



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 242 OF 2016

JOSEPH KAIRU MUTAHL.....CLAIMANT/RESPONDENT

VERSUS

BRITISH ARMY TRAINING UNIT KENYA.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant seeks through the Notice of Motion Application dated 30th January 2018 for stay pending appeal. The Respondent/Applicant was aggrieved by the decision of Ongaya J. made on 15th December 2017 wherein entered judgment in favour of the Claimant/Respondent for the payment to him a sum of Kshs. 2,997,979/- by 2nd February 2018; and establish, issue, file and serve a workplace sexual harassment policy in strict compliance of the Employment Act by 1st May 2018. The application is supported by the grounds on the face of it and the affidavit of Linda Hardiman sworn in support of the application for stay on 30th January 2018. The Claimant is opposed and filed a replying affidavit sworn on 13th February 2018.

2. The parties opted to have the application disposed of by way of written submissions. In the submissions filed for the Respondent/Applicant on 28th February 2018, the Respondent argues that there were several complaints of sexual harassment, intimidation, bullying, threatening and inappropriate behaviour by the Claimant towards a number of the Respondent's employees and that the Claimant was notified of the allegations, suspended with full pay and having determined the allegations were credible the Claimant was taken through a disciplinary process subsequent to which his services were terminated. The Claimant's suit against the termination is what led to the judgment whose summary is the gravamen of the motion for stay. The Respondent argues that the main issue that arose in the trial before the judge was the non-disclosure of the identities of the complainants and victims. The Respondent asserts that the identities were not disclosed for good reason; the complainants and victims had fear of reprisals from the Claimant and some even feared for their lives. The Respondent submitted that subsequent to the determination of the case, the complainants have confirmed that they can testify subject to safeguards being put in place as to their safety in the event a re-trial is ordered by the Court of Appeal. The Respondent argues that there is a long line of precedent established by the appellate court that the discretion to order a retrial under Rule 31 of the Court of Appeal Rules is a preserve of that court such as in the authority of **Likhanga Shikami & Another v Illangana Ingasiali Regina & Another [2015] eKLR**. The Respondent stated in any event, it believed that the appeal has good chances of success and the appeal may be allowed without the necessity for a retrial.

3. The Respondent submitted that the issues upon which a grant of stay pending appeal are well settled and that what the court should consider is the following:-

- a. An applicant should demonstrate substantial loss
- b. The application should be brought without unreasonable delay
- c. The applicant offered to furnish security for the due performance of a decree that ultimately be binding on the applicant
- d. The court may grant stay if any other sufficient reason is demonstrated

The Respondent submitted that the matters of law being raised in the intended appeal are novel in nature and it is vital that the Court of Appeal gets the opportunity to deal with them and that among them include such novel matters as to what should happen if victims and witnesses of a sexual harassment are apprehensive about disclosing their identities? The Respondent submitted that it was apprehensive that it will suffer substantial loss in that the intended appeal will be rendered nugatory if the stay is not granted. The case of **Stanley Munga Githunguri v Jimba Credit Corporation Limited (1988) KLR 838** was cited for the proposition that an arguable appeal is one that is not frivolous when the appellant has demonstrated matters that are substantial enough to warrant determination by the court. And that an arguable appeal is not necessarily one that will succeed as was held in the case of **Kenya Tea Growers Association & Another v Kenya Plantation and Agricultural Workers Union [2012] eKLR**. The Respondent argued that the applicant need not raise a multiplicity of

