



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 617 OF 2014

BETWEEN

TIMOTHY NJOROGI KABUI.....CLAIMANT

VERSUS

GATEWAY MARINE SERVICES LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

A.I. Onyango & Company Advocates for the Claimant

A.B. Patel & Patel, Advocates for the Respondent

RULING

1. Judgment was delivered in favour of the Claimant/ Employee, against the Respondent/ Employer, for a total sum of Kshs. 1,355,866 with costs and interest, on 22nd February 2019.
2. Aggrieved, the Respondent filed a Notice of Appeal on 6th March 2019. Also filed on 5th April 2019, is an Application for Stay of Execution pending Appeal.
3. The Application is based on the Affidavit of Respondent's Managing Director, Bob Weyn, sworn on 4th April 2019.
4. In summary, Weyn states that the Respondent is aggrieved by the whole Judgment; the Respondent filed a Notice of Appeal; the Intended Appeal has good prospects of success; the Claimant has commenced execution proceedings without extracting decree; execution would occasion the Respondent substantial loss and damage; and the decretal sum may not be recoverable in event decree is executed, paid and the Respondent succeeds in its Appeal. The Respondent is ready to deposit the entire amount due and if so required, deposit such other security as may be required. Weyn does not specify in his Affidavit, where he wishes to have the entire sum deposited.
5. The Claimant, Timothy Njoroge Kamau, filed a Replying Affidavit on 25th April 2019, opposing the Application. His position is that Judgment was delivered on 22nd February 2019. The Respondent was granted 30 days' stay of execution, which lapsed on 22nd March 2019. Thereafter the Claimant initiated execution proceedings, having extracted decree regularly. He states he would be ready to pay back the decretal sum, if the Respondent succeeds on Appeal. The Claimant worked for the Respondent as a Manager. He is aware that Bob Weyn is not a Kenyan Citizen and is a flight risk. The Claimant states further that the Claimant was, in the course of the trial, awarded Kshs. 12,000 as costs, which the Respondent did not pay.
6. Parties agreed on 20th June 2019, to have the Application considered and determined based on their Affidavits and Submissions. They confirmed filing of Submissions on 31st July 2019.

The Court Finds:-

7. The Respondent has not shown that the Claimant, who is a former Manager with the Respondent, and who earned a monthly salary of Kshs. 129, 132, is a man of straw, who cannot raise a sum of Kshs. 1,355,866 in refund to the Respondent, in event the Respondent succeeds on Appeal. The Claimant has sworn in his Affidavit that he would be in a position to refund the sum awarded to him to the Respondent, in event the Judgment of the Trial Court is overturned.

8. It is also clear from the record that the Respondent did not honour the order on costs made in favour of the Claimant on 9th July 2018. If the Respondent had a problem satisfying an order for payment of costs during trial, assessed at Kshs. 12,000, why should the Court trust the Respondent in its undertaking for provision of security on Appeal? An order for stay of execution is given at the discretion of the Court. In exercise of its discretion, the Court must take into account the conduct of the Applicant during trial. An Applicant who disregards orders made on costs, does not merit the favour of the Court, on applying for stay of execution.

9. The Court has taken into account that the Parties intimated, in the course of the application, that they were negotiating and intended to record a consent order. They did not do so, by the time the Cause was last mentioned in Court. There ought, therefore, to be crafted a middle-ground, which enables the Claimant to enjoy part of his Judgment, while not making it too hard for him to meet his legal burden, if the Appeal succeeds, and he is ordered to repay the entire decretal sum. While he is a former Manager who earned a good salary, and has not been shown to be a man of straw, the Claimant told the Court he had not secured a comparable job, since he left employment. There is need for a middle-ground, which allows the Claimant to enjoy some of his fruits of litigation, while protecting the Respondent's undoubted right of appeal. The Application filed by the Respondent shall be allowed on the following terms:-

a) The Respondent shall pay to the Claimant part of the decree, comprising equivalent of 4 months' salary in compensation for unfair termination at Kshs. 516,528; notice pay at Kshs. 129,132; and annual leave at Kshs. 129,132 – total Kshs. 774,792.

b) The balance at Kshs. 581,074 shall be held in an interest-earning joint bank account in the names of the Parties' Advocates.

c) Costs in the cause.

Dated and delivered at Mombasa this 30th day of September 2019.

James Rika

Judge