



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 693 OF 2019**

**ERIC KAMAU.....1ST CLAIMANT**

**DANSON NJOROGE.....2ND CLAIMANT**

**FREDRICK OTIENO.....3RD CLAIMANT**

**AGNES KARIUKI.....4TH CLAIMANT**

**VERSUS**

**DOT.COM BAKERY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2019)

**RULING**

The Court delivered a ruling on 08.11.2019 for orders:

- 1) Pending the hearing and determination of the main suit, the respondent either by itself, directors, servants or agents is hereby restrained from proceeding with the intended redundancy vide letters dated 07.10.2019, 03.10.2019, 08.10.2019 as addressed to the claimants or any other letter in any way or manner intimidating, threatening, terminating, dismissing, the claimants or in any manner interfering with the existing employment structure and employment positions or recruitment for the claimant's position or interfering with the applicants' employment, except in strict compliance with the applicable law and the contract of service between the parties.
- 2) Pending the hearing of the main suit or further orders by the Court, the parties are encouraged to compromise the dispute in terms of order (1) above towards amicable retention or termination of the contract of service.
- 3) The respondent to pay costs of the application.
- 4) Parties to take steps for the expeditious hearing or compromise of the main suit.

The respondent was dissatisfied with the ruling and the orders and has lodged a notice of appeal on 11.11.2019 and applied for certified typed copy of the proceedings by the letter dated 11.11.2019.

On 12.11.2019 the respondent filed a notice of motion through J.A. Guserwa & Company Advocates for the Honourable Court to grant the applicant (respondent in the suit) an order of stay of the execution of the Court ruling and orders given by the Court on 08.11.2019 pending the hearing and determination of the indented appeal. It is urged for the applicant that it has serious grounds of appeal including that as at the ruling of 08.11.2019 the redundancy in issue had taken effect, there is no money for the respondent to pay the claimants if they continue in employment and in view of the applicant's financial challenges. The applicant has urged that if stay of execution is not granted the appeal will be rendered nugatory because the claimants may report at work yet there is no work for them to perform and the applicant will not be able to pay due to financial difficulties. Further, if stay is granted, the applicant has raised adequate funds to pay the claimants in view of the disputed redundancy and can pay them forthwith. The application is based on the annexed supporting affidavit of Rev. Seif Mohamed Seif and his further affidavit filed on 25.11.2019. The applicant further urges that the suit can be set down for hearing on priority basis and is ready for such directions as the Court may make.

The claimants opposed the application by filing on 15.11.2019 the replying affidavit of the 1st claimant Eric Kamau and through Ogembo & Associates Advocates. It is urged that the respondent has failed to take advantage of the three clear options given in the orders in the ruling subject of intended appeal. Thus the applicant should not be allowed to defeat the claimant's rights through orders of stay of execution pending the intended appeal. The claimants further urge that the applicant has no demonstrated financial difficulties and can comply with the Court orders because the taxes already paid by the applicant indicate that the respondent is making a profit in its enterprise. To that the

respondent has submitted that the claimants obtained the evidence on the tax paid irregularly as will be shown at the full hearing. The claimants further submit that they are ready to work. Further, if stay orders are granted, the claimants submit that their contract of service will thereby lapse and nothing will be conserved or protected of their rights. Further even if the payments are made, then the accruing payments consequential to orders of 08.11.2019 ought to be provided for.

The Court has considered the parties' respective positions. The Court makes findings as follows:

- 1) There is no dispute that the application has been made promptly without delay and the applicant has filed the notice of appeal as well as applied for typed certified copies of the proceedings.
- 2) The Court has considered that the pleadings in the suit have closed and the applicant has submitted that it is amenable to hearing and final conclusion of the suit once and for all. As submitted for the claimants, it is not just to stay order 4 of the ruling on the expeditious hearing of the suit. Parties being in agreement on that point, order 4 in the ruling will not be stayed. Similarly order 3 in the ruling speaks to the future if and when the suit will be concluded and the costs taxed or agreed upon, as the case may be, so that it serves no practical purpose to stay order 3. Further Order 2 of the ruling is about compromise within alternative dispute resolution such as by negotiation or mediation. The order is within Article 159 of the Constitution and there is no justification to stay it. The Court returns that orders 2, 3, and 4 of the ruling are not amenable to stay of execution pending the proposed appeal against the ruling.
- 3) The applicant is ready and willing to forthwith pay the dues to the claimants as per the contracts of service and section 40 of the Employment Act, 2007 on redundancy as part of the condition for granting the stay orders as prayed for.
- 4) The Court considers that the full hearing would settle the dispute between parties but the respondent would also be entitled to the right of appeal and to duly exercise that right as currently proposed. In particular the matters about genuineness of the redundancy, availability of work for claimants and the applicant's financial position as urged for the claimants will best be decided at full hearing when the evidence will be taken and the witnesses cross examined accordingly.
- 5) To balance justice for the parties, the Court finds that the respondent should forthwith pay the redundancy dues per contract of service as at 08.11.2019 and section 40 of the Act as a condition for grant of stay of execution of order 1 of the ruling (and only to the extent of staying the order in so far as it restrains the applicant from continuing with the redundancy and therefore claimants continuing in employment) pending the hearing of the intended appeal. Otherwise, the suit is admitted for full hearing on priority basis and the parties to take appropriate steps.
- 6) While making the findings the Court has considered the parties' submissions on whether redundancy had taken effect as at the time the orders to be stayed were given and whether the grounds of appeal advance serious arguable points and considers that such are matters best left for determination by the Court of Appeal in the intended appeal.
- 7) The Court considers that the conditions in granting the stay of execution orders pending the intended appeal will proportionately serve justice in the case.

In conclusion the application filed on 12.11.2019 and dated 08.11.2019 is hereby determined with orders:

- 1) There be stay of execution of order 1 of the ruling delivered herein on 08.11.2019 (and only to the extent of staying the order in so far as it restrains the applicant from continuing with the redundancy and therefore claimants continuing in employment) pending the hearing and determination of the intended appeal but subject to the following conditions:
  - a) The respondent to compute and to pay each claimant the lawful and contractual separation dues as at 08.11.2019 in accordance with the provisions of the respective contracts of service and section 40 of the Employment Act, 2007 on payments in event of redundancy, and, the full computed amount to be paid not later than the close of Monday 02.12.2019 – and provided the payment shall not prejudice the claimants' case in any manner whatsoever.
  - b) The suit is admitted for hearing on priority basis and the parties at liberty to take appropriate steps in that regard.
- 2) For avoidance of doubt orders 2, 3 and 4 in the ruling delivered on 08.11.2019 are not stayed pending the proposed appeal.
- 3) The costs of the application in the cause.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 29th November, 2019.**

**BYRAM ONGAYA**

**JUDGE**