



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

CIVIL APPEAL NO. 600 OF 2019

TECHNIC DIESEL LIMITED

APPELLANT

v

MILCAH MUTHENI NDIKU

RESPONDENT

RULING

1. Before the Court is a motion dated 5 September 2019 by Technic Diesel Ltd (applicant) seeking orders

1. ...

2. ...

3. The Honourable Court does grant stay of execution of the judgment and order of the Honourable D. O. Mbeja (MR.) SRM in Chief Magistrates Employment Cause No. 95 of 2018 delivered on 26th April, 2019 pending the hearing and determination of this Appeal or until further orders of this Court.

In the alternative

3(a) Temporary injunction be issued restraining the Respondent by herself, her agents, servants, auctioneers or otherwise from executing and/or proclaiming the Appellants property in execution of the decree obtained from the Court pursuant to the judgment dated 26th April, 2019 pending the hearing and determination of this application and/or thereafter pending the hearing and determination of this Appeal or until further orders of this Court.

4. Leave be and is hereby granted to the Appellant to appeal out of time and the Memorandum of Appeal be deemed as filed in time.

5. Costs of this application abide the results of the Appeal.

2. When the motion was placed before the Duty Court on 10 September 2019, it directed that it be served for *inter partes* hearing on 24 September 2019.

3. However, on 16 September 2019, the applicant filed another motion seeking orders restraining execution process which had commenced, and the Court granted stay on condition that the decretal sum and costs be deposited into Court on or before 19 September 2019 (the Court fixed this latter motion for *inter partes* hearing on 1 October 2019).

4. The Respondent filed a replying affidavit to the application on 30 September 2019, but the application could not proceed on 1 October 2019 because the applicant sought for more time to file a further affidavit.

5. The application was rescheduled to 8 October 2019. The applicant filed the further affidavit on the morning of 8 October 2019.

6. The motion could not proceed on the rescheduled date as the Respondent sought leave to file a supplementary affidavit. She filed the supplementary affidavit on 14 October 2019.

7. On 16 October 2019, the parties addressed the Court on the application referred to in paragraph 1 herein above as the application filed on 16 October 2019 had become otiose.

Leave to appeal out of time

8. The applicant explained that it could not file and/or prepare an Appeal within the prescribed time of 30 days because it only got to know of the judgment when the Respondent served it with the decree on 21 August 2019, that a draft decree was not served upon it, and because the Court file was unavailable in the subordinate Court registry.

9. The Respondent did not rebut the facts as presented by the applicant and the Court will grant leave to file an Appeal out of time.

Stay of Execution pending appeal

10. The principles upon which an application for stay of execution pending Appeal are granted are well known.

11. The principles are derivatives of section 65 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules.

12. The Court directed the applicant to deposit the decretal sum and costs in Court, and that limb of the conditions has already been complied with.

13. The other requirements the applicant was expected to satisfy were that it would to suffer *substantial loss* if stay order was refused, and that it brought the application without inordinate delay.

14. Since the applicant moved the Court within 2 months of the judgment and considering the assertions which the Court has accepted that the file was unavailable at some point, the Court finds that there was no inordinate delay.

15. The decisive factor in the circumstances is therefore whether the applicant has demonstrated that it would suffer *substantial loss* if the conditional stay which was granted is not confirmed.

16. The Court has perused the instant application, the grounds set on the face thereof, and the affidavits on record.

17. The applicant made no effort at all to address the question of *substantial loss* but rather made much of the contention that it was not afforded a fair opportunity to make its case during the trial, as the subordinate Court declined to grant it an adjournment.

18. The ground advanced would go to the merits of the intended Appeal rather than to an application under consideration.

19. The applicant having failed to demonstrate *substantial loss*, and the Court cognisant that a fair hearing is a fundamental concept in our system of justice would reluctantly allow the motion dated 5 September 2019 in part/on condition(s).

Conclusion and Orders

20. From the foregoing, the Court orders as follows

(a) Leave to Appeal out of time is granted.

(b) *Memorandum of Appeal* against the Ruling of 28 February 2019 and the Judgment of 26 April 2019 to be filed and served within 30 days from today.

(c) Stay of Execution pending appeal is allowed on terms, that Kshs 330,073/-, being half of the decretal sum deposited in Court is released to the Respondent forthwith.

(d) If applicant does not comply with (b) above, the leave will stand vacated without any further orders of the Court.

21. Costs to abide the Appeal.

Delivered, dated and signed in Nairobi on this 22nd day of November 2019.

Radido Stephen

Judge

Appearances

For applicant Mr. Okoth instructed by Okoth & Co. Advocates

Respondent in person

Court Assistant Lindsey