



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 16 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th October, 2019)

TRACY WANGECHI MUGAMBI.....PETITIONER

-VERSUS-

WINDSOR GOLD HOTEL & COUNTRY CLUB.....RESPONDENT

RULING

1. The Respondent/Applicant, Windsor Golf Hotel & Country Club filed a Notice of Motion application dated 24/06/2019 against the Petitioner/Respondent, Tracy Wangechi Mugambi.
2. It seeks for orders that this Honourable Court be pleased to grant a stay of execution of the Judgment of Wasilwa J dated and delivered on 13/03/2019 and the Decree issued on 12/06/2019 that awarded the Petitioner Kshs. 2,575,527.00, pending the hearing and determination of both this Application and the intended Appeal. Further, that it be at liberty to apply for such further orders and/or directions as the Court may deem fit and just to grant.
3. The Application is premised on the grounds that the Decree was forwarded to the Respondent vide a letter dated 17/06/2019 and the Petitioner's Advocates gave it 7 days within which to settle the decretal sum, failure to which the decree would be executed without any further reference to it.
4. That it is willing to pay the said sum of Kshs. 2,575,527.00 within the next 14 days in a joint interest earning account held in the names of the parties' advocates as a condition for the stay of execution pending hearing and determination of the intended Appeal.
5. That being aggrieved by the said Judgment, it filed a Notice of Appeal on 12/04/2019 and further filed an application at the Court of Appeal (*Civil Application 134 of 2019*) seeking extension of time for filing the Notice of Appeal and for orders therefrom to be deemed duly filed.
6. That the enforcement of the decree and the orders therefrom is against the law and would greatly prejudice and oppress it and that there are no prospects or assurance of recovering the said decretal sum if the intended Appeal is successful.
7. That unless this Application is heard on priority basis and the orders sought granted it shall suffer substantial loss through the execution of the decree and that the intended appeal shall be rendered nugatory. That the intended Appeal is indeed arguable with prospects of success.
8. The Applicant also filed a Supporting Affidavit sworn by its HR Manager, Judy Macharia who avers that to demonstrate the Respondent is willing to pay the decretal sum, its advocates wrote to the Petitioner's advocates on 12/04/2019 requesting the Petitioner to agree to deposit the amount in a joint interest earning account pending hearing and determination of the intended Appeal, but they received no response to the said letter. She annexes the draft Memorandum of Appeal is **at pages 38 to 40 of the exhibit marked JM-2** to show that the intended Appeal is arguable and which exhibit she then produced. She prays that the orders sought be granted either as prayed or in such other manner as would safeguard the interests sought to be protected.
9. The Petitioner/Respondent filed her Replying Affidavit dated 08/07/2019 averring that upon request by the Respondent's advocates, her advocates prepared a draft bill of costs and sent it to them as the Respondent had indicated it was willing to pay the judgment debt and did not want to undergo the process of taxation.
10. That again the Respondent's advocates then requested for copies of receipts for the disbursement indicated on the draft bill of costs for purposes of settlement by the Respondent and her advocates forwarded the same to them. That she delayed execution because the

Respondent by its actions was keen on paying the judgment debt and costs of the suit and that it was clear execution proceedings would not be necessary.

11. That the Notice of Appeal dated 11/04/2019 was filed out of time and without leave and that her advocates filed an application dated 17/04/2019 (*Civil Application 126 of 2019*) seeking to strike out the said Notice of Appeal. That her advocates wrote to the Respondent's advocates inviting them to peruse and agree on a draft copy of the decree and which the Respondent's advocates confirmed to them by a letter dated 28/05/2019 that they could sign and seal the same as drafted.

12. That the Respondent failed to seek stay of execution earlier when it knew that her advocates on record had applied for a decree with the intention of executing it to recover the judgment debt. That the Respondent's advocates' letter of 12/04/2019 is proof that they are able to comfortably pay the judgment debt and will not suffer any prejudice to its business and that the application herein should thus be dismissed.