points. The Respondent stated that even one point is enough and relied on the case of **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v Kilach (2003) KLR 249**. The Respondent narrated the numerous grounds in its draft memorandum of appeal and argued that if it ordered to pay the decretal sum it would be unable to recover the sum in the event the appeal is successful. The Respondent submitted that though the Claimant had annexed a title deed and asserted that he would be able to refund the sum should the appeal be successful, this was not enough to warrant the court denying the stay being sought and that the ability to refund the successful appellant is not sufficient to rebut the applicant's assertion that the appeal will be rendered nugatory. The Respondent relied on the cases of **Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA 227** at page 232, **Nation Media Group & 2 Others v John Joseph Kamotho & 3 Others Civil Application No. NAI. 108 of 2006 (UR. 66/2006)** (unreported) where the Court of Appeal held that the fact that a respondent in an application for stay of execution has the financial means to refund the decretal sum should the appeal succeed is not invariably decisive in determining whether or not to grant a stay. The Respondent also cited the case of **Kenya Wildlife Service v Lake Jipe Safari Lodge Court of Appeal Civil Application No. 92 of 2017** (unreported) where the Court of Appeal was not persuaded that a title document simply annexed by a party to demonstrate ability to repay the decretal amount was sufficient to rebut the applicant's assertion that the appeal would be rendered nugatory. The Respondent argued that the fears by the Claimant that the Respondent could relocate are unfounded as the Respondent is an arm of a sovereign state, the United Kingdom and that it has been here for decades and has deep ties to the country. The Respondent was of the view that security would not be a necessity as it has the capacity to pay the decretal sum should the appeal be unsuccessful but nevertheless had offered security and a willingness to abide with any orders as the court may make. The Respondent finally argued that the application had been brought without unreasonable delay.

4. The Claimant in his submissions filed on 13th March 2018 argues that the issues the court has to be satisfied are that:-

- i. Substantial loss may result to the applicant unless the order is made
- ii. That the application has been made without unreasonable delay
- iii. Security has been offered for the due performance of such decree

5. The Claimant submitted that in its application for stay, the Respondent had deposed through Linda Hardiman that the assets of the Claimant are unknown to the Respondent and that if the stay pending appeal is not granted, the Respondent will suffer substantial loss. The Claimant counters this in his affidavit and states that he had worked with the Respondent since 1984 and had earned and saved enough to acquire properties and that he had property along the Nanyuki-Isiolo super highway that and therefore capable of refunding the decretal sum which in any event is quantifiable. He argued that if the Respondent which a foreign entity in Kenya relocates, he would suffer prejudice as he would have to contend with the costs of executing a decree in a foreign country. The Claimant relied on the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** which cited **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** submitted that the fact that the process of execution has been set in motion does not of itself amount to substantial loss and that even where execution has been levied and completed and property attached does not in itself amount to substantial loss because execution is a lawful process. He submitted that as was held in the case of **Silverstein v Chesoni (2002) 1 KLR 867** *the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving status quo*. The Claimant submitted that the Respondent has not demonstrated that it will suffer substantial loss and that it had not been shown that the Claimant is a man of straw that he may not repay the sum in the event of the appeal succeeding. He submitted that on the basis of **Equity Bank Ltd v Taiga Adams Co. Ltd [2006] eKLR** *the only way of showing or establishing substantial loss is by showing that of the decretal sum is paid to the claimant, that execution is carried out in the event the appeal succeeds the claimant will not be in a position to reimburse as he is a person of no means*. The Claimant submitted that he was able to refund as this was a money decree and he was not a man of straw. He argued that the Respondent had waited until the very last day before bringing this application. He stated that the explanation given is that of an indolent litigant whose conduct compromises his equity and cannot excite any love from the court of equity. He submitted that on the basis of **Selestica Ltd v Gold Rock Development Ltd [2015] eKLR** quoting **Jaber Mohsen Ali & Another v Priscillah Boit & Another [2012] eKLR** where the court held that unreasonable delay depends on the circumstances of the case and that even delay of one day may be unreasonable. The learned judge in that case held that

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

6. The Claimant argued that the Respondent had come to court on the last day and had not given any explanation for the delay. He submitted that no security had been furnished as required. He stated that he had carefully looked at the provisions of Order 42 Rule 6 of the Civil Procedure Rules and noted that the court has discretion to order for the furnishing of security but that the applicant must offer what security it can offer. It was submitted that the Respondent should have offered to deposit the entire decretal sum or 50% of the decretal sum so that the court would be able to know what orders as to security it may order. The Claimant relied on the case of **Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997** (unreported) and that the offer for security must come from the applicant as a price for stay. The Claimant submitted that the appeal will not be rendered nugatory if the stay is not granted unless the court ascertains that he is a man of straw. He stated that it was not for this court to hear the appeal and whether or not the appeal will be rendered nugatory is for the court of appeal to determine. Reliance was placed on the case of **Mungungu v National Bank of Commerce Ltd (2007) 2 EA 285**. The Claimant submitted that the Respondent had not made out sufficient basis for the grant of the orders sought. The Claimant thus urged the court to dismiss the stay application with costs.

