



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 762 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**EDWARD CLYDE ASITIBA.....CLAIMANT**

**VERSUS**

**THE ATTORNEY GENERAL.....RESPONDENT**

**RULING**

Before me, for determination is the Respondent's Notice of Motion Application dated 7<sup>th</sup> March 2019. It seeks the following orders:

1. That this Court be pleased to grant an order of interim stay of execution of the judgment and the orders of this Court; Nderi Nduma J. in a judgment signed in Kisumu on 31<sup>st</sup> July, 2018 and delivered by Onyango J. in Nairobi on 10<sup>th</sup> August, 2018 pending hearing and determination of this Application inter-partes.
2. That this Court be pleased to grant an order of interim stay of execution of the judgment and the orders of this Court; Nderi Nduma J. in a judgment signed in Kisumu on 31<sup>st</sup> July, 2018 and delivered by Onyango J. in Nairobi on 10<sup>th</sup> August, 2018 pending hearing and determination of the intended appeal.
3. That the Court do grant any other order that it may deem just and expedient in the circumstances of the case.
4. That the costs of the Application be provided for.

This Application is premised on the grounds as set out on the face of the Notice of Motion Application wherein the Applicant contends that Judgment in this matter was delivered on 10<sup>th</sup> August, 2018 awarding the Claimant general damages of Kshs.6,000,000/= for unlawful and unfair termination of employment, costs of the suit and interest from the date of judgment until payment in full. That aggrieved by the said judgment the Respondent/Applicant did file and serve its Notice of Appeal and applied to be supplied with certified copies of the Judgment and copies of typed proceedings for purposes of lodging an Appeal at the Court of Appeal.

The Respondent/Applicant further contends that being the Attorney General it is legally exempt from the requirements of furnishing security for costs.

The Respondent/Applicant urges this Court to exercise its discretion

and allow the Application as the intended Appeal will be rendered nugatory should the appellate Court reverse the decision of the superior Court.

The application is supported by the affidavit of ANNE A. AMADI, the Chief Registrar of the Judiciary, sworn on 7<sup>th</sup> March 2019 in which she reiterates the grounds on the face of the Motion.

She deposes that the appellant has an arguable appeal with high chances of success as demonstrated by the draft Memorandum of Appeal annexed to the Application. She further deposes that the Claimant will not suffer any prejudice if the Orders sought herein are granted.

The application is filed under Section 3, 12, 13, 17 and 20 of the Employment and Labour Relations Court Act, 2011, Article 159 (2) of the Constitution of Kenya, 2010, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all enabling other provisions of the law.

The Claimant opposed the application and filed a Replying Affidavit deposed by EDWARD C. ASITIBA, the Claimant/decree holder herein on 10<sup>th</sup> May 2019 in which he contends that the instant Application ought to be dismissed as it is an afterthought meant to delay the Claimant from enjoying the fruits of the Judgment delivered in his favour.

He further deposes that he is yet to extract the decree in this matter and therefore there is no threat of execution on the part of Respondent/Applicant.

The Claimant further deposes that the instant Application has been brought after unreasonable delay judgment in this matter having been delivered on 10<sup>th</sup> August 2018. He further deposes that the Applicant has not demonstrated that it has an arguable appeal with high chances of success and that the grounds on the face of the Application do not justify granting of the Orders sought therein.

The Claimant deposes that there is no allegation that he is a man of straw and would therefore be unable to pay the decretal amount should the appeal succeed. He insists that should the same be paid then it can be refunded upon successful appeal.

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

The Court directed that the application proceeds by way of written submissions.

### **Submissions by the Parties**

It is submitted on behalf of the Respondent/Applicant that the instant Application ought to be allowed as prayed as it has met the threshold for granting of the order of stay of execution as laid down in Order 42 Rule 6 of the Civil procedure Rules, 2010. To buttress its argument the Respondent/Applicant relied on several Authorities including *National Industrial Credit Bank Ltd Vs Aquinans Frank Wasike (2016) eKLR*, *Equity Bank Ltd Vs Taiga Adams Company Limited (2006) eKLR*, *Focin Motorcycle Company Limited Vs Ann Wambui Wangui and Another (2018) eKLR* and *Reliance Bank Limited (in liquidation) Vs Norlake Investments Company Limited (2002) 1 EA 227*.