13. She denies that the intended appeal is arguable or that it has prospects of success and states that the Respondent has not expressed any prejudice it is to suffer in paying her the judgment debt which is a monetary decree.

14. That she is engaged in business with a regular sizeable income and would therefore be able to refund the judgment debt in the unlikely event the Respondent's appeal is successful. That she stands to suffer prejudice if stay of execution is issued because the Respondent does not have a valid appeal on record and there is a high possibility the Court of Appeal will allow her application for striking out the Respondent's Notice of Appeal.

15. That she will also suffer greatly if not allowed to enjoy the fruits of the judgment noting that the Respondent has not been diligent in exercising its right of appeal and is likely to intentionally delay the appeal further. That it is in the best interest that the Respondent's application is dismissed. She annexes documents marked *TWM 1 – TWM 7* in support of her case.

16. The Applicant then filed a Supplementary Affidavit on 23/07/2019 sworn by Judy Macharia who avers that the Respondent's Directors and Management had not met to decide to appeal the judgment and that this decision was made on 08/04/2019.

17. That a stay order cannot be granted in respect of costs awarded to a party and that even though the Notice of Appeal was filed out of time, the Court of Appeal has the power to extend time and allow the same as having been duly filed.

18. That the Respondent/Applicant in compliance with the Court Order given on 24/06/2019 deposited the decretal sum in Court as security pending the intended appeal and that the bank statement annexed by the Petitioner does not demonstrate that she can settle the said sum if the intended appeal is successful.

19. That if the striking out of the Application is allowed by the Court of Appeal, then any stay given by this Court in this matter would automatically lapse and that the Petitioner would not incur any costs in setting aside the stay. She produces the exhibit marked *JM-3*.

Respondent/Applicant's Submissions

20. The Applicant submits that it has an automatic right to appeal against the Judgment pursuant to **Section 17(1) of the Employment and Labour Relations Court Act** and that by dint of **Article 164(3) (b) of the Constitution**, the Court of Appeal has jurisdiction to hear appeals from the ELRC.

21. That the grounds this Court should consider are: whether substantial loss may result to the Applicant unless the order is made; whether the application has been made without unreasonable delay; and such security as the Court orders for the due performance of the decree or order as may be binding on the Applicant has been given by the Applicant.

22. It submits that in determining whether an intended appeal is arguable, the Court of Appeal in the case of **Housing Finance Company of Kenya –v- Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** restated the Court's decision in **Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union, Civil Application Nai No. 72 of 2001** that the Applicant need not show that such an appeal is likely to succeed and that it is enough for him to show there is at least one issue upon which the Court should pronounce its decision.

23. That in **Focin Motorcycle Co. Limited –v- Ann Wambui Wangui & another [2018] eKLR**, the Court held that all what the Applicant needed to show are three grounds under Order 42 rule 6 of Civil Procedure Rules and that the law does not require this Court to determine the application based on the merits or otherwise of the appeal.

24. It is submitted by the Applicant that a perusal of the Petitioner's bank statements at *TWM 8* demonstrates that she has consistently been below Kshs. 150,000/= with the highest amount which is in July 2019 being Kshs. 419,219.26 and that she is thus incapable of even satisfying a quarter of the judgment sum.

25. That she has failed to prove she is a person of means and so failure to grant stay of execution shall prejudice the Applicant and result to considerable losses and that to this end it relies on the **Focin Motorcycle** case above and **Superior Homes (Kenya) Limited v Musango Kithome [2018] eKLR**. It prays that this Court finds it has satisfied the condition of substantial loss if stay is not granted.

26. The Applicant submits that it awaited the decision of the Court of Appeal in the Extension of Time application before it could make this application for stay before this Court and remembers that the Petitioner did not respond to its request to deposit the sum in a joint interest earning account.

27. That this Court should be guided by **Article 159(2) (d) of the Constitution** and exercise judicial authority without undue regard to procedural technicalities. That its filing for extension of time demonstrates its intention to regularise the Notice of Appeal and urges this Court to find that there was no inordinate delay on its part. It further submits that it has also demonstrated its good faith by sufficiently depositing the decretal amount as ordered by the Court and proving that it is ready to secure the judgment sum.

