



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 1278 OF 2017

(Formerly HCCC 515 of 2003)

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2019)

BENSON NDWIGA NJUE & 108 OTHERS.....CLAIMANTS/RESPONDENTS

VERSUS

CENTRAL GLASS INDUSTRIES LIMITED.....RESPONDENT/APPLICANT

RULING

1. Before this Court, is the Respondent's Application dated 2nd May 2019, wherein the following orders have been sought:-

a. Spent.

b. This Honourable Court be pleased to stay the execution of the judgment and decree of Honourable Lady Justice Wasilwa delivered on 24th January 2019 in ELRC Cause 1278 of 2017 pending the hearing and determination of this Application.

c. This Court be pleased to stay the execution of the judgment and decree of Honourable Lady Justice Wasilwa delivered on 24th January 2019 in ELRC Cause 1278 of 2017 pending the hearing and determination of the Appeal.

d. Costs of this Application be provided for.

2. The Application is based on the grounds that the Applicant stands to suffer irreparable damage and its appeal rendered nugatory if the order for stay of execution is not granted, as the Claimants are likely to execute the Judgment. The Applicant avers that it is willing to offer security of costs to secure the decretal sum, pending the hearing and determination of the appeal.

3. The Applicant concludes that it is in the interest of equity and justice that the orders sought be granted.

4. The Application is supported with the Affidavit of Leah Ngatia where she avers that proceedings are yet to be typed hence impossible to lodge the record of appeal.

5. The Respondents have opposed the Application vide the Replying Affidavit of Joseph Ndirangu sworn on their behalf. The Affiant avers that the Application is an abuse of the Court process aimed at hindering the Respondents from enjoying the fruits of their judgment.

6. It is the Respondents' case that the Applicant has not offered an explanation for the 98 days delay in filing the instant application, neither has it demonstrated the substantial loss it will suffer in the event the orders sought are not issued.

7. It is their position they should be paid half of the decretal sum and the other half deposited in an interest earning account in the joint names of parties' advocates, 30 days from the date of the Ruling.

8. The Affiant also responded to the grounds set out in the Applicant's appeal, which will be addressed by the Court of Appeal at the appeal stage.

Submissions by the Parties

9. The Application was disposed of by way of written submissions. The Applicant filed its submissions on 30th May 2019 while the Respondents filed theirs on 10th June 2019.

10. The Applicant submits that it has demonstrated the substantial loss it is likely to suffer if the appeal is successful by indicating that recovering the decretal sum from 73 Respondents will be an uphill task. Further, the Respondents have not demonstrated their ability to pay the decretal sum in the event the appeal is successful.

11. The Applicant also submits that the delay in filing the appeal was due to circumstances beyond its control such as the mathematical errors in the judgment.

12. It is the Applicant's position that a notice of appeal was lodged timeously and that there was no threat of execution until the Respondents taxed their bill of costs. The Applicant relies on the case of G.N. Muema P/A (Sic) Mt. View Maternity & Nursing Home vs. Miriam Maalim Bishar and Another [2018] eKLR.

13. In preserving the substratum of the appeal, the Applicant in its submissions urges this Court to take into account the sum of KShs. 21,116,788.00 plus costs of KShs. 978,427.00 and not the inflated costs of KShs. 62,468,335.00. It relies on the case of Barack Otieno Ombima vs. Farouk & 2 Others [2018] eKLR.

14. In conclusion, the Applicant submits that this Court has the discretion to grant the orders sought, which orders should be granted because it has proved that this Application falls within favourable consideration of this Court's discretion, for grant of the orders for stay. The Applicant relies on the case of Amal Hauliers Limited vs. Abdulnasir Abukar Hassan [2017] eKLR.

15. The Respondents submit that the commencement or completion of the execution process does not amount to substantial loss as execution is a lawful process. The Applicant must show that it will be totally ruined if it pays the decretal sum. They rely on the cases of Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] 1KAR 1018 and Tropical Commodities Suppliers Limited & Others vs. International Credit Bank Limited (in liquidation) [2004] 2 EA.

16. The Respondents further submit that the onus of proving that they cannot repay the decretal sum if the appeal succeeds rests on the Applicant and rely on the case of Machira T/A Machira & Company Advocates vs. East African Standard [2002] KLR 63.

17. The Respondents further submit that the capacity to pay the decretal sum should not curtail the enjoyment of the fruits their judgment and rely on the case of Stephen Wanjohi vs. Central Glass Industries Limited Nairobi HCCC 6726 of 1991.

18. It is the Respondents' submissions that the reason given for the Applicant's failure to file the Application on time are administrative reasons hence the Application is an afterthought. They rely on the case of Joseph Kangethe Kabogo & Benson Mburu Kangethe vs. Michael Kinyua Ngari [2012] eKLR.

19. I have examined the averments of both Parties. Order 42 rule 6(2) of the Civil Procedure Rules provides instances under which this Court can grant stay 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”.

20. The Applicants came to Court seeking orders herein on 2/5/2019 following a judgement of this Court delivered on 24/1/2019.

21. It is not clear why they took over 4 months to file such an application which period was inordinately long in the circumstances.

22. The Applicants however submitted that they stand to suffer irreparable damage if orders of stay are not granted given the amount of money involved which they aver they are unlikely to recover if the appeal succeeds. They are also willing to deposit security as directed by Court.

23. Considering the judgement of this Court in which the decretal sum goes to millions of shillings, indeed recovery will be an uphill task if the appeal succeeds.

24. However, given the length of time this case has been in Court since 2003, and given the principle that litigation must come to an end and that the Claimants should not be denied the opportunity to reap fruits of their judgement, I will allow stay on condition that ½ the decretal sum is released to the Claimants and the other ½ deposited in an interest earning account held in the joint names of counsels on record within 60 days. In default execution to proceed.

Dated and delivered in open Court this 17th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wachira holding brief Kouna for Claimants

Obara for Respondents