



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CASE NO. 444 OF 2017**

**JOHN MURIITHI MURIUKI.....CLAIMANT/RESPONDENT**

**VERSUS**

**MS HAZEL HOLMES & 5 OTHERS.....RESPONDENTS/APPLICANTS**

**RULING**

1. The application before me is the Respondents/Applicants' notice of motion application dated 1<sup>st</sup> April 2019 and filed on 27<sup>th</sup> May 2019. Through it, the Respondents seek an order of stay of execution of the Judgment and decree of the court pending determination of an intended appeal. The motion is supported by the affidavit of Madan Aggarwal one of the Registered Trustees of Nanyuki Sports Club on behalf of himself and duly authorised by the other Registered Trustees of Nanyuki Sports Club except for Gilfrid Powys (now deceased). The motion is also supported by grounds on the face of the motion, to wit, that the applicant being dissatisfied by the judgment of the court delivered on 25<sup>th</sup> February 2019 filed a notice of appeal under rule 75 of the Court of Appeal Rules and that it was apprehensive the Claimant may be in no position to make restitution in the event of the appeal being successful.

2. The motion was opposed by the Claimant who filed a replying affidavit sworn on 10<sup>th</sup> June 2019. He deponed that the motion was a delaying tactic meant to deny him the fruits of judgment and that there was no ground for the grant. He asserted that the Respondent had not filed any appeal despite the stark provisions of Rule 82 of the Court of Appeal Rules which requires the appeal to be lodged within 60 days from the date the notice of appeal was lodged. He deponed that should the court however be inclined to grant the prayers sought the Respondent/Applicant should be ordered to deposit the full decretal sum as security.

3. The parties consented to argue and oppose the motion through written submissions. The Applicant filed its submissions on 8<sup>th</sup> July 2019 and argued that if the decree is satisfied at this stage, the Claimant/Respondent will be unable to make restitution as his means for doings so are unknown to the Respondent/Applicant. The Respondent/Applicant submits that it stands to suffer substantial loss should the court decline to grant the order since there is no guarantee the Claimant/Respondent will be able to refund the decretal sum. The cases of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR** and **Linotype-Hell finance Limited v David Garland Baker [1992] ALL ER Vol. 4 pg 887** were cited for this proposition. The Respondent/Applicant argued that it stood to suffer substantial loss if the Claimant/Respondent did not refund the sum after a successful appeal against the decision of the superior court. The Respondent/Applicant submitted that by merely deponing that he had capacity to pay did not shift the burden of proving his ability to repay the sum due. The Respondent/Applicant cited the case of **Kenya Commercial Bank Limited v Naphtally J. B. Hawala Civil Application No. Nai 240 of 1997 (103/97 UR)** (unreported) where the Court of Appeal stated that *the intended appeal is arguable and not at all a frivolous one, it would, if successful, be rendered nugatory because of the financial ability of the respondent to disgorge the garnished amount that would have been paid to him*. The Respondent/Applicant submitted that it was intent on appealing the decision of the court and that there was no indication that the Claimant/Respondent had no reason to believe that no appeal is intended. Regarding the tender of security the Respondent/Applicant submitted that the tender of such security is premature as the form, nature and extent of security is a matter for determination by the court upon application for stay. It submitted that it had offered to deposit the decretal sum in a joint account in the names of the advocates for the parties which is in line with common practice. It relied on the cases of **Housing Finance Company of Kenya v Sharok Kheer Mohamed Ali Hirji & Another [2015] eKLR** and **G.N. Muema P/A(sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR** for the arguments. It was argued that the Court of Appeal in the Sharok case above held that the notice of appeal filed was a clear intention to appeal and that the question of the validity of the notice of appeal cannot be dealt with in an application for stay of execution. The Respondent/Applicant urged the court to follow the precedent and hold that there is an appeal in place and that there is a clear intention to appeal whose validity is not the concern of this court. The Respondent/Applicant submitted that there was sufficient cause for the grant of the order for stay of execution.

4. The Claimant/Respondent submitted that the Respondent/Applicant sought stay of execution in an application dated 1<sup>st</sup> April 2019 and filed 27<sup>th</sup> May 2019 a month after it was prepared and dated. The Claimant/Respondent submitted that the notice of appeal dated 5<sup>th</sup> March 2019 was lodged on 6<sup>th</sup> March 2019 and was served upon the advocates 7 days outside the prescribed limited. He submitted that furthermore, 60 days had lapsed since filing the appeal and the Respondent/Applicant has not made any step or lodge a memorandum of appeal and record of appeal. It was argued that there was no appeal as the Respondent/Applicant had failed to comply with Rule 83 of the Court of Appeal

Rules 2010. The Claimant/Respondent submitted that the Respondent/Applicant had not met the requirements of Order 42 Rule 2 of the Civil Procedure Rules 2010. He submitted that there was clear and inordinate delay and no security was offered. The cases of **JMM v PM [2018] eKLR** and **G.N. Muema P/A(sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR** were cited for the argument that the approach to court must be timeous and the Respondent/Applicant had not shown it would suffer substantial loss as required in law. He relied on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR** and sought costs as against the Respondent/Applicant. He urged the dismissal of the motion with costs.

5. The factors a court will consider in a stay application are well settled in law. In the case of **Butt v Rent Restriction Tribunal** the court held:-

*i) 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.*

*ii) 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.*

*iii) 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.*

*iv) 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.*

*v) 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.*

6. From this decision as well as myriad others from the Court of Appeal and courts of concurrent jurisdiction, the law is clearly set out. The factors for consideration include there being an arguable appeal. As noted there should be an arguable appeal, not necessarily an appeal that would succeed as that is for the Court of Appeal to determine. Before me, no memorandum of appeal and no grounds for the intended appeal have been set out. There is no way the court can discern if indeed there is any appeal. A notice of appeal is clearly an indication of an intent to appeal. However, in the absence of anything else other than the notice filed one cannot be said to be pursuing an appeal. I find the application for stay to be entirely devoid of merit only fit for dismissal with costs as I hereby proceed to do. Motion denied, costs to the Claimant.

It is so ordered.

**Dated and delivered at Nyeri this 28<sup>th</sup> day of October 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**