Petitioner/Respondent's Submissions

28. The Petitioner submits that the question of whether an appeal is arguable or not does not arise in consideration of applications for stay of execution under **Order 42 rule 6 of the Civil Procedure Rules**. That this is only considered in applications for stay of execution filed before the Court of Appeal and which are governed by **Rule 5(2) of the Court of Appeal Rules**.

29. That applications made under Order 42 rule 6 are based on the facts of existing appeals, which valid appeal does not exist on record herein as it was filed out of time and that the Applicant's right to appeal is not an infinite right that can be used any time as it has a time limit. That the Applicant's directors and management not having met is not a reasonable explanation for the delay to file proceedings on behalf of the company as was similarly held in the case of **Fubeco China Fushun v Naiposha Company Ltd & 11 others, Civil case No. 222 of 2012.**

30. That she has also demonstrated she is involved in an income generating business, an alternative means she found after being unfairly terminated. That in **Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCCC No. 6726 of 1991** quoted in the case of **Socfinac Company Ltd v Nelphat Kimotho Muturi, Civil Appeal 542 of 2012 eKLR**, the Court held that '*financial ability of a decree holder solely is not a reason for allowing stay and that it is enough that the decree holder is not a dishonourable miscreant without any form of income.*'

31. That the Applicant has not on its part demonstrated the loss it will suffer if the Petitioner is paid the decretal sum and she relies on the case of **Equatorial Commercial Bank Ltd & 2 others –v- Retreat Villas Limited, Civil case No. 443 of 2001 eKLR** where the Court dismissed the application for stay and held that the amount of the decretal sum is not enough proof of substantial loss where an Applicant fails to explain the loss they stand to suffer.

32. The Petitioner/Respondent submits that in considering whether there has been undue delay in bringing this application for stay of execution, the Court should not only look at the time taken to file the same since the judgment was delivered but also the conduct of the Applicant prior to the filing.

33. That the Applicant did not immediately move this Court for stay of execution orders but waited until she threatened execution and which is unreasonable delay.

34. That in the case of **Ricrac Company Ltd & another –v- Kenya National Highways Authority & another, Constitutional Petition No. 50 of 2016 eKLR**, the Respondent produced correspondences showing that the Applicant had intended to pay the judgment debt and the Court in dismissing the application, held that the application was brought in bad faith with intention to delay settlement of the decree.

35. That the Applicant herein has erroneously submitted that it awaited the Court of Appeal's decision in its extension of time before filing this application which is false as the said application for extension of time has not been heard and determined. She contends that the unreasonable delay in filing the application herein has not been sufficiently explained by the Applicant.

36. She submits that the Applicant has indeed deposited the decretal sum in Court as security but that it should not be forgotten that the Applicant does not have a valid appeal on record and further, that she has opposed its application for extension of time to file the appeal.

37. That in the event this Court allows the deposit in Court to remain as security for stay of execution, she will be condemned to wait years before enjoying the fruits of her judgment and she prays that this Court does not allow for the same.

38. That the grant of stay of execution pending appeal is a discretionary power to which the Court must consider the positions of both parties and ensure that justice is dispensed to both as observed in the case of **Machira t/a Machira & Company Advocates v East African Standard (2002) 2 KLR 63.**

39. She finally submits that the Applicant has not fulfilled the conditions set forth in Order 42 Rule 6 of the Civil Procedure Rules in order to be granted a stay of execution.

40. I have examined the averments on record. From the Applicants' submissions, they seek stay pending an application filed in Court of Appeal seeking extension of time to file an appeal.

41. Given that the Court of Appeal is already ceased of this case and given that there is no appeal yet filed I find that the right form to argue this application is before the Court of Appeal and I therefore decline to grant any stay orders.

42. Costs to the Respondent.

Dated and delivered in open Court this 28th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chege holding brief Gichumbi for Petitioner

Wanjiku Kamau holding brief Nyikuri for Applicant