



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1559 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**SILVIA ANYESI.....CLAIMANT**

**VERSUS**

**RAHMA MOHAMMED.....RESPONDENT**

**RULING**

Before me, for determination is the Respondent's Notice of Motion Application dated 4<sup>th</sup> June 2019. It seeks the following orders:

1. That this Application be certified urgent and be heard ex parte in the first instance (*spent*).
2. That there be a temporary stay of execution of the judgment and Order of the Court issued on 20<sup>th</sup> May 2019 pending the hearing and determination of the Application inter parties.
3. That there be a stay of execution of the judgment and consequential orders issued on 20<sup>th</sup> May 2019 pending the hearing and final determination of the intended appeal by the Respondent against the said judgment.
4. That the costs of this Application be provided for.

This Application is premised on the grounds that:-

- a) The Respondent has filed an appeal against the judgment delivered by the Court on 20<sup>th</sup> May 2019.
- b) The Appeal is arguable and has overwhelming chances of success.
- c) The Respondent will suffer substantial loss if the stay is not granted.
- d) The Claimant is a woman of straw and may not be able to reconstitute the decretal sum if paid to her thus rendering the appeal nugatory.
- e) The Applicant is prepared to abide by any Order for the furnishing of security as may be made by the Court.
- f) The Application is made timeously without any undue delay.

The Application is supported by the Affidavit of **RAHMA MOHAMMED** sworn on 4<sup>th</sup> June 2019 in which she reiterates the grounds on the face of the motion.

The Application is filed under Order 42 Rule 6 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act Laws of Kenya and all enabling other provisions of the law.

The Claimant opposed the Application by filing a Replying Affidavit deponed by **SYLVIA ANYESI**, the Claimant herein on 11<sup>th</sup> June, 2019 and filed in Court on 12<sup>th</sup> June 2019, in which she contends that the instant Application ought to be dismissed as it is an afterthought

meant to delay the suit and prevent the Claimant from enjoying the fruits of the Judgment delivered in her favour.

She further contends that this Court did Order parties to appear before the County Labour Officer for conciliation, which Order was not obeyed by the Respondent herein and a report was prepared to that effect. Further, that the Respondent never raised any objection on the Report then, only choosing to raise issues after delivery of the Court's Judgment in this matter.

The Claimant urged that should this Court be inclined to allow the instant Application, it orders that the Respondent/Applicant deposits the decretal sum Kshs.308,557.30/= in Court pending the hearing and determination of the intended Appeal.

In conclusion the Claimant urged the Court to dismiss the instant Application as the same is void of merit.

The Application was argued on 10<sup>th</sup> July 2019.

### **Submissions by the Parties**

It is submitted on behalf of the Respondent/Applicant that the instant Application ought to be allowed as prayed as she seeks to appeal against the Court's Judgment delivered on 20<sup>th</sup> May 2019 for the reasons that the Court relied on the report prepared by the County Labour Officer who did not have any evidence.

It is further submitted that the Respondent was given conditional stay that she deposits the decretal sum in Court, which condition was complied with as directed.

The Respondent/Applicant urged this Court to allow the instant Application as her intended Appeal has high chances of success and that the same will be rendered nugatory should the Appeal succeed.

She further submitted that the Claimant will not suffer any prejudice should the Orders sought herein are granted. It is further contended that the Respondent/Applicant has a right as provided under Article 50 of the Constitution of Kenya, 2010 to be allowed to exhaust the trial process.

In conclusion the Respondent/Applicant urged this Court, in the interest of Justice, to allow the instant Application as prayed.

The Claimant on the other hand in opposition to the Application reiterated the averments made in her Replying Affidavit in opposition sworn on 11<sup>th</sup> June 2019. It is further the Claimant's submission that the Respondent/Applicant failed to attend to conciliation despite being invited by the Labour Officer and as directed by this Court. The Claimant further contended that the instant application is only meant to delay her from enjoying the fruits of the Judgment entered in her favour.

The Claimant urged this Court to dismiss the Application with costs.

### **What is the Threshold for 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 deems fit to order.

The requirements for grant of stay of execution pending Appeal set out in **Butt -V- Rent Restriction Tribunal [1982] KLR 417**, 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 20<sup>th</sup> May 2019. The Applicants being dissatisfied with the Judgment filed a Notice of Appeal on 3<sup>rd</sup> June 2019. The instant Application was filed on 4<sup>th</sup> June 2019. There was thus no delay in filing the same.

### **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.

In the instant cause the Claimant/Respondent is a former employee who lost her employment with the Respondent. The Respondent/Applicant states in Paragraph 13 of her Supporting Affidavit that the Claimant will not be in a position to refund the decretal sum should the Appeal succeed as she is not in gainful employment and/or her source of income is not known. This was not disputed by the Claimant in her Replying Affidavit and Submissions. I therefore opine that indeed should the Appeal succeed the same will be rendered nugatory as the Claimant would not be in a position to refund the same thus occasioning substantial loss to the Respondent/Applicant.

### **Security**

The record reflects that Radido J. did on 4<sup>th</sup> June 2019, when this matter was listed for hearing of the certificate of urgency made the following orders:

1. That a temporary stay of execution of the Judgment and Order of the Court issued on 20<sup>th</sup> May, 2019 be and is hereby granted pending the hearing and determination of the Application inter parties on condition the decretal sum and costs are deposited into Court on or before 11<sup>th</sup> June 2019
2. That Application be served for interpartes hearing on 13<sup>th</sup> June 2019.

I note that the Respondent/Applicant did comply with the Court’s direction by depositing the decretal sum of Kshs.308,857.30 in Court on 11<sup>th</sup> June 2019 thus confirming the order of stay of execution.

I further note that there is an application filed by the claimant seeking rectification of the judgment. The court awarded the sum of Kshs.208,080.50, although on the itemised judgment the tabulation comes to Kshs.308,857.30.

As is evident from the judgment, the court stated as follows just before listing the heads of award –

*“I am giving the respondent the benefit of doubt on the question of unfair termination thus only awarding statutory benefits as follows...”*

The sum of Kshs.100,776.80 was thus included in error as in the body of the judgment there was no award of compensation.

I therefore confirm the award to the claimant to be as follows

1. One month’s salary in lieu of notice.....Kshs.12,597.10
2. Underpayment arrears as follows –
  - i..... Kshs.4,597.10 (Kshs.12,597.10 – 8,000.00) x 13 months  
that is June 2015 to May 2016.....Kshs.59,762.30
  - ii..... Kshs.3,247.95 (Kshs.11,247.95 – 8,000.00) x 23 months  
that is June 2013 to April 2015.....Kshs.74,702.85
3. 18 months accrued leave pay at 1.75 per  
each complete month.....Kshs.13,226.95
4. 3 months’ maternity leave pay at.....Kshs.37,791.30

Since the claimant was in person, the respondent will pay her Kshs.10,000 costs to cover her reasonable expenses and disbursements in respect of the case. I thus award the claimant a total of **Kshs.208,080.50**

The corrections are made pursuant to the powers of the court to make correction of errors as provided under Rule 34 of the Employment and Labour Relations Court (Procedure) Rules as well as in response to the claimant's application dated 24<sup>th</sup> May 2019 for rectification of the error apparent on the face of the record..

**Conclusion**

The Application dated 4<sup>th</sup> June 2019 is allowed. The Respondent/Applicant directed to file his Appeal within 60 days from the date hereof.

Costs of the application will be paid by the Appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF AUGUST 2019**

**MAUREEN ONYANGO**

**JUDGE**