



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 494 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

CHRISTINE KINYA GIKUNDA.....CLAIMANT

VERSUS

MANTRAC LIMITED.....RESPONDENT

RULING

The Respondent/Applicant, Mantrac Kenya Limited filed a Notice of Motion Application dated 24th June 2019 brought under Sections 3(1), (2) and (3), 12, 13, 17 and 20 of the Employment and Labour Relations Court Act, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, Article 159(2) and 164(3) of the Constitution of Kenya in which it seeks an order staying execution of judgment in this matter and any consequential orders, pending the hearing and determination of this application and intended appeal. That this Court be also pleased to issue directions and/or conditions as it may deem fit in the interest of justice.

The Application is based on the grounds that Judgment was delivered on 14th June 2019 by Abuodha J. wherein the court awarded the Claimant 6 months' compensation of Kshs.1,200,000/= subject to statutory deductions. That the Respondent/Applicant being dissatisfied with the said judgment has filed a Notice of Appeal and has applied for typed proceedings so as to prepare a record of appeal. That the right to appeal is a constitutional and legal right and the Respondent deserves to be facilitated to pursue the intended appeal. That the Respondent/Applicant is ready and willing to abide by any directions and/or conditions as to security as may be made by this Court and that it has made this application without undue delay. That it would have filed the same earlier save for the few days it has taken to have the judgment typed and signed, to consider the award therein and consult internally and externally. That if a stay of execution is not granted, the Respondent/Applicant's appeal will be rendered nugatory thereby visiting prejudice upon it while the Claimant/Respondent may be compensated by way of costs should the appeal fail. That this Court has powers to issue the orders sought herein and make further orders that may aid the parties in their quest for justice and that it is in the interest of justice that the said orders be granted.

The Application is supported by the Affidavit sworn by the Applicant's Human Resource Manager, John Kiiri who avers that their advocate managed to get a copy of the typed and signed Judgment on 19th June 2019 and shared with them for internal consultation and advice. That this application for stay pending appeal is necessary because the Applicant is exposed to execution by the Claimant if no stay orders are granted by this Court. He annexes copies of the Notice of Appeal and Letter requesting for proceedings marked **JKM 1a and b** and avers that the Respondent/Applicant has an arguable appeal with high chances.

The Claimant filed a Replying Affidavit dated 15th July 2019 sworn by the Claimant who opposes the application and avers that an appeal does not automatically warrant a stay of execution. That the Applicant has not shown any reason why it should not satisfy the money decree save that it intends to file an appeal. That there is no appeal on record for the Court to determine that there is an arguable appeal with chances of success and that the notice of appeal filed in court cannot help the Court determine the same. That the Applicant should satisfy the decree before court as that does not affect his appeal and that there is no evidence that the appeal will be rendered nugatory if stay is not granted, especially this being a money decree that can be paid back.

Submissions

The Application came up for hearing on 16th June 2019 and the Respondent/Applicant's advocate submitted orally in Court that the Applicant has requested for judgment and typed proceedings by a letter dated 14th June 2019 and that the same has been paid for.

The Claimant's Advocate submitted that they relied on the Claimant's Replying Affidavit and the grounds raised in the reply. That the Applicant has not demonstrated what risk or loss it stands to suffer in the event the application is not allowed. That the application is essentially the applicant's counsel asking the court to deny the decree holder the benefits of her judgment obtained from a decision made on

merit as opposed to a Notice of Appeal. That if the court is however inclined to grant the orders, the court directs that the judgment debtor pays at least half of the amount to the decree holder and the balance be deposited in a joint interest earning account.

The Applicant's advocate in a rejoinder urged the Court to be guided by the case of *Amal Hauliers Ltd -v- Abdunnasir Abukar Hassan [2017] eKLR* where the court in citing *Butt v Rent Restriction Tribunal* agreed with the Court of Appeal that discretion of granting stay of appeal should not be granted to render an appeal nugatory or hinder the success of appeal. That if the court does not grant stay it will be essentially saying that the Claimant has a high chance of succeeding in the appeal at the expense of the Respondent. The respondent prayed that the Court grants the orders sought and give directions on the security to be deposited.

Determination

Order 42 rule 6 (2) of the Civil Procedure Rules bars the court from ordering stay of execution pending appeal unless the application is brought without inordinate delay; the Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and the applicant is willing to give security as the court may order. Makau J. in dismissing an application for stay of execution in the case of *Kwekwe Mwakela v Krystalline Salt Ltd [2015] eKLR* observed that the court saw no difficulty in the third requirement for grant of stay because the applicant had offered to deposit the decretal sum as security if the court directs that as a condition for stay and that the only hurdle the applicant failed to jump is proving that she would suffer substantial loss if stay was not granted, which loss must be proved by evidence in affidavit. Makau J. went on to hold that the applicant having failed to discharge the burden of proving the inability to repay the Judgment debt by the Claimants, rendered the motion a sham for failure to meet the threshold for stay pending appeal.

In the case of *Finlay Flowers (K) Limited and Another v Kenya Plantation and Agricultural Workers Union [2019] eKLR*, the Court of Appeal at Nyeri observed that:

“10...to succeed in an application of this nature, the applicant is required to demonstrate that the intended appeal is arguable and that if we do not accede to the request to grant the orders sought the intended appeal will be rendered nugatory. In *Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006* this Court stated:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

“15. In *Reliance Bank Limited vs Norlake Investments Limited [2002] 1 EA 227* the Court stated that where a decree is for payment of money, “the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case.”

There are two separate criteria for grant of stay pending appeal. Under Order 42 Rule 6(2) of the Civil Procedure Act, the threshold for grant of stays is proof of substantial loss to the applicant and security for due performance of the decree.

However under Rule 5(2)(b) of the Court of Appeal Rules, the appellant must show that the appeal is arguable and that if orders of stay are not granted the appeal will be rendered nugatory.

In the present application, the respondent has expressed fears that should orders of stay not be granted the appeal will be rendered nugatory. It has further expressed willingness to abide by any conditions that may be set by the court.

The claimant (decree holder) has on the other hand not demonstrated that should she be paid and should the appeal succeed she will be in a position and/or be willing to refund the decretal sum.

It is the opinion of the court that the best interests of justice will be served by granting the orders of stay on condition that the decretal sum is deposited into an interest earning account in the joint names of Counsel for the claimant/decree holder and Counsel of the applicant/judgment debtor.

I accordingly grant stay of execution pending appeal subject to the appellant depositing the decretal sum within 30 days from date of ruling failing which the orders of stay will lapse.

Costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE