



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 171 OF 2014

FREDRICK AMBOGA.....CLAIMANT

VERSUS

FONES DIRECT.....RESPONDENT

RULING

1. On 16th June 2017, I delivered judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 79,920
- b) 1 month's salary in lieu of notice.....13,320
- c) Overtime compensation.....5,501
- d) Costs plus interest from date of judgment until payment in full.

2. The Respondent subsequently moved the Court by way of Notice of Motion under certificate of urgency dated 12th July 2017 for an order of stay of execution pending appeal.

3. The application, which is supported by an affidavit sworn by the Respondent's Relationship Officer, Wafula Nelson Bruce is based on the following grounds:

- a) That the Respondent has an arguable appeal with a high probability of success;
- b) That if stay of execution is not granted, the Respondent's appeal will be rendered nugatory;
- c) That unless the application is granted, the Claimant may levy execution against the Respondent;
- d) That substantial loss will result to the Respondent unless the orders sought are granted;
- e) That the application has been made without unreasonable delay;
- f) That the application ought to be granted in the interest of equity and justice.

4. In the affidavit sworn in support of the application, it is deponed that a Notice of Appeal was filed on 23rd June 2017 and served on the Claimant's Advocates on 29th June 2017.

5. The Claimant filed Grounds of Opposition dated 18th July 2017, stating the following:

- a) That the application has been brought in bad faith to derail and prejudice the due process of the Court and further to defeat the cause of justice;
- b) That the application is frivolous and vexatious and is intended to delay payment of the decretal sum to the Claimant;
- c) That the Respondent has brought the application with the sole purpose of denying the Claimant the fruits of his lawfully obtained judgment.

6. Counsel for the parties appeared before me on 20th July 2017 and agreed to dispense with the application by way of written submissions. However, only the Respondent complied.

7. The single issue for determination in this application is whether the Respondent has made out a case for grant of stay of execution pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the following conditions for granting of such an order:

- a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;
- b) That the application has been made without unreasonable delay;
- c) That the applicant has given adequate security for the due performance of such order as may be binding on them.

8. Additionally, there is the well-established condition developed under case law that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see **Banking Insurance & Finance Union (Kenya) v Murata Sacco Society Limited [2015] eKLR**).

9. Evidently, the application herein was filed in good time and security may be ordered by the Court. On the question whether there exists an arguable appeal that would be rendered nugatory if the orders sought are not granted, I am guided by the decision of the Court of Appeal in **Syner-Med Pharmaceuticals Ltd v Glaxo Group Limited [2010] eKLR**, where it was held that an arguable point does not necessarily mean one which will succeed once fully ventilated.

10. It would appear therefore that this application turns on the question of substantial loss. In addressing this question in **Butt v Rent Restriction Tribunal [1982] KLR 417 Madan JA** (as he then was) held that in exercising its discretion to grant or decline a stay of execution, the Court must consider the particular circumstances of each case.

11. This being a cash award the Claimant's ability to repay the award amount is a significant question. There is however no proof that the Claimant is a man of straw and as was held by **Radido J** in **David Mbugua v Keroche Breweries Ltd [2015] eKLR** it is not enough for a judgment debtor to state that a decree holder will not be able to repay the decretal sum if the appeal succeeds.

12. In the written submissions filed on behalf of the Respondent, reference was made to the decision in **Absalom Dova v Tarbo Transporters [2013] eKLR** where it was held that in granting stay of execution pending appeal, the Court should have the rights of both parties in view. I think this is the correct route to take. On the one hand, there is the applicant's right of appeal while on the other, there is the Claimant's right to enjoy the fruits of a judgment in their favour. I have balanced these rights and therefore grant a conditional stay of execution in the following terms:

- a) The Respondent shall release to the Claimant the equivalent of 50% of the decretal sum within the next 14 days from the date of delivery of this ruling;
- b) The balance, being the equivalent of 50% of the decretal sum shall be deposited in an interest earning account in the joint names of the parties' Advocates within the next thirty (30) days from

the date of delivery of this ruling;

c) Failure to observe any of the conditions of stay set out above shall lead to an automatic lapse of the stay hereby granted;

13. The costs of this application will be costs in the appeal.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Masese for the Claimant

Mr. Ojijo for the Respondent