivered a Judgment in which it made the following Orders and awarded reliefs as follows:-*

Judgment be and is hereby entered for the Respondent against the Applicant as follows:-

- i. *5 months' salary in lieu of notice*
- ii. *Gratuity equivalent of 26 days for 17 years worked*
- iii. *Long service award as per the Collective Bargaining Agreement*
- iv. *6 months' salary as compensation for unlawful termination*

v. *The Respondent be issued with a certificate of service*

vi. *The Applicant pay costs of this suit.*

b) *The Applicant is aggrieved by the Court's Judgment delivered by Honourable Lady Justice Hellen Wasilwa on 2nd April, 2019.*

c) *On 4th April, 2019, the Respondent served the Applicant with the intended Decree effecting the Judgment delivered by Honourable Lady Justice Hellen Wasilwa on 2nd April, 2019. In a letter dated 3rd April, 2019, the Respondent's Advocates stated that should the Applicant's Advocates fail to return the intended Decree within 7 days, they would move to Court to have the Decree sealed.*

d) *The Applicant intends to Appeal against the Judgment, and has filed a Notice of Appeal dated 5th April, 2019. The Applicant's Appeal is arguable.*

e) *Unless this Application is heard as a matter of urgency and the Orders sought herein granted, the Applicant's Appeal will be rendered nugatory, as the Applicant will be exposed to the implementation of the Judgment delivered on 2nd April, 2019, which has significant consequences.*

f) *The Applicant's Appeal will be rendered nugatory if successful, should a Stay of Execution and maintenance of status quo ante of the Judgment delivered on 2nd April, 2019 not be granted, as the Applicant would be unable to recover any amounts paid to the Respondent, as the Respondent has no known assets that may be attached in execution. The Respondent will already have been utilized the same amounts.*

g) *The Applicant is not in a position to know the resources that the Respondent has at his disposal.*

h) *If the Application is not heard as a matter of urgency, the Applicant's Right of Appeal will be compromised, and its Appeal rendered nugatory if successful.*

i) *The refusal to grant the Stay of Execution of the Judgment and Decree in this cause will occasion the Applicant hardship.*

j) *The Applicant is ready and willing to comply with any reasonable conditions this Honourable Court may impose for the grant of the Orders herein.*

k) *The Stay of Execution of Judgment and Decree in this cause is NARDINE MUSAMBAYI sworn on 8th April, 2019 in which he reiterates the averments made in the Notice of Motion Application.*

4. The Claimant opposed this Application vide a Replying Affidavit filed in Court on 8th May, 2019 deposed by **JOHN KAMWERE MWANGI** the Claimant/Respondent, in which he avers that the instant Application is incompetent, a non-starter, frivolous and is an abuse to the Court process. He urged this Court to dismiss the same with costs.

5. The Claimant/Respondent further contends that despite serving the Applicant with the draft Decree, it failed to respond to the same and would therefore be unfair for the Applicant to seek stay of Execution for a Decree it failed to approve.

6. The Claimant/Respondent contends that the Applicant has not in any way demonstrated that its intended Appeal has high chances of success by annexing a draft Memorandum of Appeal to its Application.

7. It is further the Claimant's/Respondent's averment that the Applicant only seeks to delay and/or deny him the fruits of his judgment by filing the instant Application noting that litigation must come to an end this matter having been decided on merit. He further pointed out that the Applicant has previously failed to deposit the decretal amount as directed by the Court as security for a previous Judgment dated 21st July, 2015.

8. The Claimant urged the Court to direct that the Applicant to deposit one half of the amount payable to him in a joint interest earning account in the joint names of the advocates on record and that they release the other half directly to him should this Court be inclined to allow the instant Application.

9. In conclusion, the Claimant/Respondent urged this Honourable Court to dismiss the instant Application with costs to the Claimant/Respondent.

10. In disposing of the instant Application, the parties agreed and were directed to file written submissions. However, on 22nd May, 2019 when the matter was mentioned to confirm filing of written submissions Mr. Nyabena pointed out that the Applicant had failed to file its submissions and therefore urged the Court to rely on what was on record and prayed for a Ruling date.

11. I have considered the averments of both parties. The Applicant moved this Court on 8/4/2019 following a judgement delivered on 2.4.2019 seeking stay of execution orders. In the circumstances of this case then, the Applicant filed this application without any delay.

12. 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”.

13. The Applicant approached this Court within delay as indicated above and therefore met the requirements of Order 42 rule 6(2) above.

14. The Applicant must also demonstrate that they stand to suffer irreparable harm or damage if the orders sought are not granted.

15. To this, the Applicant have not. They also never offered to submit any security as a condition for the grant of the orders sought in this application. The Applicants therefore failed to demonstrate how they will suffer if the orders sought are not granted.

16. The Applicants have however filed a Notice of Appeal. In view of this fact, and so that the Appeal is not rendered nugatory, I will allow stay on condition that the Applicants deposits ½ the decretal sum in a joint interest earning account held in the joint names of Counsels on record and the other half be released to the Claimant within 30 days. In default execution to issue.

17. Costs to abide the outcome of the appeal.

Dated and delivered in open Court this **1st day of July, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oondo holding brief Eshiwani for Applicant – Present

Nyabena for Claimant – Present