The Respondent/Applicant further submitted that the Claimant herein is a man of straw as he has failed to rebut the evidentiary burden placed on him to demonstrate that he has the necessary resources to repay the decretal sum should the Appeal succeed. The Applicant therefore contended that it is likely to suffer irreparable loss and thus urges this Court to exercise its discretion and allow the Application as prayed.

With regard to furnishing security as provided under Order 42 Rule 6(2)(b) the Applicant submitted that it is legally exempt from the requirements of furnishing security of costs.

The Applicant further contends that it has demonstrated that it has an arguable appeal in its draft Memorandum of Appeal as annexed to the Application. The Respondent/Applicant further submitted that the Claimant has not demonstrated why he believes that the intended Appeal has no chances of success. To fortify this argument the Respondent/applicant cited and relied on the case of *Royal Media Services Limited Vs Veronica Chepkemboi (2015) eKLR* where it was held:

*“To demonstrate that an appeal is arguable, the Applicant does not need to show that the issue to be raised on appeal will succeed. It simply needs to show that the intended appeal raises a reasonable question of law that should be determined by this Court.”*

The Respondent/Applicant further relied on the case of *Kenya Hotel Properties Limited Vs Willisden Investments Limited &*

*6 Others (2013) eKLR*.

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

The Claimant in his submissions in opposition to the application reiterated the averments made in his Replying Affidavit sworn on 10<sup>th</sup> May 2019.

It is the Claimant's submission that the Respondent/Applicant has failed to meet the threshold for grant of the orders sought in its application as set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 and in the decision of *Butt Vs Rent Restriction Tribunal (1982) KLR 417*.

The Claimant further submitted that the Respondent/Applicant's Appeal does not have chances of success as it failed to call any witnesses at the hearing of this matter to rebut the evidence adduced by the Claimant and therefore the award of Kshs.6,000,000/= was reasonable in the circumstances.

The Claimant urged the Court to dismiss the instant Application with costs to the Claimant. To buttress this position the Claimant relied on the Authority of *Amal Hauliers Limited Vs Abdulnasir Abukar Hassan (2017) eKLR* where it was held:

*“A perusal of the Memorandum of appeal shows that the Applicant is appealing against the decision on liability and quantum. Much as I do not want to speculate on the outcome of the appeal, I do not think that the Respondent will leave this Court empty-handed. He says he needs the money for treatment. His proposal that he gets half the decretal sum is therefore reasonable.”*

### **Analysis and Determination**

After considering the parties' arguments and the evidence adduced, the only issue that arises for determination is whether or not the instant Application is merited.

### **What is the threshold of 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 10<sup>th</sup> August 2018. The Applicant being dissatisfied with the Judgment filed a Notice of Appeal on 13<sup>th</sup> August 2019 and also proceeded to write to the Deputy Registrar on 10<sup>th</sup> August 2018 seeking to be furnished certified copy of the Judgment and typed proceedings for purposes of lodging its appeal. The instant Application was filed on 7<sup>th</sup> March 2019.

Having promptly filed a notice of appeal, I believe the reason the application was filed was the notice of taxation dated 1<sup>st</sup> February 2019 served together with the claimant's Bill of Costs dated 31<sup>st</sup> January 2019.

I find this a reasonable ground to explain the delay in filing this application in the circumstance of this case where the appellant is the Attorney General against whom execution cannot issue without leave of the court. There was thus no necessity to file an application for stay before the Bill of Costs was filed.

### **Substantial Loss**

The right to Appeal is enshrined in the right to a fair hearing. A party has the right to seek justice to the highest court of the land.

In the instant Application the Applicant has not demonstrated that he will be able to refund the decretal sum should the appeal succeed and this means that the Applicant risks losing the sum of Kshs.6,000,000/- together with costs and interest. Secondly, the appeal may be rendered nugatory and be reduced to an academic exercise if it is not possible to recover the decretal sum for the claimant/decre holder.

In the circumstances, I allow the instant Application and grant stay of execution of Judgment and decree pending appeal.

The intended appeal to be filed within 90 days from the date hereof failing which Claimant/decre holder proceeds to execute for the decretal sum.

The costs of the application be in the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2019.**

**MAUREEN ONYANGO**

**JUDGE**