7. The application for stay was made in January 2018. In the view of the Claimant this was inordinate delay. In the mind of the Respondent the same was made without undue delay. As Aburili J. held in the case of **Selestica Ltd v Gold Rock Development Ltd** in some instances even a delay of a day could be unreasonable. She cited the decision of Sila J. in which the court held that *the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land*. I agree that in some instances a delay of even a day may

be inordinate. In the case before the court, there was a time span given for certain action and the Respondent moved court before the expiry of the period within which it was to make the payment. Whereas the Claimant deems the application as being late, the same was filed before the expiry of the period given for the payment. The Respondent also filed a notice of appeal on time which in my view does not show indolence.

8. On the remaining and even more crucial limbs of the stay application, the court has this to say. While the court does not wish to put down the Claimant, or anyone for that matter, he owns a property along the Nanyuki-Isiolo road whose value he places at some Kshs. 8,000,000/-. That is quite a valuable asset even if there is no valuation report. However, to correct him, there is no superhighway in Kenya as all we have are some highways and a number of roads. Be that as it may, the application before me is one that seeks stay of execution pending appeal. The parameters for such a grant are set out by both parties and need no repeating. The Respondent asserts that it has met the threshold and the Claimant asserts that the Respondent could pack up and leave as it is not a Kenyan organisation. The Court of Appeal has pronounced itself on what arguable appeal means. It is not in my province to determine the merits or otherwise of the intended appeal. The Respondent argues that it has novel points it wishes to raise on appeal. Though we would not wish to rain on their party, Ochieng J. held in the case of **Equitorial Commercial Bank Ltd & 2 Others v Retreat Villas Limited [2006] eKLR** that

In the same vein, I hold the considered view that simply because the point which the defendant seeks to appeal against was a novel one, is not sufficient cause to justify a stay of execution. The novelty of the point of law could, properly, be the foundation for leave to appeal, if such leave were necessary.

9. For stay to be granted, the Respondent must go slightly beyond the novelty of points on appeal. In this case, there is an issue that rises from the assertions of parties on the determination by the learned judge whose decision precipitated the intended appeal. It would be for the Court of Appeal to make pronouncement on the issues raised. What the Respondent asserts is that that appeal will be rendered nugatory should the decretal sum be paid out and the Respondent succeeds. Whereas the decree is a money decree, there are grounds for the apprehension of the Respondent. If the Respondent is to succeed in the appellate court and the Claimant has become untraceable or is unable to pay, what relief could it have? What if the Claimant in the interim disposes of the property as in the affairs of man there could be reasons for a disposal? On the converse, the Claimant if apprehensive that the Respondent may relocate and leave him holding a paper decree incapable of execution as the costs of levying execution abroad would be pricey should the Respondent cease operations in Kenya. Whereas the sum of Kshs. 2,997,000 may not be substantial in some quarters, it is tidy sum. The inability to recover the sum for either the Claimant or the Respondent would result in substantial loss for the aggrieved party. In my view this limb of the test is satisfied as the sum is not pocket change.

10. Regarding security for the due performance of the decree of this court, the Respondent has offered security in word and has intimated that it will abide by any order made on the issue of security. Order 42 does not by itself require the furnishing of security. A careful reading of the Order shows that it is the court that has the discretion to order a party to furnish security. The Respondent being a foreign entity, despite the deep roots it has in the country, and as demonstrated by the very long period of service of the Claimant does not perhaps fall in the category of those who may up and leave at a moments notice. Having considered all the parameters for the grant or denial of the stay pending appeal, the court is inclined to exercise its discretion to order stay and order a deposit of security for the performance of the decree. In the case, a sum of close to 3 million was ordered by Ongaya J. to be paid out to the Claimant. In view of the foregoing arguments by the Claimant and the Respondent's position on offer to abide by the orders of the court on the stay, I will order the deposit of half the decretal sum in an interest earning account in the joint names of the advocates for the parties herein. The deposit must be made within 21 days of today. The costs for this application will abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nyeri this 25th day of April 2018

Nzioki wa Makau

JUDGE