



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**SUIT NO. 56 OF 2016**

**HUMPHREY MUKUNDI MWANGI.....CLAIMANT/RESPONDENT**

**VERSUS**

**BRADE GATE HOLDINGS LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent/Applicant's Notice of Motion application dated 8<sup>th</sup> January 2018 and filed on 12<sup>th</sup> January 2018 seeks for the stay of execution of the decree issued on 1<sup>st</sup> December 2017 pending the hearing and determination of the Respondent/Applicant's appeal. The grounds are that the Respondent/Applicant has appealed against the whole judgment of the Court delivered on 14<sup>th</sup> July 2017 and that the Claimant/Respondent has applied for execution and has proclaimed the Respondent/Applicant's assets. The Respondent/Applicant's assets are charged to Family Bank and therefore not available for attachment and sale and that the Respondent/Applicant will suffer irreparable loss and damage if a stay of execution is not granted; the Respondent/Applicant's appeal will be rendered nugatory if the orders of stay are not granted and that the Respondent/Applicant's appeal has high chances of success. The application is supported by the supporting affidavit of Rawlings Thuo Mathenge annexed in which it is deposed that the former advocates had failed to file a stay or appeal against the decision of the Court made in July 2017 and that they discovered this anomaly in September 2017 and now that the Claimant/Respondent has sought to execute the decree of the Court by proclaiming the assets of the Respondent/Applicant the Respondent/Applicant seeks to obtain a stay pending the hearing and disposal of the intended appeal. The deponent asserts that the amount of compensation awarded to the Claimant/Respondent is of such magnitude that if paid over to the Claimant/Respondent, the Respondent/Applicant's business and cash flow will be adversely and severely affected. The Respondent/Applicant is apprehensive that the Claimant would not be in a position to refund the money if the intended appeal is successful and therefore the balance of convenience weighs in favour of the Respondent/Applicant. It is deposed further that the Claimant/Respondent will not suffer any prejudice if the stay is granted and that the Respondent/Applicant is willing to comply with the conditions the court will grant for stay.

2. The motion is opposed and the Claimant/Respondent filed a Replying Affidavit sworn on 29<sup>th</sup> January 2018. In it he deposes that he is opposed to the application by the Respondent/Applicant as the judgment was delivered way back on the 14<sup>th</sup> July 2017 and that the Respondent/Applicant filed an application on 9<sup>th</sup> October 2017 and had not included a prayer for stay. It was deposed that there is no evidence tendered to demonstrate the 14 assets described and listed in the proclamation of attachment are unavailable for attachment. He deposes that in respect to vehicles there is no evidence attached to show that the vehicles have been used as collateral or securities by the Family Bank of Kenya Limited. The Claimant/Respondent asserts that there is no basis for the grant of the orders sought as there is no demonstration of the prejudice the Respondent/Applicant will suffer should the execution proceed and that the application is an abuse of the process of court and should be dismissed with costs to him.

3. The application for stay by the Respondent/Applicant is made seeking to stop execution of the decree of the court dated 1<sup>st</sup> December 2017 for a sum Kshs. 2,320,881.46 payable to the Claimant/Respondent. In the effort to execute for the sum, the Claimant/Respondent who is the decree holder has instructed auctioneers to proclaim and attach the property of the Respondent/Applicant the judgment debtor. The

application was brought on 12<sup>th</sup> January 2018, execution having commenced on 18<sup>th</sup> December 2018 vide the proclamation notice. The court granted interim stay of execution pending the hearing and disposal of the motion. There is a notice of appeal that was subject of an application for leave to file notice of appeal out of time. The ruling of the court rendered on 17<sup>th</sup> November 2017 was to the effect that a notice of appeal be filed within 14 days of the said date and a notice of appeal was filed on 24<sup>th</sup> November 2017. In the application seeking leave, no stay was sought and consequently no stay was granted.

4. In cases where stay of execution pending appeal is sought, the party seeking the stay has to satisfy the court of certain criteria. The power exercised in granting the stay is discretionary. A stay can be granted if the court finds that there is basis for the grant. In the case of **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365** the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held:-

*The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.*

5. In addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of **Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR** as follows:-

*In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other*

6. Further, in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417**, Madan JA (as he then was) held that it is in the discretion of the court whether to grant or refuse stay but what has to be judged in each case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory per Brett, LJ in Wilson v Church (No. 2) 12 Ch D (1879) 454 at p 459. (underline mine)

7. The conditions for stay are that firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The Respondent/Applicant herein has an arguable appeal given the draft memorandum of appeal annexed to the application. That disposes of the first limb. Whereas there is an averment that the property proclaimed is part of a debenture or security, there is nothing to show that the property cannot be attached as no evidence is annexed to prove the allegations that it is security. It is in my view goods that are amenable for attachment. Regarding the substantial loss, it is not disputed that a sum of over 2 million Kenya shillings is not substantial and should the Respondent/Applicant succeed on appeal and the Claimant/Respondent is unable to refund the sum it would be substantial loss to the Respondent/Applicant. Respondent/Applicant herein has not furnished security but has offered to meet any condition as may be imposed by the court in the order for stay. The appeal relates to a sum teetering towards 2.5 million being the decretal sum plus interest. The final ground for grant of stay pending appeal as enunciated by Madan JA (as he then was) in **Butt v Rent Restriction Tribunal** (supra) is that a court should consider whether failure to grant stay may render the appeal, if successful, nugatory. It is therefore in the interests of justice that I grant a stay pending appeal but on terms. The Respondent/Applicant must deposit the sum of Kshs. 2,320,881.46 in an interest earning account in the joint names of the advocates for the Claimant/Respondent and Respondent/Applicant respectively and pay thrown away costs which I assess at Kshs. 50,000/-within the next 21 days. The thrown away costs are to meet auctioneers charges and incidentals. For avoidance of doubt the stay is conditional on the meeting of these terms.

It is so ordered.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of February 2018**

**Nzioki wa Makau**

**JUDGE**