



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 2152 OF 2017**

**LU YINI.....CLAIMANT**

**VERSUS**

**AVIC INTL. BEIJING (E.A) CO. LIMITED.....1ST RESPONDENT**

**CHEN ZHF.....2ND RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

**RULING**

The Court delivered the judgment in the suit on 15.03.2019 in favour of the claimant and against the respondents for:

- a) The declaration that the termination of the claimant's contract of service on account of pregnancy and reasons related to the pregnancy was unlawful and unfair.
- b) The respondent to pay the claimant a sum of **USD 18,750.00** and **Kshs.375, 000.00** by **01.05.2019** failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- c) The dismissal of the counterclaim with costs in favour of the claimant.
- d) The respondent to pay the claimant's costs of the suit.

The respondents filed an application to review the judgment and decree on 21.06.2019. The Court considered the application and in a ruling dated 19.07.2019 it was dismissed with costs in favour of the claimant. The respondents were dissatisfied with the ruling and have lodged a notice of appeal on 26.07.2019 against the ruling.

The respondents have filed a notice of motion on 14.08.2019 and dated 13.08.2019 through Nyaanga & Mugisha Advocates. The application is under section 1A, 1B, and 3A of the Civil Procedure Act Cap 21; Rule 17 (1) (2) and (3) of the Employment and Labour Relations Court (Procedure) Rules 2016; Order 42 Rule 6(1) and (2) and Order 51 rule 1 of the Civil Procedure Rules 2010; and all enabling provisions of law.

The application is based on the attached affidavit of Dennis Muchiri, the respondent's legal officer and is for substantive orders:

- 1) That there be a stay of execution of the judgment entered on 15.03.2019 (Honourable Justice Byram Ongaya) and the resultant decree pending the hearing and final determination of the intended appeal.
- 2) The applicants should be at liberty to apply for further orders or directions as the Honourable Court may deem fit and just to grant.
- 3) The costs of the application to abide the outcome of the intended appeal.

The grounds urged in support of the application are as follows:

- a) The application is for stay of execution of the judgment and decree given by the Court on 15.03.2019.
- b) By a ruling delivered on 15.03.2019 the Court declined to grant a review of the judgment and decree.

- c) The applicants are aggrieved with the judgment of 15.03.2019 and they wish to appeal to the Court of Appeal.
- d) If the decree is executed the applicants will suffer irreparable harm because they will pay the decretal sum.
- e) The intended appeal has some arguable grounds including whether the claimant was lawfully employed without a work permit; whether in absence of a work permit the contract was void and unenforceable; and whether in the circumstances the claimant could validly draw salaries.
- f) The applicants are willing to deposit the decretal sum for security and to abide by conditions the Court may grant.
- g) It is lawful, just and proper that the stay of execution is granted as prayed for.

The claimant opposed the application by filing on 03.10.2019 her replying affidavit, the grounds of opposition and the preliminary objection through Stanley Henry Advocates. It is urged for the claimant as follows:

- a) The Court has no jurisdiction under Order 42 rule 6 of the Civil Procedure Rules, 2010 to entertain the respondents' application seeking stay of execution of the judgment and decree issued on 15.03.2019 as no appeal has been preferred against the said judgment and decree.
- b) The application is res judicata because similar prayers were made in the earlier application of 21.06.2019 dismissed on 19.07.2019. The ruling is being appealed against but not the judgment and the decree. The remedy lies in the Court of appeal under Rule 5(2) (b) of the Court of Appeal Rules.
- c) Consent orders were recorded on 10.12.2018 for partial Judgment in favour of the claimant for payment by the respondent of USD 3, 000.00 and Kshs.60, 000.00 but the respondent (applicant) has failed to honour that partial judgment.
- d) Stay of execution is irregularly sought because Order 42 rule 6 does not apply in the circumstances and is calculated to deny the claimant the enjoyment of the fruits of her successful litigation.
- e) The application is misconceived, untenable, unmerited, and a brazen abuse of Court process. It does not lie in law as is frivolous and should be dismissed with costs.

The parties filed their respective submissions. The Court has considered the parties' positions on the application.

The Court returns that the application will fail.

**First**, as submitted for the claimant, in Nairobi City Council –Versus- Ransley [2002]EA 494, the Court of Appeal held thus, “**26. There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision.**” And further, “**It is trite law that without a notice of appeal against particular orders we would have no Jurisdiction to grant a stay order of those orders and we cannot, therefore, accept Mr. Oduol’s argument to the effect that the notice of appeal against the ruling of 11th April, 2002, entitles him to apply for a stay of execution of orders made on 11th March, 2002**” Accordingly the Court returns that in absence of the relevant notice of appeal against the judgment and decree herein, there is no basis for the Court to grant an order of stay of execution pending appeal as prayed for. Clear provisions of Order 42 Rule 6 apply. In Nguruman Limited –Versus- Shompole Group Ranch & Another [2014]eKLR, the Court of Appeal held that there can be no order of stay pending an appeal unless a notice of appeal had been lodged first. The Court is bound by that decision. The Court lacks jurisdiction as submitted for the claimant.

**Second**, it is clear that the respondents preferred an application for review against the judgment and decree herein. Once having elected to do so, the jurisdiction of the Court in that regard was exhausted. The Court holds that the applicants' alleged dissatisfaction with the judgment and the right to appeal against the judgment was exhausted once the applicants opted to apply for a review of the judgment. The application being premised on an alleged dissatisfaction with the judgment and seeking a stay of execution of the judgment and decree is therefore found to be an abuse of Court process. Rule 33 of the rules of the Court is clear that a person aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed may within reasonable time apply for a review of the judgment or ruling upon the grounds set out in the rule. Thus the Court finds that a review is an option to appeal or available where appeal is unavailable. The applicants exercised their option and are bound accordingly. In conclusion, the application dated 13.08.2019 and filed on 14.08.2019 is hereby dismissed with costs.

**Signed, dated and delivered in court at Nairobi this Friday, 22nd November, 2019.**

**BYRAM ONGAYA**

**JUDGE**